SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1077-21

ADEBISI OJE,

Plaintiff-Appellant,

v.

MOUNTAIN CREEK RESORT, INC., and JOHN HENRY,

Defendants-Respondents.

Argued January 11, 2023 – Decided July 10, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0189-19.

William Stoltz argued the cause for appellant (Law Offices Rosemarie Arnold, attorneys; William Stoltz and Paige R. Butler, on the briefs).

Samuel J. McNulty argued the cause for respondents (Hueston McNulty, PC, attorneys; Samuel J. McNulty and John F. Gaffney, on the brief).

PER CURIAM

Plaintiff Adebisi Oje appeals from the September 16, 2021 Law Division order granting summary judgment dismissal of her personal injury complaint against defendants Mountain Creek Resorts, Inc. (Mountain Creek) and its employee, Jonathan Henry (improperly pled as John Henry). Plaintiff also appeals from the November 19, 2021 order denying her motion for reconsideration. The complaint stemmed from plaintiff sustaining severe injuries following a twenty-foot fall from a ski lift operated at Mountain Creek while receiving snowboarding instruction from Henry. We affirm.

I.

We glean these facts from the motion record, viewed in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

On December 29, 2017, plaintiff and her sister, Adesola Oje, visited Mountain Creek's ski area in Vernon to go snowboarding. Because plaintiff considered herself a "[b]eginner," the sisters purchased Mountain Creek's ticket package that included a snowboarding lesson with equipment rentals and ski lift tickets. The rental agreement plaintiff executed when she received her

equipment included a "full and complete release of liability and indemnity agreement" (liability release).

The liability release specified in pertinent part that plaintiff acknowledged that "skiing and/or snowboarding is a hazardous activity which may result in injury or death . . . even during participation in Mountain Creek's ski and snowboard school." (Emphasis omitted). Plaintiff also acknowledged that "participation in ski and snowboard school shall not in any way eliminate the inherent risks in snow skiing, snowboarding or riding ski lifts," and plaintiff expressly assumed "all risks" related to participation in "an inherently dangerous sport." (Emphasis omitted).

Additionally, the liability release provided that:

> To the fullest extent permitted by law, [plaintiff] fully release[d] Mountain Creek . . . , its agents, servants and assigns from any claim or liability that [plaintiff] may have . . . for personal injury or death associated with [plaintiff's] use of any of the property owned or controlled by them. To the fullest extent permitted by law, [plaintiff] also agree[d] to defend, indemnify and hold harmless Mountain Creek from any and all claims, suits, costs and expenses including attorneys' fees for personal injury, death or property damage against it by [plaintiff] or third parties arising or allegedly arising out of or resulting from [plaintiff's] conduct while utilizing Mountain Creek's facilities . . . whether or not Mountain Creek's negligence contributed thereto in whole or in part.

[(Emphasis omitted).]

After purchasing the tickets and executing the liability release, the sisters collected their rental equipment and proceeded to a designated meeting area to await their instructor. Henry, who was employed by Mountain Creek as a "[s]nowboard [i]nstructor," met the sisters at their scheduled lesson time.

Henry started the lesson in the "progression area" with the instruction of introductory concepts before moving to the "steeper pitch" on the "Sugar Slope." To get to the top of the Sugar Slope, Henry and the sisters had to ride a ski lift. While waiting in line for the lift, Henry explained each step of the boarding process to the sisters, including the placement of the restraining bar to secure them once seated in the chairlift. About halfway through the ride, Henry instructed the sisters on how to dismount from the lift, and explained his "trick" of maintaining balance by pretending they were holding an open can of paint in their hands and could not spill it.

After the first ride, the group dismounted from the lift without incident, and the lesson continued on the Sugar Slope with Henry teaching the sisters how to navigate the steeper incline. Once they made it to the bottom of the hill, the group proceeded to the lift to ascend for a second time. Plaintiff fell during the

second ski lift ride, just after Henry raised the chairlift's restraining bar to prepare to disembark.

During subsequent depositions, Henry testified that he lifted the bar about fifteen to twenty feet away from the disembarking point, "right where the sign [instructing passengers to lift the bar] was [located]." In their respective depositions, neither Henry nor plaintiff's sister could say exactly how plaintiff fell, but both stated that they saw plaintiff fall out of "the corner of [their] eye." Henry further testified that when he observed plaintiff leaning forward, he attempted to "reach over and prevent [plaintiff] from falling out of the chair," but was obstructed by Adesola,[1] who was seated in between them.

Plaintiff's deposition testimony differed from her sister's and Henry's. While Henry and Adesola recalled the fall occurring during the second ski lift ride, plaintiff testified that she "fell on the very first ride." Additionally, although Henry recounted lifting the bar "right where the sign was," plaintiff testified that when she fell, they "were not at the end at all" and "[t]he sign to get you off the lift" had not yet appeared. Plaintiff admitted that she did not know "why [she] fell" but believed Henry "raised the bar before he was supposed

[1] We refer to plaintiff's sister by her first name because of the common surname and intend no disrespect.

to." Further, contrary to Henry's testimony that Adesola "was [seated] in the middle," plaintiff recalled Henry being seated between herself and her sister.

Plaintiff fell about twenty feet to the ground below and sustained severe injuries, including fractures in her dominant wrist that required emergency surgery; fractures and ligament tears in her left hip; swelling and bruising on her lower back; and facial bleeding, abrasions, and contusions. Following the incident, plaintiff continued to experience physical limitations that rendered simple activities difficult, and she suffered "serious emotional and psychological trauma" due to the physical limitations associated with her recovery.

In 2019, plaintiff filed a seven-count complaint against defendants seeking damages for her injuries based on various theories of negligence, including negligent operation and maintenance of the ski lift in violation of various statutory duties (count one); the doctrine of respondeat superior (count two); negligent hiring, training, and supervision (count three); and failure to warn of known hazardous and dangerous conditions (count five). Count four alleged negligence against fictitious parties; count six alleged that plaintiff was an "intended third[-]party beneficiary" under defendants' insurance policy; and

count seven alleged "the doctrine of res ipsa loquitor." Plaintiff consented to the dismissal of counts six and seven in the trial court.

During discovery, plaintiff produced a report by her expert witness, Mark A. Di Nola. In his report, Di Nola stated he had "over [forty-four] years of experience investigating accidents in the insurance industry and [thirty-six] years of accident investigation, incident analysis, risk management and loss control experience in the ski industry." Di Nola's report identified two standards governing defendants' conduct in the case: (1) "[t]he generally accepted practices and principles in the ski industry," which the report described as "the body of knowledge developed over decades of ski area operations . . . codified into the standard of care that ski area operators owe to skiers"; and (2) the Professional Ski Instructors Association and the American Association of Snowboard Instructors[2] (PSIA/AASI) Beginner's Guide to Snowboarding (Beginner's Guide), which the report asserted "outlines the standard of care" for "teaching beginner snowboard lesson[s]." The report cited relevant portions of the New Jersey Ski Act (Ski Statute), N.J.S.A. 5:13-1 to -12, to establish the

[2] PSIA/AASI is a professional trade organization that sets certification standards for ski and snowboard instructors and develops education materials to assist in obtaining certification. What is PSIA-AASI, PSIA-AASI, https://www.thesnowpros.org/who-we-are/ (last visited June 21, 2023).

former, and presented the latter in the form of screenshots from a YouTube video published by the PSIA/AASI, as well as the transcript from the video.

Based on these authorities, Di Nola opined in his report that plaintiff's injuries were a direct result of:

> a. Mountain Creek's failure to properly instruct, train, supervise and manage its snowboard instructors;
>
> b. Mountain Creek's failure to reasonably ensure . . . Henry made an effort to continuously learn, develop and improve personal riding skills, teaching skill, experience and knowledge prior to December 29, 2017;
>
> c. Mountain Creek's failure to ensure snowboard instructors are taught and develop teaching techniques that prepare them to instruct beginner snowboarder group lessons that reasonably provide instruction, demonstration, observation, practice for beginner snowboarders to develop skills, knowledge and experience that beginner snowboarders require to prepare to unload the . . . chairlift and unload safely;
>
> d. Mountain Creek's failure to maintain safety and snowboarder responsibility as a top priority while riding and teaching;
>
> e. Mountain Creek's and . . . Henry's failure to reasonably provide instruction, demonstration, observation, practice for beginner snowboarders in a group lesson to develop skills, knowledge and experience that beginner snowboarders require to prepare to unload the . . . chairlift and unload safely;

> f. Mountain Creek's and . . . Henry's failure to reasonably provide instruction, demonstration, observation, practice for beginner snowboarders in a group lesson to develop skills, knowledge and experience that beginner snowboarders require to prepare to unload the . . . chairlift and unload safely prior to approaching the midpoint on the . . . chairlift;
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> g. . . . Henry's failure to reasonably observe, teach and watch [plaintiff] to adjust his teaching accordingly to help improve skills, knowledge and experience that beginner snowboarders in group lessons require to prepare to unload the . . . chairlift and unload safely prior to approaching the midpoint on the . . . chairlift;
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> h. . . . Henry's failure to reasonably observe and evaluate [plaintiff's] abilities, knowledge and movements while riding the . . . chairlift immediately prior to, while raising [the] restraining bar[,] and after raising the restraining bar . . . during their preparation to unload the . . . chairlift;
>
> i. . . . Henry's failure to communicate with [plaintiff] to ensure she understood what was being taught, failure to ask [plaintiff] to reflect on how the lesson was progressing, failure to ask questions throughout the lesson, and failure to rephrase his instruction and demonstrate skills prior to moving on.

The report concluded that "Henry's negligent instruction [was] not an inherent risk of skiing that [was] 'essentially impractical or impossible for the ski area operator to eliminate,'" as contemplated by N.J.S.A. 5:13-1(b).

Di Nola was also deposed by defendants. During his deposition, Di Nola admitted that there was "no issue relating to the mechanical operation of the chairlift" in question, "no issue regarding the signage that was posted," and no issue with "the loading and unloading procedures of the lift attendants" other than Henry. As such, Di Nola conceded that defendants were not liable under the Ski Lift Safety Act, N.J.S.A. 34:4A-1 to -15. Di Nola also acknowledged that he was not "a ski instructor" nor "a snowboard instructor," and "ha[d] never been certified by the American Association of Snowboard Instructors." Nonetheless, Di Nola testified that defendants were negligent because Henry had inadequate training as a snowboard instructor and "was[not] properly communicating with . . . plaintiff or her sister." Di Nola explained that Henry "went from the beginner area . . . directly to the lift without going over . . . how to get on and off the lift." In support, Di Nola relied on the Beginner's Guide YouTube video, "which [he] download[ed] and looked at."

Following the discovery end date, defendants moved for summary judgment. Defendants argued that because Di Nola's report and deposition testimony failed to assert a violation of any enumerated statutory duty, plaintiff's claims relating to defendants' violation of any duties imposed by statute should be dismissed. As to the remaining negligent instruction claim, defendants

argued that Di Nola's report constituted a net opinion, and further contended that absent any violation of a statutory duty, enumerated or otherwise, they were protected by the liability release plaintiff executed before her lesson. Plaintiff countered that her expert's opinion was not a net opinion and established a violation of a statutory duty. Further, plaintiff asserted that the liability release was unenforceable as against public policy.

Following oral argument, the motion judge entered an order on September 16, 2021, granting summary judgment to defendants and dismissing all remaining counts of the complaint with prejudice. In his accompanying oral opinion, the judge determined plaintiff had not presented sufficient facts to establish that defendants "were in any way negligent." The judge explained that plaintiff's expert failed to identify a standard "that was violated," and there were "no facts to support an allegation of a statutory violation." According to the judge, the expert failed to specify "what . . . instruction Henry should have given . . . plaintiff other than common sense." Therefore, the judge concluded that the expert report did not provide a "sufficient basis . . . to allow [the case] to go to a jury."

Plaintiff subsequently moved for reconsideration. During oral argument, plaintiff conceded that Di Nola's conclusions relied upon "an admittedly

unwritten standard," but asserted that the standard was an adequate basis to sustain his opinion that the failure to instruct beginner riders on proper dismounting procedures before getting on the ski lift "[was] negligence" and "[was] not proper industry standard."

Following oral argument, the judge entered a November 19, 2021 order denying the reconsideration motion for substantially the same reasons that he had granted summary judgment. In an oral opinion, the judge emphasized that it was not the source of the authorities that Di Nola's report cited that he took issue with; rather, it was that the authorities cited provided no standard to support the expert's conclusion that "defendant[s] were negligent." According to the judge, "[Di Nola's] report [was] riddled with his own assumptions" and "his own conclusions." The judge explained that the YouTube video relied upon by Di Nola "does not establish standards that he indicates were violated." In fact, the judge found the YouTube video was "addressed to what an individual should learn, not to what an institution should do." Finally, the judge rejected plaintiff's request for a N.J.R.E. 104 hearing on the expert's opinion, ruling that no hearing was required to deem the expert's opinion an inadmissible net opinion. This appeal followed.

On appeal, plaintiff raises the following points for our consideration:

POINT I: THE TRIAL COURT'S DECISION TO RULE THAT PLAINTIFF'S EXPERT REPORT WAS A NET OPINION WAS PREMATURE IN THE ABSENCE OF A HEARING PURSUANT TO N.J.R.E. 104.

POINT II: THE TRIAL COURT ERRED IN GRANTING DEFENDANT[S'] MOTION FOR SUMMARY JUDGMENT.

A. The Trial Court Erroneously Concluded That Plaintiff's Expert Report Constituted A "Net Opinion."

i. Di Nola Was Qualified to Provide An Expert Opinion in This Matter

ii. Di Nola's Opinion Was Not A Net Opinion.

B. Accepting the Expert's Opinion, Summary Judgment Was Inappropriate Because Plaintiff Raised A Triable Issue of Fact as to Whether . . . Defendants Violated the Ski Act.

C. Having Raised An Issue of Fact as to Whether . . . Defendants Violated the Ski Statute, Summary Judgment Based on the Release Was Inappropriate Because That Release is Void and Unenforceable as Against Public Policy.

POINT III: THE MOTION COURT'S DECISION TO DOUBLE DOWN ON ITS NET OPINION ANALYSIS ON RECONSIDERATION CONSTITUTED AN ABUSE OF DISCRETION, AND AS SUCH, THE

NOVEMBER 19, 2021 ORDER SHOULD . . . ALSO BE REVERSED.

II.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

> [I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.
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> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citations omitted) (quoting R. 4:46-2(c)).]

Whether a genuine issue of material fact exists depends on "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. "If there is no genuine issue of material fact, we must then 'decide whether the trial

court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions . . . ." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

When reviewing "a summary judgment motion premised on an evidentiary ruling," we proceed in "the same sequence as the trial court, 'with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court.'" Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 330 (App. Div. 2017) (quoting Townsend v. Pierre, 221 N.J. 36, 53 (2015)). We "apply a 'deferential approach'" to a trial court's decision to admit or exclude expert testimony, "'reviewing it against an abuse of discretion standard.'" 27-35 Jackson Ave., LLC v. Samsung Fire & Marine Ins. Co., 469 N.J. Super. 200, 211 (App. Div. 2021) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). "Absent a clear abuse of discretion, an appellate court will not interfere with the exercise of that discretion." Nicholas v. Hackensack Univ. Med. Ctr., 456 N.J. Super. 110, 117 (App. Div. 2018) (quoting Carey v. Lovett, 132 N.J. 44, 64 (1993)).

Likewise, we review a trial court's decision on a motion for reconsideration under an abuse of discretion standard. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Thus, "a trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015) (citing Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)). Reconsideration is only available when "'either ([1]) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.'" Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 455, 462 (App. Div. 2002) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

Turning to the applicable evidentiary standard, "a negligence cause of action requires the establishment of four elements: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013). "The plaintiff bears the burden of establishing those elements 'by some competent proof.'" Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citations omitted) (first citing Buckelew v. Grossbard, 87 N.J. 512, 525

(1981); and then quoting Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953), aff'd o.b., 14 N.J. 526 (1954)). "Actions against a ski operator for personal injuries sustained by a skier on its ski slope are governed by common-law negligence principles unless the Ski Statute applies." Brett v. Great Am. Recreation, Inc., 279 N.J. Super. 306, 314 (App. Div. 1995), aff'd, 144 N.J. 479 (1996). The Ski Statute codifies and applies "fundamental principles of negligence" to skiers and ski operators by establishing certain duties as defined in the statute. Brett, 144 N.J. at 502.

By way of background:

> In setting forth the legislative findings and the purpose of the Ski Statute, N.J.S.A. 5:13-1 provides:
>
> > a. The Legislature finds that the sport of skiing is practiced by a large number of citizens of this State and also attracts to this State large numbers of nonresidents, significantly contributing to the economy of this State and, therefore, the allocation of the risks and costs of skiing are an important matter of public policy.
> >
> > b. The purpose of this law is to make explicit a policy of this State which clearly defines the responsibility of ski area operators and skiers, recognizing that the sport of skiing and other ski area activities involve risks which must be borne by those who engage in such activities and which are essentially impractical or impossible

> for the ski area operator to eliminate. It is, therefore, the purpose of this act to state those risks which the skier voluntarily assumes for which there can be no recovery.
>
> [Reisman v. Great Am. Recreation, Inc., 266 N.J. Super. 87, 92 (App. Div. 1993) (emphasis omitted).]

Interpreting this language, we have previously explained that "the Ski Statute exists primarily for the purpose of providing ski area operators with protection against liability based on risks 'which are essentially impractical or impossible for [them] to eliminate.'" Id. at 95 (alteration in original) (quoting N.J.S.A. 5:13-1(b)).

Further,

> the Assembly Judiciary, Law, Public Safety and Defense Committee Statement which follow[ed] N.J.S.A. 5:13-1 announced, in pertinent part, that:
>
> . . . .
>
> The bill . . . specifically list[s] the responsibilities of ski area operators and skiers. It provides that an operator is not liable to a skier for a skiing injury unless he violates his responsibilities. In addition, it bars a skier from suing an operator for a skiing injury if the skier contributes to the injury by violating his responsibilities. . . .
>
> However, the Statement also acknowledged that:

> [A] skier is not barred from suing an operator based upon assumed risks or for injuries to which he contributed if the operator violated his duties or responsibilities under the bill. In [such a] case, the provisions of the comparative negligence law would apply.
>
> [Id. at 92-93 (quoting Assemb. Judiciary, L., Pub. Safety & Def. Comm. Statement to A. 1650, 2-3 (Nov. 20, 1978)).]

In pertinent part, N.J.S.A. 5:13-4 delineates the duties of skiers as follows:

> a. Skiers shall conduct themselves within the limits of their individual ability and shall not act in a manner that may contribute to the injury of themselves or any other person.
>
> b. No skier shall:
>
> (1) Board or dismount from a ski lift except at a designated area;
>
> . . . .
>
> (3) Act in any manner contrary to posted rules while riding on a rope tow, wire rope tow, j-bar, t-bar, ski lift, or similar device that may interfere with the proper or safe operation of the lift or tow;
>
> . . . .
>
> (5) Knowingly engage in any type of conduct which may injure any person, or place any object in the uphill ski track

> which may cause another to fall, while traveling uphill on a ski lift;
>
> . . . .
>
> c. Every skier shall maintain control of his [or her] speed and course at all times, and shall stay clear of any snow grooming equipment, any vehicle, any lift tower, and any other equipment on the mountain.
>
> d. A skier shall be the sole judge of his [or her] ability to negotiate any trail, slope, or uphill track and shall not attempt to ski or otherwise traverse any trail, slope or other area which is beyond the skier's ability to negotiate.
>
> e. No skier shall board a rope tow, wire rope tow, j-bar, t-bar, ski lift, or other similar device unless he [or she] has sufficient knowledge and ability to use the lift. If the skier does not have such knowledge or ability, he [or she] shall ask for and receive, or follow any posted, written or oral instructions prior to using such device.

N.J.S.A. 5:13-5, which addresses assumption of risk on the part of the skier, provides:

> A skier is deemed to have knowledge of and to assume the inherent risks of skiing, operating toboggans, sleds or similar vehicles created by weather conditions, conditions of snow, trails, slopes, other skiers, and all other inherent conditions. Each skier is assumed to know the range of his [or her] ability, and it shall be the duty of each skier to conduct himself [or herself] within the limits of such ability, to maintain control of his [or her] speed and course at all times while skiing, to heed all posted warnings and to refrain

> from acting in a manner which may cause or contribute to the injury of himself[, herself,] or others.

Thus, "N.J.S.A. 5:13-5 emphasizes that skiers are only deemed to assume those risks which are 'inherent' in the sport of skiing." Reisman, 266 N.J. Super. at 95. "In the skiing context, an inherent risk is one that cannot be removed through the exercise of due care if the sport is to be enjoyed." Brett, 144 N.J. at 499. "A danger that may feasibly be removed, however, is not an inherent danger." Id. at 500-01; see, e.g., Pietruska v. Craigmeur Ski Area, 259 N.J. Super. 532, 537 (Law Div. 1992) ("Improper operation of a ski lift is not an inherent risk of skiing since, with due care, it can be eliminated.").

Under N.J.S.A. 5:13-6, the assumption of risk by the skier

> shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a skier for injuries resulting from the assumed risks . . . unless an operator has violated his [or her] duties or responsibilities under [the Ski Statute], in which case the provisions of [New Jersey's comparative negligence statute, N.J.S.A. 2A:15-5.1 to -5.8,] shall apply.

N.J.S.A. 5:13-3(a), which enumerates the particular duties and responsibilities of the operator, provides:

> It shall be the responsibility of the operator to the extent practicable, to:
>
> > (1) Establish and post a system generally identifying slopes and trails and

> designating relative degrees of difficulty thereof; and to make generally available to skiers information in the form of trail maps or trail reports.
>
> (2) Make generally available either by oral or written report or otherwise, information concerning the daily conditions of the slopes and trails.
>
> (3) Remove as soon as practicable obvious, man-made hazards.

N.J.S.A. 5:13-3(d) provides that:

> No operator shall be liable to any skier unless said operator has knowledge of the failure to comply with the duty imposed by this section or unless said operator should have reasonably known of such condition and having such knowledge has had a reasonable time in which to correct any condition or comply with any duty set forth in this section.

Thus, "[i]f the factfinder finds that the injuries were proximately caused by the ski operator's violation of one or more of its statutory responsibilities, the skier is entitled to recover under principles of comparative negligence." Brett, 279 N.J. Super. at 315 (citing N.J.S.A. 5:13-6).

In Reisman, the plaintiff's mother brought a personal injury action against a resort on behalf of her son, "a novice skier," after a drunken skier collided with him. Reisman, 266 N.J. Super. at 89-90. The defendant resort argued that the Ski Statute barred plaintiff's action and asserted that the assumption of risk

doctrine entitled it to a directed verdict at the close of all the evidence and, subsequently, a judgment notwithstanding the verdict. Id. at 91-92.

In affirming the jury verdict for the plaintiff and the judge's denial of the respective motions, we noted,

> the risk which was involved, a drunken and dangerous skier, is clearly not an "inherent" risk of the sport of skiing which [the] plaintiff should be charged with having assumed by virtue of setting foot on [the] defendant's slopes. Moreover, it cannot be categorized as the sort of risk which is "impractical or impossible" to eliminate, especially in light of the fact that [the] defendant was fully aware of it. Clearly, with due care on [the] defendant's part, this risk could have been eliminated.
>
> [Id. at 95.]

In rejecting the defendant's contention that it had not violated any of the expressly delineated responsibilities set forth in N.J.S.A. 5:13-3(a), we stated that "to afford [the] defendant insulation from liability in this case based on a narrow and literal reading of N.J.S.A. 5:13-3 would actually serve to frustrate, rather than advance, the underlying goals of the Ski Statute." Ibid. We explained:

> To deem the list of ski area operators' duties and responsibilities set forth in [N.J.S.A. 5:13-3(a)] as being exhaustive would be patently inconsistent with the express language contained in N.J.S.A. 5:13-5 and [N.J.S.A. 5:13-1(b)]. These sections of the Ski Statute

> directly address the degree of insulation from liability that a ski area operator is entitled to under the Ski Statute.
>
> [Id. at 94-95.]

Thus, courts have recognized that the ski area operator's expressly delineated statutory responsibilities are not exhaustive and naturally imply the existence of related duties. See, e.g., Brett, 279 N.J. Super. at 317 (imposing an implied duty on ski area operator "to post suitable warnings of danger" where "physical removal of a hazard is not possible"); Brough v. Hidden Valley, Inc., 312 N.J. Super. 139, 151 (App. Div. 1998) (extending the ski area operator's statutory duty to remove man-made hazards as soon as practicable to include "reducing the danger through safer alternatives, warning devices or other safety measures" when actual removal is not practical); Murray v. Great Gorge Resort, Inc., 360 N.J. Super. 395, 403 (Law Div. 2003) (finding an implied duty on the part of the ski area operator to "inspect its slopes and trails, at least on a daily basis, to ascertain the existence of dangerous or hazardous conditions" based on the operator's statutory duty to apprise skiers of daily trail conditions).

We have also held that in addition to statutory duties, ski area operators remain subject to common law duties in connection with risks a skier does not assume under the Ski Statute. Reisman, 266 N.J. Super. at 97. Accordingly, we

have held that the Ski Statute does not preclude a ski area operator's liability for injuries caused by the operator's failure to address a risk that was not inherent to the sport or otherwise "impractical or impossible" to eliminate. Id. at 95-96. Such liability stems from "general negligence principles concerning the duty owed by owners and occupiers of land to business invitees," rather than a Ski Statute violation. Id. at 97.

Here, the parties do not dispute that the Ski Statute applies. Plaintiff qualifies as a "skier," see N.J.S.A. 5:13-2(c) (defining "skier" to include "a person utilizing the ski area for recreational purposes such as skiing");[3] and defendants qualify as ski area "operator[s]" under the statute, see N.J.S.A. 5:13-2(a) (defining ski operator to include "a person or entity who owns, manages, controls or directs the operation of an area where individuals come to ski" and

[3] Although snowboarding is not specifically included in our Ski Statute, "plaintiff paid for the privilege to enjoy snowboarding on defendant's ski slopes and trails and . . . was exposed to the identical risks as traditional down-hill skiers. It would frustrate, rather than promote, the underlying goals of the Ski Statute to exclude snowboarding from the Ski Statute." Murray, 360 N.J. Super. at 399-400; accord Shukoski v. Indianhead Mountain Resort, Inc., 166 F.3d 848, 851 (6th Cir. 1999) (holding that a snowboarder was "skier" covered by provisions of Michigan's Ski Area Safety Act based on the definition of "skiers" utilized by the American National Standards Institute, which includes people using snowboards).

"pay money . . . for the privilege," or "any individual or entity acting on behalf of an operator for all or part of such activities").

The pivotal issue is whether plaintiff's injuries were proximately caused by defendants' violation of their statutory duties under the Ski Statute. In that regard, plaintiff relied on her expert to establish that negligent training and instruction were not an inherent risk of the sport that plaintiff assumed but rather a hazard that defendants had a duty to eliminate. According to plaintiff, by failing to eliminate the hazard, defendants breached their statutory duty to make skiing reasonably safe for customers such as herself. See Davis, 219 N.J. at 407 (explaining that in some cases, "the plaintiff must . . . 'establish the requisite standard of care and [the defendant's] deviation from that standard' by 'present[ing] reliable expert testimony on the subject'" (second and third alterations in original) (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 42 (App. Div. 1996))).

We first address plaintiff's argument that the judge erred in ruling on the admissibility of plaintiff's expert report without conducting an evidentiary hearing pursuant to N.J.R.E. 104(a). We have held that a trial judge's failure to conduct a Rule 104 hearing before barring expert testimony was an abuse of discretion when doing so left the judge without "any foundation for a

determination whether the evidence was admissible." State v. Green, 417 N.J. Super. 190, 206 (App. Div. 2010). Our Supreme Court has also held that "in cases in which the scientific reliability of an expert's opinion is challenged and the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing." Kemp ex rel. Wright v. State, 174 N.J. 412, 432-33 (2002).

Still, an evidentiary hearing is not always required; the issue is whether the evidentiary proceeding, with or without a Rule 104 hearing, was capable of producing a fair, balanced, and accurate assessment of the expert's testimony. See Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt., L.L.C., 450 N.J. Super. 1, 100 n.50 (App. Div. 2017) (finding "no error in the failure to conduct [a Rule 104] hearing" because the expert "was examined at great length at his deposition about his methodology and that deposition testimony was available to and considered by the trial judge at the time of his ruling").

Generally speaking, "the need for a hearing is remitted to the trial court's discretion," Kemp, 174 N.J. at 432, and a trial court is only required to conduct a Rule 104 hearing before ruling on the admissibility of expert testimony if the predicate "determination[s] cannot be made on the written submissions alone,"

Township of Manalapan v. Gentile, 242 N.J. 295, 309 (2020) (citing Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 142-43 (2013)). Indeed, our courts have found no error despite the lack of a separate evidentiary hearing when the trial court considered the expert's report and, if available, deposition testimony, before deeming expert testimony inadmissible in a summary judgment hearing. See, e.g., Davis, 219 N.J. at 404, 414; Satec, Inc., 450 N.J. Super. at 327, 331-34; Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 242-43 (App. Div. 2013).

Here, plaintiff has not identified any facts that would require a Rule 104 evidentiary hearing under the principles enunciated in Kemp or Green. Plaintiff has not advanced a unique theory of causation that requires expert scientific testimony to substantiate, nor is Di Nola's opinion related to any novel or emerging scientific field. See Kemp, 174 N.J. at 430. Further, the written submissions, which included both Di Nola's report and portions of his deposition testimony, set forth the various authorities upon which his conclusions were based and clearly explained their application to the facts of plaintiff's accident. See Green, 417 N.J. Super. at 206. Thus, we discern no abuse of discretion in the judge's decision that there was no need for a Rule 104 hearing. The expert's

written submissions provided the judge with an adequate foundation on which to adjudicate the summary judgment motion.

Next, plaintiff contends that her expert's report "plainly provided the 'whys and wherefores' of his opinion" and was therefore not a net opinion.[4]

"It is well-established that the trial court 'must ensure that [a] proffered expert does not offer a mere net opinion.'" Satec, Inc., 450 N.J. Super. at 330 (alteration in original) (quoting Pomerantz Paper Corp., 207 N.J. at 372). "Such an opinion is inadmissible and 'insufficient to satisfy a plaintiff's burden on a motion for summary judgment.'" Ibid. (quoting Arroyo, 433 N.J. Super. at 244).

N.J.R.E. 703

> mandates that expert opinion be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'"
>
> [Townsend, 221 N.J. at 53 (quoting Polzo v. County of Essex, 196 N.J. 569, 583 (2008)).]

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by

[4] We need not address the expert's qualifications as plaintiff does because the judge implicitly found that the expert was qualified.

factual evidence or other data.'" Id. at 53-54 (alterations in original) (quoting Polzo, 196 N.J. at 583). Stated differently, "[t]he net opinion rule 'requir[es] that the expert "give the why and wherefore" that supports the opinion, "rather than a mere conclusion."'" Davis, 219 N.J. at 410 (second alteration in original) (quoting Pomerantz Paper Corp., 207 N.J. at 372).

Although "[t]he rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable," Townsend, 221 N.J. at 54, it does prohibit courts from "rely[ing] on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified," Pomerantz Paper Corp., 207 N.J. at 373. Rather, "expert testimony must be based upon a consensus of the involved profession's recognition of the standard defined by the expert," and the expert must offer "some evidential support . . . to establish the existence of the standard." Satec, Inc., 450 N.J. Super. at 330 (first citing Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999); and then citing Buckelew, 87 N.J. at 528-29).

Experts may include what they have "learned from personal experience and training" as evidentiary support for the existence of the standard. Id. at 333. However, "such experience, in turn, must be informed and given content and

context by generally accepted standards, practices, or customs of the . . . industry." Ibid.; see also Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001) (finding expert attorney offered net opinion when he "offered no evidential support establishing the existence of a standard of care, other than standards that were apparently personal to himself").

Plaintiff asserts that Di Nola provided adequate evidentiary support for his conclusions because his report cites the Ski Statute and the Beginner's Guide in "explain[ing] how he believed Henry's conduct violated [industry] standards, was negligent and caused [p]laintiff's accident." However, the Ski Statute does not establish any standards regarding the hiring or training of ski instructors, the requisite quality of any instruction provided, or a requirement to provide instruction to skiers at all. See N.J.S.A. 5:13-3(a). Even where the statute provides that a skier must "ask for and receive" instructions, the duty to ask for help belongs to the skier, and the statute neither specifies who the skier should ask nor states what instructions should be given. See N.J.S.A. 5:13-4(e).

Further, although the Beginner's Guide is published by an authoritative source, it does not set forth the "training methods promulgated by the [PSIA/AASI]" for snowboard instructors as plaintiff asserts; instead, the stated purpose of the Beginner's Guide is to provide "helpful tips" to beginner skiers

and snowboarders. The Beginner's Guide makes no mention of proper instructor training, proper communication between instructor and student, the level of supervision an instructor should exercise over a student, or a ski area operator's responsibility to maintain safety as described in Di Nola's report. As such, the report's conclusions as they relate to negligent instruction are unmoored from any established standard of care.

Consequently, the judge did not abuse his discretion either in adjudicating the initial summary judgment motion or on reconsideration when he concluded that Di Nola's report offered a net opinion. As the judge found, the report did not identify the industry standard Di Nola claimed defendants violated nor the instruction Henry failed to give. Indeed, plaintiff conceded during oral argument on the reconsideration motion that Di Nola's conclusions relied upon "an admittedly unwritten standard." However, an expert opinion "based on [the expert's] personal view of th[e] standard" without objectively demonstrating that the asserted standard of care is recognized by the industry is "infirm." Satec, Inc., 450 N.J. Super. at 334.

Without Di Nola's opinion, plaintiff's claim under the Ski Statute fails because plaintiff failed to present competent evidence that defendants violated any express or implied statutory duties. See Brett, 279 N.J. Super. at 315 ("If

the factfinder finds that the injuries were not proximately caused by the ski operator's violation of any of its statutory responsibilities, the Statute bars the injured skier from recovering compensation from the operator."). Indeed, plaintiff concedes that N.J.S.A. 5:13-3(a) contains no duty to eliminate the hazard of negligent instruction. Instead, plaintiff essentially urges this court to recognize an implied statutory duty "to eliminate non-inherent hazards, namely negligent hiring/training of snowboard instructors, and negligent teaching by those instructors." However, neither caselaw nor the text of the Ski Statute supports the existence of such a duty.

Under the Ski Statute, a skier is assumed to know the range of their ability and assigns to them the risk of injury caused by their own inexperience. See N.J.S.A. 5:13-4(d); N.J.S.A. 5:13-5. Even when a skier is charged with the duty to seek out instruction, N.J.S.A. 5:13-4(e), the Ski Statute is silent as to who the skier should ask and what level of instruction should be provided. In short, the Ski Statute unequivocally places the risk of injury caused by the skier's own inexperience on the skier, and there is no explicit or implicit statutory responsibility for an operator in a skier's training or instruction. Thus, even if the judge erred in excluding Di Nola's opinion, even with the opinion, plaintiff

still has not established a triable issue of fact as to whether defendants violated their statutory duties under the Ski Statute.

Plaintiff contends that "Mountain Creek's negligent hiring and training of Henry[] and Henry's negligent instruction of plaintiff" created "an issue of fact as to whether . . . [d]efendants failed in their statutory duty to eliminate non-inherent hazards." Relying on "Reisman and its progeny," plaintiff asserts that "negligent hiring/training of snowboard instructors, and negligent teaching by those instructors," are not inherent risks of skiing that are essentially impractical or impossible for ski area operators to eliminate.

However, as we explained in Brett, "[t]he common law, and not the [Ski] Statute, was applied in Reisman because there the skier's injury was the result of neither the violation of a statutory duty nor the assumption of a statutory risk." Brett, 279 N.J. Super. at 314-15. Thus, under Reisman, the ski area operator's liability for failure to remove non-inherent risks stemmed from the operator's common law duties, not its statutory ones. Ibid. However, because plaintiff has not advanced in her merits brief any arguments regarding defendants' liability under a common law negligence theory, we consider the claim abandoned. See Drinker Biddle & Reath LLP v. N.J. Dep't of L. & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (considering claims not addressed in the merits

brief abandoned); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

Based on our decision that there is no triable issue of fact as to whether defendants violated their statutory duties under the Ski Statute, we need not address plaintiff's argument regarding the enforceability of the liability release. We reach this conclusion because the argument is based solely on plaintiff's contention that the release is void as against public policy for allowing defendants to avoid liability for violating their statutory duties. See Steinberg, 226 N.J. at 359 ("A liability waiver . . . in a consumer agreement that exculpates a business owner from liability for tortious conduct resulting from the violation of a duty imposed by statute or from gross negligence is contrary to public policy and unenforceable."). But see Vitale v. Schering-Plough Corp., 231 N.J. 234, 248 (2017) ("Our law 'does not demand a per se ban against enforcement of an exculpatory agreement based on the mere existence of a duty recognized in the common law in respect of premises liability.'" (quoting Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 306 (2010))).

Affirmed.