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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0258-11T4

MARGARET WELLINGHORST,

Plaintiff-Appellant,

v.

BRIAN ARNOTT, JAMES PUORO PLUMBING & HEATING, SHORELINE ELECTRICAL, INC., ROBERT F. POLAND EXCAVATING, INC., and ROBERT F. POLAND, individually,

Defendants,

and

CARANNANTE & ASSOCIATES and JOSEPH CARANNANTE, individually,

Defendants-Respondents.

Submitted September 12, 2012 - Decided March 8, 2013

Before Judges Sapp-Peterson and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3181-09.

Fronzuto Law Group, attorneys for appellant (Adam J. Boyle and Casey Anne Cordes, on the brief).

William J. Rush, attorney for respondents.

PER CURIAM

Plaintiff appeals from the pretrial order barring her expert from testifying at trial after the trial judge concluded the expert had rendered a net opinion. We affirm.

The salient facts giving rise to the order are largely undisputed. On November 5, 2007, while walking her dog in Brielle, plaintiff tripped over the edge of a trench that had been cut in the roadway in front of 621 Homestead Avenue. Plaintiff sustained injuries to her left hand as a result of the fall. Defendants, Carannante & Associates and Joseph Carannante,[1] individually, oversaw the construction underway at that location, including the excavation, backfilling, and compaction of the area where a utility trench had been excavated.

Plaintiff retained William Poznak, a professional engineer, as her expert. Poznak has more than thirty years experience as a civil engineer and construction official. He has been involved in the construction of trench, sewer, and water systems worth millions of dollars. He prepared an expert report and was deposed on April 19, 2011. He conducted a site inspection on December 14, 2010, during which he took measurements and made

[1] Plaintiff obtained default judgments against defendants, Robert F. Poland, individually, and Robert F. Poland Excavating, Inc., while the claims against all other defendants were either voluntarily or summarily dismissed.

observations. He also took photographs and made a diagram of the area in question.

Poznack testified that the asphalt patch covered the trench sunk uniformly, while the surrounding roadway did not sink. He attributed the uniform sinking to improper backfill. He also testified that because the backfilling had occurred approximately four years earlier, he was unaware of any test that could determine why the patch had sunk. When questioned as to his familiarity with ground penetration radar testing, he responded, "[t]that's something real new[,]" he had never used it and was "not familiar with it." Moreover, as for testing with which he was familiar, a Westervelt cake test, he testified he was "not certified to make a test." He expressed doubt whether any testing had been performed at the time the trench was backfilled because he had not seen any certifications in any of the materials he had been provided, which was typical for excavation jobs with which he had been associated. He acknowledged, however, that such certifications were not standard for the industry.

Defendant moved for summary judgment, and by order dated July 19, 2011, the motion judge denied the motion. Trial commenced two weeks later before a judge other than the judge who presided over the motion. At that time, defendant moved, in

limine, to bar the testimony of plaintiff's expert. Defendant's counsel urged that the opinion expressed by plaintiff's expert in his report established no factual or reasonable scientific basis for the opinion. In response, plaintiff's counsel urged the court to deny the application. Plaintiff argued Poznak had over thirty years experience overseeing the excavation and construction of water and sewer systems, had conducted a site inspection of the area, and reviewed photographs taken three days after plaintiff's fall that depicted the sunken condition of the area. Based upon these factors, plaintiff's counsel argued Poznak rendered an opinion that the patch sank due to it being improperly backfilled and compacted, evidenced by the uniformity of the existing road, which did not sink.

The trial judge was not persuaded by these arguments and found that Poznak's opinion did not satisfy the requirements for admissibility as expert testimony:

> Now, Poz[]nak noticed that based on his over thirty years of experience in the field of civil engineering[,] the repaved area constituted an unsafe position.
>
> Well, he doesn't know how much the street sank or how it looked at all [other] than a week after. What he knows is what he sees based on three years after[,] and I cannot see how he can[,] with any degree of certainty[,] based on fifty years of experience[,] tell how a street could have sank in the three years as opposed to the second week or so because as we further look

> in the brief[,] he said he measured that the patch was three quarters of an inch below the street level and attributed this half difference to . . . improper compaction at the time of the construction. Well, he didn't see it at the time of the construction. He didn't see it until three years later. So he doesn't know what happened at the time of the construction.
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> Poz[]nak stated in his deposition that based on over thirty years of experience, which he keeps telling us . . . that over time the area subcompacted, rendered a compaction test useless. So whether you can -- compact now, but he can't say when you compact. We don't know whether he compacted the year before, was it compacted the day that [plaintiff] fell or it compacted due to some other . . . reason other than the fact that it wasn't compacted properly because no one ever lifted the street to measure the concrete, the graveling, or the amount of asphalt that was put in the street . . . .
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> . . . .
>
> Further, Mr. Poz[]nak notes that at this point there [were] no scientific facts which would state with certainty as to why the asphalt -- dropped. That's the bingo.
>
> He would not be able to tell this jury[,] based on any scientific tests with any certainty based on his own expert report[,] why this asphalt had dropped. So what purpose would he be? He could not tell with any scientific certainty[,] based on his own report[,] why the asphalt dropped[,] which I find then all he would be able to give is a net opinion[,] and a net opinion rule is prohibited against a speculative testimony.

The present appeal ensued.

Plaintiff contends the trial court erred in finding Poznak's opinions, as expressed in his report and deposition, were net opinions. Plaintiff additionally contends that even if the trial court properly excluded Poznak's testimony, summary judgment should not have been granted because expert testimony was not necessary to prove defendant's negligence. We disagree with both contentions.

At the outset, we review the trial court's determination barring Poznak's testimony under an abuse of discretion standard. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). As such, a trial court's discretionary admissibility determinations "will not [be] disturbed, absent a manifest denial of justice." Lancos v. Silverman, 402 N.J. Super. 258, 275 (App. Div.), certif. denied sub. nom., Lydon v. Silverman, 196 N.J. 466 (2008). We do not, however, defer to discretionary rulings that are "inconsistent with applicable law." Pressler & Verniero, Current N.J. Court Rules, comment 4.6 on R. 2:10-2 (2012).

We begin our discussion by noting the in limine motion was heard on the day of trial. We have repeatedly cautioned trial courts against consideration of such motions in limine on the day of trial when such motions have the potential to summarily dispose of the case, as happened here. See Bellardini v. Krikorian, 222 N.J. Super. 457, 464 (App. Div. 1988) (noting

that "in limine rulings on evidence questions . . . . should be granted only sparingly and with the same caution as requests for dismissals on opening statements"). See also Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 46-47 (App. Div. 1990) (noting that a hearing on motion in limine required judge to make factual determinations more properly left to the jury). This is particularly true where, in this case, defendant moved for summary judgment one month earlier and, according to plaintiff, raised the same argument which the motion judge rejected in denying summary judgment.

Plaintiff did not object to the in limine motion on the ground that defendant's claimed net opinion argument had been previously raised and rejected by a different judge one month earlier. Nor did plaintiff argue that no new developments occurred since the denial of summary judgment that warranted revisiting the issue at trial. We are therefore satisfied that in this instance, the trial court did not abuse her discretion in considering the motion, particularly since the court afforded both parties a full opportunity to be heard on the issue. See Lombardi v. Masso, 207 N.J. 517, 537-38 (2011) (explaining that "where a judge is inclined to revisit a prior interlocutory order, what is critical is that he provide the parties with a fair opportunity to be heard on the subject").

We now address whether the opinions expressed by Poznak were net opinions. An expert's net opinion is an opinion bereft of any support in factual evidence or similar data. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). Thus, to survive a motion to exclude expert testimony, the expert's opinion must state the "'why and wherefore' of his . . . opinion[s]." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (quoting Jimenez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996)). An expert's opinion based solely upon the personal opinion of the expert is unreliable. Rubanick, supra, 242 N.J. Super. at 65 (stating "[i]t is clear that the reliability requirement is not satisfied simply by the expert testifying as to his or her personal belief or opinion").

Here, the objective data upon which Poznak's opinion was based was essentially limited to a visual inspection of the area three years following the accident and a review of photographs taken of the area of the fall three days after plaintiff's accident. He performed no tests, stating there were no tests he could perform to determine whether there was insufficient compaction of the trench because such tests would have had to have been performed at the time the trench was backfilled. He testified "the patch was put in probably even with the road and

then it started sinking. Maybe the first week or two it was an eighth of an inch and then maybe six months later it was down to three quarters of an inch." Yet, he provided no facts to support these conclusions beyond his experience. Thus, we agree, as the trial judge observed in her opinion, that not only is there an absence of any reliable evidence identifying when the sinking commenced, there is also no reliable evidence addressing why the sinking occurred. In short, Poznak's expert opinion is flawed because it was not "derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field." Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992). Consequently, the judge did not abuse her discretion in excluding Poznak's testimony.

Finally, we reject plaintiff's claim that expert testimony was not necessary to assist the jury in resolving the disputed issues. Whether the trench was properly backfilled and compacted is beyond the kin of the average juror. While Poznak acknowledged the existence of testing procedures to determine whether a trench has been properly compacted, he acknowledged that such tests are generally performed contemporaneously with the backfilling. The only other testing procedure about which Poznak testified is ground penetration radar, which he explained is something that is "real new" and which he had never used.

The very existence of these testing procedures negates the contention that determining why and when sinking commenced to occur does not require expert testing.

Affirmed.