SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2537-20

MEDRELL JOHNSON,

Plaintiff-Appellant/Cross-Respondent,

v.

NATIONAL SCHOOL BUS SERVICE, c/o MARV POER, FIRST STUDENT, INC., and JMB LANDSCAPE COMPANY, INC.,

Defendants-Respondents,

and

PIPE WORKS SERVICES, INC., and SPF PROPERTIES,

Defendants/Third-Party Plaintiffs-Respondents/ Cross-Appellants,

v.

NATIONAL SCHOOL BUS SERVICE, c/o MARV POER, FIRST STUDENT, INC.,

Third-Party Defendant-
Respondent.

Argued May 16, 2023 – Decided August 18, 2023

Before Judges Sumners and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9098-17.

Paul A. Krauss argued the cause for appellant/cross-respondent (Brandon J. Broderick, LLC, attorneys; Paul A. Krauss, on the briefs).

Mark R. Scirocco argued the cause for respondents/cross-appellants SPF Properties and Pipe Works Services, Inc. (Scirocco Law, PC, attorneys; Mark R. Scirocco and Stephen T. Scirocco, on the briefs).

Gerald T. Ford argued the cause for respondent First Student, Inc. (Landman Corsi Ballaine & Ford, PC, attorneys; Gerald T. Ford and Brittany M. Barbet, on the brief).

Dennis B. O'Brien argued the cause for respondent JMB Landscape Corp., Inc. (Zirulnik, Demille & Flynn, attorneys; Dennis B. O'Brien, on the brief).

PER CURIAM

Plaintiff Medrell Johnson, a bus driver for National School Bus Service, c/o Marv Poer, First Student, Inc., was performing an early morning pre-drive inspection in the parking lot when she slipped and fell on snow and ice in a

parking lot. National leased the property from its owners, SPF Properties and Pipe Works Services, Inc. Plaintiff filed a negligence action against National, seeking damages for personal injuries. She later filed a second amended complaint naming JMB Landscape Company, Inc. as a defendant. National had hired JMB to remove snow and ice from the parking lot where plaintiff slipped and fell.

After the two-year statute of limitations had expired, the trial court granted plaintiff leave to amend her complaint a third time to sue SPF and Pipe Works. Plaintiff later dismissed her claims against National without prejudice. SPF and Pipe Works, in turn, filed a third-party complaint against National, seeking contractual indemnification for plaintiff's claims.

Before us, plaintiff appeals from: (1) an October 30, 2020 order granting SPF and Pipe Works summary judgment dismissal of plaintiff's third amended complaint because National had sole responsibility to maintain the parking lot;[1] and (2) a March 31, 2021 order granting JMB summary judgment dismissal of

[1] Plaintiff does not challenge the motion judge's February 5, 2021 order denying her motion to vacate the October 30, 2020 summary judgment order and reinstate her complaint as to SPF and Pipe Works. The judge viewed the application as one for reconsideration under Rule 4:49-2, rather than a motion to vacate under Rule 4:50-1(f). The motion was filed on or about December 16, 2020—well beyond the twenty-day time limit for a reconsideration motion.

plaintiff's third amended complaint and all cross-claims and counterclaims with prejudice because there was no evidence JMB was negligent in removing snow and ice where plaintiff slipped and fell.[2] In addition, SPF and Pipe Works cross-appeal from a December 13, 2019 order denying their motion to dismiss plaintiff's third amended complaint on the grounds it was filed after the statute of limitations expired.[3]

We affirm the order granting summary judgment to SPF and Pipe Works because they had no legal duty to remove snow and ice from the area where plaintiff fell. Since we affirm that order, we need not address the cross-appeal by SPF and Pipe Works. We also affirm the order granting summary judgment to JMB because there was no evidence plaintiff's accident was caused by its negligence.

I

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motions, and view them in the light most favorable to the non-moving parties. Angland v. Mountain

[2] The orders were issued by different motion judges.

[3] The order was issued by the same motion judge who entered the March 31, 2021 order.

Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

National operates its bus service out of its headquarters at 29 River Road in Chatham, which it owns. The neighboring property is 33 River Road, where plaintiff slipped and fell on snow and ice on February 22, 2016. National also owns 37 River Road, situated next to 33 River Road, making 33 River Road sandwiched between National's properties at 29 and 37 River Road.

When plaintiff's accident happened, 33 River Road was owned by SPF. Paul Giglio is the owner of SPF and deposed that SPF purchased 33 River Road in 2014 or 2015. Pipe Works, a plumbing company also owned by Giglio, operates out of SPF's property at 33 River Road.

National parked buses at both 29 and 37 River Road. In addition, National had a longstanding oral agreement, utilizing the rear of SPF's property at 33 River Road to park buses. This portion of 33 River Road was also used as an access area for National's buses to its properties at 29 and 37 River Road. National buses parked in the shape of a "U" from 29 River Road to 37 River Road, with the bottom of the "U" behind 33 River Road.

Robert Windhorst, National's location manager, deposed that National's use of 33 River Road began in 1987, in accordance with an oral agreement with

the former owner of 33 River Road. Giglio stated that, long before SPF purchased the property, National leased the rear section of the property to park buses. This arrangement continued after SPF became the owner of 33 River Road. SPF continued its predecessor's oral agreement with National, resulting in National paying $1,910 per month for use of SPF's property.

The rear of 33 River Road leased to National was separated from the front of the parking lot—which was used by Pipe Works—by a physical barrier of horizontal telephone poles across the ground. National buses parked parallel to the telephone poles. According to plaintiff, these horizontal telephone poles were a longstanding barrier and had been on the ground since she started working at National in 1988. Per its agreement with SPF, National exclusively used, maintained, and controlled the leased area behind the telephone poles. As Windhorst testified, "it's always been the case that we are responsible for anything on our side of the telephone poles." The telephone poles were moved on one occasion prior to 2016 with the consent of both National and SPF.

National's responsibilities for the rear portion of SPF's property included snow and ice removal. On January 24, 2016, National hired JMB for snow removal at its property as well as the leased property from SPF. According to both Windhorst and James W. Hocko, JMB's owner, there was no written

contract between JMB and National for snow removal services. Windhorst and Hocko agreed that JMB would only perform snow plowing services when requested by National. Therefore, JMB did not perform any snow removal services after January 24; which was the only time that winter JMB removed snow prior to plaintiff's accident. In addition to JMB's efforts, National's employees removed snow on the leased property. Neither SPF nor Pipe Works performed maintenance of the area leased to National where plaintiff fell.

Plaintiff stated her fall occurred in National's leased area of 33 River Road, about six feet from the telephone poles that separated that portion from SPF's lot. After her fall, plaintiff reported the accident to her supervisors. She also indicated in her interrogatory answers that she "had reported to her employer a previous fall down from similar snow and ice conditions" almost a year prior. She did not inform SPF or Pipe Works of that fall. Prior to her current fall, plaintiff complained to her supervisors that the leased portion of the property was "a mess" and not plowed well.

II

We review a grant of summary judgment using the same standard that governs the motion judge's decision. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (citing Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact challenged and that the moving party is entitled to a judgment order as a matter of law." R. 4:46-2(c); Brill, 142 N.J. at 540. "When no issue of fact exists, and only a question of law remains, this [c]ourt affords no special deference to the legal determinations of the [motion judge]." RSI Bank, 234 N.J. at 472 (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016)).

In a negligence action, a plaintiff bears the burden of proving four elements: (1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages. D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011) (citation omitted). "The duty owed to a plaintiff is determined by the circumstances that brought . . . her to the property." Ibid. (citation omitted). The mere occurrence of an incident causing an injury is not alone sufficient to impose liability. Long v. Landy, 35 N.J. 44, 54 (1961). A plaintiff must establish facts proving negligence, not inferences "based upon a foundation of pure conjecture, speculation, surmise or guess." Ibid.

A

Guided by the above principles, we find no merit to plaintiff's argument that the motion judge erred in granting summary judgment to SPF and Pipe Works. She contends that SPF and Pipe Works, as owners of the property where she slipped and fell, owed her a duty under Shields v. Ramslee Motors, 240 N.J. 479 (2020), to maintain the area free of hazards because National's lease agreement with SPF and Pipe Works was not in writing. She points out that they did not have a written lease agreement with National defining the length of the lease, the area of the property leased, or the duties of the parties. Thus, "it is clear [from the record] that Pipe Works retained control over the property where [her] fall occurred and retained the authority to unilaterally change the area [National] could access for its [buses]," which resulted in her being on the property where her fall occurred. Plaintiff argues SPF and Pipe Works breached their duty, making them -liable for her injuries.

We agree with the motion judge that National—not SPF and Pipe Works––had the responsibility to clear the area where plaintiff slipped and fell on snow and ice. It is undisputed that National leased the area from SPF and Pipe Works per an oral agreement—requiring monthly rent of $1,910—and assumed responsibility to maintain the area by keeping it clear of snow and ice.

Plaintiff's reliance on Shields is misplaced. Shields held a commercial landowner may properly delegate to a tenant the legal duty to remove ice and snow from the leased property. 240 N.J. at 489-94. Thus, by placing responsibility on the tenant, "[i]t would not be fair to place responsibility for removal of snow and ice on a commercial landlord that lacks control over the property." Id. at 493. It is undisputed that is what occurred here. Under its oral lease with SPF and Pipe Works, National assumed the responsibility to remove ice and snow from the property. Plaintiff fails to establish why that oral lease is not a binding agreement governing National's obligation to remove snow and ice from the property it leased from SPF and Pipe Works. As the motion judge held, there was a "meeting of the minds" with respect to National's duty to maintain the leased property.

Furthermore, we see no basis to conclude, as plaintiff argues, that SPF and Pipe Works owed her a duty of care based on Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993), which it breached, causing her injuries. In Hopkins, the Court made it clear that whether a duty is owed depends on four factors: "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." 132 N.J. at 439. None of these factors weigh in favor of plaintiff.

Applying Shields, landlord SPF has no relationship with tenant National and its employee, plaintiff. SPF and Pipe Works assumed no risk and had no control over the area leased to National, especially considering National hired JMB to remove snow and ice. Plaintiff identifies no public policy benefit to justify imposing liability upon SPF and Pipe Works. Moreover, plaintiff can pursue a workers' compensation claim against National—a clear indication of our Legislature's position on employee work-related accidents. Under the circumstances presented in this case, we discern no "basic fairness" in imposing a duty upon SPF and Pipe Works to protect plaintiff from being injured on the property leased to her employer. See ibid.

In sum, plaintiff did not show SPF and Pipe Works owed her a duty that they breached, contributing to her accident. Therefore, summary judgment was providently granted in favor of SPF and Pipe Works.

To the extent we have not addressed any arguments raised by plaintiff regarding summary judgment to SPF and Pipe Works, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

B

Plaintiff argues JMB was improperly granted summary judgment because there was "not only a genuine issue of material fact, but multiple issues of

material fact, such as facts that could lead a jury to conclude that [JMB is] responsible or partially responsible for the occurrence of the accident." However, she fails to point out how JMB was liable for negligently clearing the area of snow and ice where plaintiff fell on February 16, 2016. She merely relies on her liability expert's report stating that "[t]he precipitation during the month of February and the existence of a snow pack from previous storms would provide notice to defendant that when temperature rose above freezing melting would occur and when it fell below again the melt would refreeze creating areas of ice." Her expert opined that "snow and/or ice conditions would not have formed on the incident walkway had it been adequately treated prior to the incident timeframe by . . . JMB." There is no merit to plaintiff's arguments.

Viewing the facts in the light most favorable to plaintiff, the motion judge found that: (1) on January 23, 2016, two feet of snow fell, which National hired JMB the next day to remove; and (2) JMB was not engaged by National to perform any subsequent snow removal, even though it snowed four more times––February 5, 8, 12, and 15—before plaintiff's accident. The judge stressed that plaintiff's expert failed to "describe the actions JMB took or did not take in its snow removal activities in relation to the specific area of [p]laintiff's fall," nor

did he address "the effects of the multiple subsequent snow events" after JMB removed snow on January 24, 2016. In sum, the judge held:

> [w]ithout such analysis, it is simply not possible for a fact finder to determine from the proffered expert testimony if [plaintiff] fell because of what JMB did or failed to do or due to snow events and concomitant snow removal activities (or omissions) that occurred (multiple times) in the month that followed.

Although our review of the motion judge's order is de novo, there is no reason to disagree with his reasoning. The judge correctly determined plaintiff's expert failed to establish how JMB is liable for plaintiff's February 22 accident based on its snow removal on January 24, which was followed by four subsequent snowfalls for which it was not hired to remove snow.

The judge did not address the parties' arguments regarding whether the expert rendered inadmissible net opinion. Nonetheless, we agree with JMB that the expert's opinion was inadmissible net opinion. The expert failed to indicate any objective support for his opinion that JMB's negligence was a proximate cause of plaintiff's accident. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) ("[A]n expert offers an inadmissible net opinion if he or she 'cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is personal.'" (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011))); see also Townsend v. Pierre, 221 N.J.

36, 53-54 (2015) ("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 factual evidence or other data.'" (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008))).

In sum, plaintiff did not show JMB negligently removed snow on January 24, 2016, and that such negligence contributed to her slip and fall on February 22, 2016. Therefore, summary judgment was providently granted in favor of JMB.

To the extent we have not addressed any arguments raised by plaintiff regarding summary judgment to JMB, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.