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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2852-21**

**JANET ROESLER and
ROBERT ROESLER,**

Plaintiffs-Appellants,

v.

**JACK BAKER'S WHARFSIDE
RESTAURANT AND PATIO BAR,
and CHEF'S INTERNATIONAL,
INC.,**

Defendants-Respondents.

Argued May 15, 2023 – Decided May 30, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, Docket No. L-1096-19.

William D. Wright argued the cause for appellants (The
Wright Law Firm, attorneys; William D. Wright and
Angela Berghoff, on the briefs).

Mark J. Leavy argued the cause for respondents
(Marks, O'Neill, O'Brien, Doherty & Kelly, PC,

attorneys; Melissa J. Brown and Amanda A. King on the brief).

PER CURIAM

In this trip and fall action, plaintiffs Janet and Robert Roesler¹ appeal from the Law Division's April 5, 2022 order granting summary judgment in favor of defendants Chef's International, Inc. and Jack Baker's Wharfside Restaurant and Patio Bar. We affirm, substantially for the reasons articulated in Judge James Den Uyl's well-reasoned opinion.

We discern the following facts from the record. At approximately 2:45 p.m. on May 11, 2017, seventy-year-old Janet fell on stairs while exiting defendants' premises, causing her to land on her back and hit her head.² As a result of this incident, plaintiffs filed the instant complaint on May 3, 2019, seeking damages pursuant to a theory of negligence and loss of consortium. Pertinent here, plaintiffs alleged that "a dangerous and hazardous condition existed at the property consisting of an improperly installed, designed, constructed, or otherwise maintained walkway and handrail."

¹ The parties first names are used in this opinion for clarity, as both plaintiffs have the same last name. We intend no disrespect from this informality.

² Hospital records from the incident indicate that plaintiff missed a step; however, plaintiff disagrees.

Two weeks after the subject incident, photos of the scene were taken, memorializing the condition of the stairs and railings in question. The front of defendants' building included an egress with two sets of wooden stairway steps and a ramp. The stairway leading to the egress doors of the restaurant included a four-step condition to a landing which extended to the egress doorway. Beginning at the top of the steps, measuring descent, the first step down measured approximately seven inches, the second step down measured approximately six inches, the third step down measured approximately six inches, and the fourth step down to the asphalt measured approximately six and one quarter inches. The overall width of the stairway measured eight feet and eight inches; however, the stairway was divided into two sections by a center handrail. When viewing the stairs from the top, the right handrail was the only handrail that stopped before the bottom of the steps.

Janet was deposed in this matter on February 25, 2020. During her deposition, she testified that she was holding on to the right handrail as she descended the right side of the staircase toward the parking lot below when she "lost her footing" and fell on, what she believed to be, the "last step."

Janet was unable to describe how she lost her footing and, in her testimony, confirmed multiple times that she was holding onto the handrail both

when she was coming down the stairs and "at the time [she] began to fall[.]" When asked whether she noticed anything wrong with the handrail when she was coming down the stairs, Janet testified that, "[t]he only thing [she] noticed or felt . . . was that the wood was a little split. [She] could feel it on [her] hand that the wood was splintering." Janet did not know whether the handrail was loose or unsteady, nor did she know whether she noticed anything about the treads of the stairs as she was descending.

When asked to provide more detail about how she fell and how it came to be that she hit the backside of her body when she fell while walking forward, Janet responded, "I really don't recall." When specifically asked whether anything about the way the stairs looked as she was coming down caused or contributed to her accident, Janet stated, "[n]o, not that I remember anyway."

Janet further testified that, prior to the date of the accident, she regularly ambulated with the assistance of a medically prescribed cane or with the help of her husband but was unable to recall whether she was utilizing her cane on the date of the incident. In addition, Janet testified that she had multiple fall downs prior to the date of the accident because she "would lose [her] balance." Janet explained that she was treated for her balance issues prior to the incident and had just completed physical therapy as a result.

Thereafter, plaintiffs served an October 8, 2020 liability expert report authored by Scott Moore, P.E. In anticipation of his report, Moore conducted a site inspection of the subject property and reviewed various documents.

Although repairs to the stairs and handrail were performed after the incident and prior to his inspection, Moore was able to review photos of the subject property in its original condition which were captured by Google Street View in August 2017. These photos indicated that the right handrail stopped before the bottom of the steps, to which Moore opined that, "[a]t the time of the incident, it seems the railing did not extend all the way and may have been a different height." Moore further noted that only the right handrail stopped at the bottom of the set of stairs while it continued on the adjacent railings. Moore went on to state that, "it is clear that the subject set of stairs had a failed and inappropriate handrail which was a substantial factor in the causation and resulting injuries experienced" by Janet, which was a "significant contributing factor" in her "inability to recover from her loss of footing as she descended the staircase."

Photos taken of the subject stairway after repairs were made subsequent to Janet's accident established that the subject handrail had been extended, and

that repairs were made to the bottom of the stairs.³ Moore relied on these photos to conclude that, "at the time of the incident, [the handrail] was inadequate, lacking, and was in disrepair by way of a missing extended handrail and poorly secured railing. Based on the completed repairs, the post was likely not secured as it is seen with significant steel strapping as a repair."

Based on his review of discovery documents, Moore established that defendants had owned and operated the premises since 1980. Admittedly without knowledge of the date that the subject handrail was constructed, and while acknowledging that compliance with the code may not be required, Moore cited to the 2015 International Building Code for his contention that the subject handrail was required to extend "at least [eighteen] inches past the last stair tread." Moore reached this conclusion based on an assumption that the subject handrail "was likely replaced at some point" prior to the accident.

Ultimately, Moore's report concluded:

In my professional opinion[,] there is a direct causal relationship between the inadequate handrail in conjunction with the failing and deteriorated handrail post and [Janet]'s fall and resulting injuries. Further, I conclude that had the subject area been adequately inspected, repaired, monitored, and maintained reasonably safe and in compliance with cited

³ In an April 5, 2022 written opinion, the judge noted that such evidence would be inadmissible under N.J.R.E. 407.

documents, [Janet] would most likely have been able to arrest her fall and avoid injury following losing her footing on the subject staircase.

On November 12, 2020, plaintiffs' eyewitness, Jeanne Nelan, was deposed. In describing the incident, Nelan stated that Janet was ahead of her going down the stairs and "when [Janet] got to the bottom or maybe one step before the bottom she just kind of – her right arm kind of went up in the air and she did a 180 and landed on her back in front of me." When asked whether she noticed anything about the condition of the stairs that stood out to her, Nelan stated:

Yeah[,] . . . that the bottom step was not the same height as the rest of the stairs. . . . [T]here's a definite difference in the height. And I believe that the railing did not go down to the bottom to the ground. It was maybe up on the last normal step so that that last half step I'll call it, I don't know if it's half the height. So[,] I just remember that myself, too, like thinking it was a little off.

In response to Moore's expert report, defendants commissioned and served the January 29, 2021 report of Keith Bergman, P.E. Contrary to Moore's report, Bergman opined that "[t]he actions and/or inactions of Janet [] caused" the incident to occur. "At the time of the incident, Janet [] had a compromised [gait] and made use of a cane for assistance. Regardless, the egress door had access to/from the parking lot via a ramp, which Janet [] could have used and entirely

avoided the steps." Bergman went on to state that, "[h]ad Janet [] made use of the access ramp, and avoided the steps, this incident would not have occurred." In addition, Bergman further pointed out that Janet had the option to use the handrail along the center of the stairway but chose not to.

Bergman's report went on to contest the "mechanics" of Janet's fall, stating that her description did "not comport with the fall occurring as a condition of the steps[.]" Rather, based on Janet's position after the fall, Bergman was of the opinion that she simply lost her balance, turned, and fell backwards.

In addition, the subject property, Bergman opined, was improperly referenced in Moore's report as being within the Borough of Point Pleasant; rather, it is located in the Borough of Point Pleasant Beach and is subject to that Borough's general ordinances. Based on his review of the relevant records and ordinances, Bergman established that the subject property was constructed between 1963 and 1970 and was, therefore, not required to adhere to International Property Maintenance Code/2015 edition and/or be upgraded to comply with more modern codes. Because of the age of the structure, the building elements were "grandfathered," as the various codes and standards referenced in his report came into place after the completion of the construction of the subject building.

Ultimately, Bergman concluded that the "overall condition of the incident stairway was reasonable and appropriate for its intended use." In Bergman's opinion, the cause of Janet's fall was "her inattentiveness and/or a misstep as she had a compromised [gait]."

On November 15, 2021, Moore was deposed. Moore first testified that the building code in effect at the time of the design of a stairway is the one that applies. Moore then testified that, "unless there is a change of use or layout, the code that [the stairway] most recently complied with is what it needs to remain in compliance with." Finally, Moore admitted that he did not have knowledge of when the subject handrail was last repaired or replaced prior to the accident.

On March 4, 2022, defendants moved for summary judgment at the close of discovery and a hearing was conducted on the matter on April 1, 2022. On April 5, 2022, Judge Den Uyl issued an order granting defendants' motion and, consequently, dismissing plaintiffs' complaint with prejudice.

In a written opinion affixed to the April 5th order, the judge found that, "viewing the evidence in the light most favorable to plaintiff[s], a rational fact finder could not find in [plaintiffs'] favor without speculating about the proximate cause of the fall." The judge went on to reason that:

You cannot reconcile [Janet]'s testimony that she was holding onto the hand railing at the time she began to

fall with the opinion of her liability expert, Scott Moore. Also, [Janet]'s lack of recollection of material facts on the mechanism of her fall leave too many blanks for a jury to fill in. There is no competent evidence to connect the dots between any theory of negligence and proximate cause for [Janet]'s fall[,] only speculation and conjecture.

Thereafter, plaintiffs filed a motion for reconsideration on April 18, 2022 and a hearing was conducted on the matter on May 13, 2022. In an oral opinion, the judge denied plaintiffs' motion and upheld the dismissal with prejudice, reasoning that plaintiffs "fail[ed] to demonstrate that the court's decision was based upon a palpably incorrect or irrational basis. Or that this court either did not consider or failed to appreciate the significance of the probative competent evidence." This appeal followed.

On appeal, plaintiffs raise the following arguments:

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED AS THE EVIDENCE COULD HAVE SUSTAINED A VERDICT IN FAVOR OF THE PLAINTIFF.

II. PLAINTIFFS' EXPERT'S OPINIONS ARE BASED ON THE FACTUAL RECORD AND NOT NET OPINION.

III. THIS CASE IS NOT SO EXTRAORDINARY AS TO REMOVE THE ISSUE OF PROXIMATE CAUSE FROM THE PURVIEW OF THE FACTFINDER.

Rule 4:46-2(c) provides that a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The court must "consider whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In applying that standard, a court properly grants summary judgment "when the evidence 'is so one-sided that one party must prevail as a matter of law.'" Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

We review the trial court's grant or denial of a motion for summary judgment de novo. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). We "apply the same standard governing the trial court," Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012), and do not defer to the trial court's interpretation of "the meaning of a statute or the common law." Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

In a premises liability case, such as here, "the plaintiff has the burden of proving that the property owner's negligence caused her injuries." McDaid v. Aztec West Condo. Ass'n, 234 N.J. 130, 142 (2018) (citing Jerista v. Murray, 185 N.J. 175, 191 (2005)). To survive a grant of summary judgment in a negligence action, a plaintiff must show that they could have presented a prima facie case against defendants, see Jerista, 185 N.J. at 191, which consists of the following four elements: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. County of Essex, 196 N.J. 569, 584 (2008)). The plaintiff must do this "by some competent proof." Ibid. (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014)).

At issue here is the third element: proximate cause. "Ordinarily, the issue of proximate cause should be determined by the factfinder." Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999). However, "the issue of proximate cause 'may be removed from the factfinder in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established.'" Townsend, 221 N.J. at 60 (quoting Fleuhr, 159 N.J. at 543).

[T]o prove the element of causation, plaintiffs bear the burden to "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause

in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."

[Id. at 60-61 (emphasis added) (quoting Davidson v. Slater, 189 N.J. 166, 185 (2007)).]

"Thus, in the unusual setting in which no reasonable factfinder could find that the plaintiff has proven causation by a preponderance of the evidence, summary judgment may be granted dismissing the plaintiff's claim." Id. at 60.

Guided by these legal standards, we discern no principled reason to disturb Judge Den Uyl's grant of summary judgment in favor of defendants. This is a matter where, at worst, plaintiffs are attempting to establish the element of causation by "pure speculation or conjecture," and, at best, the probabilities are "evenly balanced." See Townsend, 221 N.J. at 60-61 (quoting Davidson, 189 N.J. at 185).

Here, plaintiffs' theory of liability is that Janet would have been able to arrest her fall if the subject handrail was constructed or maintained in a different manner. However, based on plaintiffs' expert report and the testimony of Moore, Nelan, and Janet herself, the judge correctly found that "[t]here is no competent evidence to connect the dots between any theory of negligence and proximate cause[.]"

First, many aspects of Moore's report were either unsupported, or directly contradicted, by the factual record. See Townsend, 221 N.J. at 55. At one point, Moore opined that Janet "testified [that] she was holding onto the railing and that she felt it was insecure;" however, when specifically asked during her deposition whether she noticed that the handrail was loose or unsteady, Janet could not recall. In addition, many of Moore's conclusions, including his asserted standard of care, were derived either from inapplicable building codes, which he admits were not in effect at the time the building was constructed, or subsequent remedial measures, which are inadmissible pursuant to N.J.R.E. 407.

Next, Nelan's testimony largely fails to support plaintiffs' theory of liability, as it related almost exclusively to her perception of the stairway's uneven tread height—an alleged "defect" that went unnoticed by both plaintiffs and plaintiffs' expert. At one point, Nelan did testify that she witnessed Janet's "right hand holding the railing and then coming up like there was no more railing;" however, her testimony in that regard was largely based on speculation as she was unable to indicate what caused her to fall.

Finally, Janet's own testimony is fatal to her case, as it leaves "too many blanks for a jury to fill in" and, on many occasions, contradicts the testimony of both Moore and Nelan.

In that regard, Janet was unable to describe how she lost her footing; admitted that she noticed nothing wrong with the handrail—including whether it was loose or unsteady—other than the fact that "the wood was a little split"; admitted that she did not notice anything unusual about the treads as she descended the stairs; and could not provide any details on the mechanics of her fall. However, one subject that Janet could recall, and confirmed multiple times, was the fact that she was holding onto the handrail both when she was coming down the stairs and "at the time [she] began to fall," essentially refuting any argument that the design of the handrail somehow contributed to her fall.

In addition, Janet's deposition testimony directly contradicted the corresponding hospital records from the day of the incident, which indicated that she "lost her balance" and missed a step. Prior to the incident, Janet, who is seventy years old, had a prior medical history of balance issues, for which she had been treated, and a compromised gait, both of which had caused her to fall in the past. Moreover, Janet was prescribed a cane for assistance while walking, but could not recall whether she was using it at the time of her fall.

Given the lack of a sufficient expert report or other competent evidence to support the notion that the design of the handrail was a proximate cause of

Janet's fall, we find that summary judgment was appropriately granted in defendants' favor.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION