Prepared by the Court

	SUPERIOR COURT OF NEW JERSEY
ANTHONY PROSCIA, ELIZABETH MOLD, Plaintiff(s),	LAW DIVISION
	OCEAN COUNTY
v.	
	CIVIL ACTION
CHRISTOPHER S. CHRAMPANIS, Defendant.	DOCKET NO. OCN-L-655-20

OPINION

This action comes before this court on Motion for Summary Judgment filed by Defendant, S.O.M.E Architects, seeking dismissal of Plaintiff's Complaint. The Court briefly summarizes the facts pertinent to this Motion.

On or about June 27, 2015, real property located at 225 Silver Beach Road, Lavallette, New Jersey was transferred by deed to co-plaintiff Elizabeth Mold (the "Property"). Subsequently the Plaintiffs engaged John. C. Chando to prepare architectural plans for the construction of a new home. The Architect of Record for the project was Kenneth T. Schier, R.A. Plaintiffs then entered into a contract with CSC Fine Homes and Renovations, LLC (the "Contractor") for the construction of the home pursuant to the Architectural plans.

Construction of the home commenced and the Contractor constructed the foundation of the home. On April 30, 2019, the Township of Toms River issued a "Notice and Order of Penalty" as a result of the Contractor's failure to request a required inspection pertaining to the foundation of the home. Thereafter, on or around June 2019, the Contractor hired moving defendant, S.O.M.E Architects to perform a review of the foundation at the property.

On June 7, 2019, S.O.M.E., by and through its principal. Michael M. Simpson, R.A., P.P., LEED AP, observed the then existing condition of the property's foundation and subsequently issued a letter report to the contractor. Thereafter, on June 12, 2019, the project passed the foundation inspection and construction of the home proceeded. However, on January 6, 2020, the plaintiffs terminated their contract with CSC Fine Homes and Renovations, LLC.

The Plaintiffs then hired Chando to complete the construction of the home. Prior to commencing the work, Chando inspected the work that had been done and advised that the structure should be torn down because he felt that the foundation was unsafe. Ultimately, Plaintiffs decided against tearing down the structure and Chando continued work using the existing foundation.

On July 8, 2020, Chando prepared a letter to William Petterson, the Building Sub Code Official of Toms River, for Kenneth A Schier, RA's signature. The letter states that the foundation is "structurally sound". The following day, Mr. Schier signed and issued the exact letter from Chando on his own letterhead to William Petterson. Chando then completed construction of the home.

Plaintiffs filed their Complaint on March 5, 2020 against a number of defendants, including the moving defendant, S.O.M.E. Architects, alleging professional negligence on the part of S.O.M.E. Plaintiffs allege that S.O.M.E. owed a duty to exercise care in providing architectural and design service with regard to the Project and that S.O.M.E.'s conduct fell below the applicable standard of architectural care.

S.O.M.E. filed a motion to dismiss plaintiff's Complaint based on the Economic Loss Doctrine. After oral argument was conducted, the Court denied the motion on October 13, 2020, based on the fact that an Affidavit of Merit had not yet been filed. The Order stated that "the economic loss doctrine does not bar Plaintiff's claim at this time. Defendant may move for Summary Judgment at the close of discovery."

On January 13, 2023, S.O.M.E. renewed its motion for summary judgment arguing that S.O.M.E owed no duty to plaintiffs; that the Economic Loss Doctrine bars recovery, and that the report and testimony of plaintiffs' expert, Mr. Kenneth Schier, is a net opinion. Plaintiff's cross-motion for summary judgment was filed shortly thereafter.

The Court held oral argument on March 17, 2023 and again on April 14, 2023 addressing the summary judgment motions. The Court heard arguments from both parties pertaining to the expert reports produced. The Court now renders its decision on the issues raised.

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 issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). This standard requires the Court to consider the evidence presented "in the light most favorable to the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The Court must determine whether a rational factfinder could possibly resolve the alleged dispute in favor of the non-moving party. Ibid. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). Because the grant of summary judgment serves as a final disposition of the issues contemplated by the order, courts generally "seek to afford 'every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.'" Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988).

A claim of negligence requires a showing of: “(1) [a] duty of care, (2) breach of [that] duty, (3) proximate cause, and (4) actual damages.” Weingberg v. Dinger, 106 N.J. 469, 484 (1987). The Plaintiff has the burden of proving by competent, credible evidence that the defendant was negligent and that the defendant’s negligence was a substantial contributing factor in causing the plaintiff’s loss. Scafidi v. Seiler, 225 N.J. Super. 576, 580 (App. Div.1988). “[N]egligence is a fact which must be proved and which will never be presumed; nor will the mere proof of the occurrence of an accident raise a presumption of negligence.” Nelson v. Fruehauf Trailer Co., 11 N.J. 413, 416 (1953). The question of negligence turns on “the reasonableness of the action in relation to the foreseeable risks,” which is “an essentially objective determination to be made on the basis of material facts.” Weinberg, 106 N.J. at 484.

Whether a person owes a duty of reasonable care toward another turns on “whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.” Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993). In determining whether imposing a duty of care on a defendant is fair, and consequently, whether duty of care exists, the Court must “assess the totality of the

circumstances that a reasonable person would consider relevant in recognizing a duty of care to another." Id. at 93. The totality of the circumstances must include a determination of whether the harm was foreseeable or known to the defendant, such that the defendant had a duty to protect the plaintiff from it. *See* ibid.

Here, S.O.M.E. argues that it owed no duty to the plaintiff. S.O.M.E. asserts that there was no contract between the parties and that S.O.M.E performed no work on the project for the benefit of the plaintiffs. The court disagrees with this argument and finds that defendant S.O.M.E. did in fact owe a duty of care to the plaintiffs in this matter. S.O.M.E's involvement with this project was to observe the foundation and prepare a report setting forth those observations. Plaintiff's contractor was to rely on the representations made by S.O.M.E in constructing the home, therefore, S.O.M.E's actions were to benefit the Plaintiffs in this matter.

Next, to render a person liable in negligence when a duty is shown to exit, "there must be some breach of duty, by action or inaction, on the part of the defendant to the individual complaining, the observance of which duty would have averted or avoided the injury." Brody v. Albert Lifson & Sons, Inc., 17 N.J. 383, 389 (1955). Additionally, that breach of duty must have been both the actual cause-in-fact of the plaintiff's injuries and the proximate or legal cause of the plaintiff's injuries. Dawson v. Bunker Hill Plaza Associates, 289 N.J. Super. 309, 322 (App. Div. 1996). Proximate or legal cause is defined as "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complaint of and without which the result would not have occurred." Fernandez c. Baruch, 96 N.J. Super. 125, 140 (App. Div. 1967), rev'd on other grounds, 52 N.J. 127 (1968).

Moreover, the breach of duty must have caused the plaintiff to suffer actual damages that would not have occurred but for the breach of duty. Smith v. Whitaker, 160 N.J. 211, 235 (1999). Should the plaintiff fail to establish any of the requisite elements of negligence, the plaintiff's claim must fail.

In the majority of negligence cases, "the plaintiff is not required to establish the applicable standard of care." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014). In those cases, it is not necessary for the plaintiff to prove the standard of conduct violated by the defendant. It is sufficient for plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury which is competent to

determine what precautions a reasonably prudent [person] in the position of the defendant would have taken. Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961). In such cases a "layperson's common knowledge" permits the "jury to find that the duty of care has been breached, without the aid of an expert's opinion." Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996).

In some cases, however, the jury "is not competent to supply the standard by which to measure the defendant's conduct." Sanzari, *supra*, 34 N.J. at 134-35. As such, the plaintiff must "establish the requisite standard of and [the defendant's] deviation from that standard" by "present[ing] reliable expert testimony on the subject." Giantonnio, *supra*, 291 N.J. Super. at 42. New Jersey courts have found that certain more complex subject matters require expert testimony to establish the applicable standard of care, and, in making that determination, courts will decide "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether conduct of the party was reasonable." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982).

New Jersey Rules of Evidence 702 and 703 control the admission of expert testimony. N.J.R.E. 702 provides that:

> "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

N.J.R.E. 703 provides that:

> "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

In State v. Kelly, this Court applied Rule 702's similarly worded predecessor, Evidence Rule 56, and identified three prerequisites to a determination that expert testimony is permissible:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror;

(2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and

(3) the witness must have sufficient expertise to offer the intended testimony.

State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

An expert may not provide an opinion at trial that constitutes mere net opinion. The rule prohibiting net opinions is a corollary of New Jersey Rule of Evidence which provides that an expert's testimony may be based on 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 in forming opinions on the same subject. N.J.R.E. 703. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 400, 98 A.3d 1173, 1175 (2014).

An 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.'" Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372, 25 A.3d 221 (2011). That is, an expert must "explain a causal connection between the act or incident complained of and the injury or damages allegedly resulting therefrom." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Expert testimony that is "based merely on unfounded speculation and unquantified possibilities" should be barred. Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div. 1990). Thus, experts must "give the 'why and wherefore'" of their opinions, not "mere conclusion[s]." Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)).

Here, Plaintiffs offer the report of Kenneth Schier, R.A. to establish the applicable standard of architectural care in this matter. Mr. Schier was retained by plaintiffs to provide an opinion related to the June 7, 2019 letter prepared by S.O.M.E. related to the foundation conditions at the Project. The expert report was served on July 6, 2021. Mr. Schier sets forth the following standard of care:

Specific to New Jersey Law, the Rules of Professional Conduct for Architects states:

> 13:27-5.1 COMPETENCE a) An architect shall at all times recognize the primary obligation to protect the health, safety and welfare of the public in the performance of professional duties, shall act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by architects of good standing, practicing in the same locality.

During his deposition, Mr. Shier defined the applicable standard of care as "protecting the health, safety and welfare of the public… That's the standard of care under the architect's license statute."

Mr. Schier makes the following opinions in his report that S.O.M.E. breached the applicable standard of care; (1) when S.O.M.E conducted its site inspection and prepared the Foundation Report, it was not in possession of the Plans as permitted by the Township. Schier states that "S.O.M.E.'s reliance upon a copy of predecessor plans instead of Plans as permitted by the Township was unreasonable. It is my opinion that this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services."

The report does not detail why possession of the permitted plans is required under an applicable standard of care. The report is devoid of any explanation is to what possession of the plan would have avoided or what harm flowed from the lack of plans. Rather, the report contains one conclusory statement that "this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services."

(2) Contrary to S.O.M.E's statement within the Foundation Report, the photographs do not indicate that the ICF system was assembled by the Contractor in accordance with Fox Block methodologies. "It is my opinion that this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services."

There is no analysis presented that the method of construction cause any damages or deficiency in the structural integrity of the foundation wall.

(3) S.O.M.E. did not go on a ladder to observe (or attempt to observe) the top of the ICF foundation walls during the site inspection, including whether the Contractor had installed

anchor bolts within the top of the ICF walls. Additionally, the Foundation Report does not indicate that the Contractor provided S.O.M.E. with any documentation substantiating the purchase or installation of anchor bolts. “S.O.M.E.’s failure to conduct any due diligence with respect to the anchor bolts was unreasonable. It is my opinion that this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services.”

Schier’s report does not explain how the failure to install anchor bolts prior to the time of inspection was a deviation from an applicable standard of care. There is no standard described stating that anchor bolts are required to be installed prior to inspection. The report fails to establish a causal link between failure to install prior to inspection and damages that flowed from that failure.

(4) S.O.M.E.’s failure to determine whether the Project’s foundation as constructed could indeed support the two-story house being framed above was unreasonable. “It is my opinion that this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services.”

The expert report states that it was S.O.M.E.’s failure to determine whether the foundation could support a two-story house was a breach of S.O.M.E.’s duty. However, the Court record indicates that S.O.M.E. stated that the foundation was sound in the report that it issued, thus there was no failure to act on S.O.M.E’s part. Further, the record indicates that all modifications made to the foundation were cosmetic. The structure that is standing today was built upon the same foundation that S.O.M.E. inspected.

(5) S.O.M.E.’s Foundation Report does not address and completely ignored that the Contractor had failed to install flood vents in the ICF walls. Flood vents are required by Code. S.O.M.E.’s site inspection was either so lacking or so flawed that it failed to notice the lack of opening in the foundation walls for the flood vents. As a result, the ICF walls were cored for the installation are the pour, which required much more effort as opposed to if they had been accommodated before the concrete was installed. S.O.M.E.’s failure to notice – or intentional disregard – as to the lack of flood vents was unreasonable. “It is my opinion that this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services.”

The expert report does not indicate whether an applicable standard of care requires flood vents to be installed prior to the pour, nor does he indicate whether it is a deviation to install the

flood vents after the pour. The report fails to state what, if any, damages flowed from installing the flood vents after the pour.

(6) S.O.M.E. should have conducted non-destructive testing, such as ground penetrating radar, to determine the quantity if rebar within the Project foundation, given that S.O.M.E.'s site inspection occurred, and the Foundation Report was prepared months after the concrete pour. S.O.M.E.'s failure to do so was unreasonable. "It is my opinion that this constitutes a breach of the duty S.O.M.E. owed with respect to the architectural services."

The expert report notes that S.O.M.E. should have conducted non-destructive testing, but the report does not indicate whether the standard of care requires non-destructive testing. Further, the report fails to address what damages, if any, resulted from failure to conduct non-destructive testing.

(7) Schier states that there was a change out of the steel I-beam for the wood parallam beam and that the change out was unreasonable and structurally unsafe. "If Plaintiffs demonstrated that S.O.M.E. did approve the change out of the steel I-beam to the wood parallam beam, it is my opinion that this constitutes a breach of the duty S.O.M.E owed with respect to the architectural services it rendered relating to the Project's framing and structural integrity."

Schier's report claims that the wood parallam was structurally unsafe. However, there is no factual support for this conclusion. The report fails to include an analysis of load levels requiring steel beams versus wood parallams. Further, there is no analysis of the load level carried by the wood parallam in this particular structure and no indication from any scientific analysis that wood parallam was inadequate. The report does not set forth a standard as to when steel I-beam must be used. Lastly, there are no facts in the record to indicate that S.O.M.E. approved the change from steel I-beam to wood parallam.

Schier's opinions are devoid of any citation to an industry standard or authoritative treatise or text. This court has stated that [e]xperts must "give the 'why and wherefore'" of their opinions, not "mere conclusion[s]." Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)). There is not a "why or wherefore" in any portion of Schier's opinion. Rather, the opinions of Plaintiff's expert are conclusory. When an expert does not have a proper factual basis

to render an opinion, an expert "ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." Jimenez, 286 N.J. Super. at 540.

During his deposition, Schier was asked: "So in your professional architectural opinion, what is the typical architect to do if he is a follow-up architect coming to a project where there is a completed foundation that had not been inspected?" Schier responded in relevant part, "Well, first of all, I mean if it was me, I would contact the architect of record and have a discussion with him about the project first… As it turned out the structural integrity of the wall was okay. So Mr. Simpson sort of lucked out. But I think the way he did it and what he was wrong about unprofessional, what why I wrote the report."

In response, Defense counsel followed up and asked, "I understand you don't agree with his approach, but again, what is the deviation from the health, safety and welfare standard of care that you identified that he did here?" Schier again began his response with, "first of all, I would have made sure I was looking at a copy of the plans that were the actual permitted plans." Defense counsel again asked "how did the actions of Mr. Simpson deviate from the standard of care which you have defined as protecting the health, safety, and welfare of the public?

Plaintiff objected but allowed Schier to "elaborate again." Schier stated "if the foundation, if Mr., if everything went forward and Mr. Simpson's letter was accepted and everything was approved and the project got built the way that it was going and there happens to be, God forbid, a problem with the foundation and the house collapsed, you know, that certainly would be an obvious breach and we would be talking about a lot more that what we are talking about now. So yeah. I think he did. I think he did."

In his expert report and deposition testimony, Plaintiff's expert failed to set forth a proper standard from which S.O.M.E. deviated that subsequently caused harm to the plaintiff. This Court has held that, "opinion testimony "must relate to generally accepted. standards, not merely to standards personal to the witness." *Fernandez v. Baruch*, 52 N.J. 127, 131, 244 A.2d 109 (1968).

Without a valid expert report establishing a causal connection between S.O.M.E.'s alleged deviations and the plaintiff's damages, the claims against S.O.M.E. fail and must be dismissed, with prejudice.

Accordingly, defendant's motion in limine barring the opinions of the plaintiff's expert Kenneth Schier is granted. Additionally, Defendant's motion dismissing the plaintiff's complaint is granted as the plaintiffs cannot produce expert testimony indicating the defendant deviated from the accepted standard of architectural practice.