SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2208-14T3

EDER GONZALEZ IXCOPAL,

Plaintiff-Appellant,

v.

CROWN EQUIPMENT CORPORATION,

Defendant-Respondent,

and

MATERIAL HANDLING SUPPLY,
INC. t/a MHS LIFT,

Defendant.

Argued October 25, 2016 – Decided April 25, 2017

Before Judges Fisher and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1602-11.

Christina Vassiliou Harvey argued the cause for appellant (Lomurro, Munson, Comer, Brown & Schottland, LLC, attorneys; Richard Galex and Eric H. Lubin, on the briefs).

Thomas J. Cullen, Jr. (Goodell, Devries, Leech and Dann, LLP) of the Maryland bar, admitted pro hac vice, argued the cause for respondent (Coughlin Duffy LLP, and Mr. Cullen,

attorneys; Timothy I. Duffy and Mr. Cullen, of counsel and on the brief).

PER CURIAM

In this personal injury action, plaintiff Eder Gonzalez Ixcopal alleges he suffered injuries as a result of the defective design and inadequate safety warnings of a forklift he operated, which defendant Crown Equipment Corporation (Crown) manufactured. After a testimonial N.J.R.E. 104 hearing, the trial court barred plaintiff's sole expert witness on the ground he offered a net opinion and thereafter granted summary judgment in Crown's favor. Defendant appeals from the court's evidentiary ruling. We affirm.

I.

The forklift in question, defendant's model RR 5220, requires its operator to stand in a cabin that is completely open from the chest up. The driver operates the forklift from a side stance, with the forward-moving direction to the driver's left and the forks trailing to the right. The driver enters the cabin through an opening in the front. To improve stability, the forklift is narrow enough to enable the operator to maintain five points of contact with the forklift by having two hands on controls, two feet on the floor, and the back against a support. The opening does not have a door or other enclosure, and the driver is not restrained by a belt or tether.

The cabin floor contains two foot pedals. The driver must depress both to move the forklift. The pedal under the operator's right foot must remain depressed to maintain the vehicle's speed as well as its steering. The pedal under the operator's left heel serves as an emergency brake. The operator automatically triggers it by lifting his heel.

Plaintiff was an experienced driver of the RR 5220. He was properly trained and licensed to operate it since 2005. Yet, on December 16, 2009, he suffered a severe foot injury after colliding with another forklift. Plaintiff was driving the loaded forklift down an aisle in the warehouse where he worked. He saw another forklift ahead of him at what appeared to be a safe distance. He then turned his head to confirm his load was properly situated. When he turned back, he discovered the distance between the two forklifts was safe no longer.

Plaintiff tried to avoid a collision by lifting his left foot to release the emergency brake. The forklift jerked in response to the sudden deceleration, but plaintiff's maneuver was too late. The vehicles crashed. The force from the vehicle's change in momentum also destabilized plaintiff. He grabbed the forklift's control panel to keep himself from falling, but his left foot swung outside the cabin and was partially crushed at the point of impact.

On June 14, 2011, plaintiff sued Crown, alleging negligent design and inadequate warnings.[1] During discovery, plaintiff submitted a November 2013 expert report from Howard Sarrett, a New Jersey licensed professional engineer since 1992. Sarrett worked with a wide variety of machine designs as an engineer for various companies from 1969 to 1991 and as a consultant for attorneys since 1990. He estimated he had examined forklift designs about a dozen times, but only as a litigation consultant.

In preparing his report, Sarrett "visually examined" the forklift plaintiff operated and the accident scene. He also reviewed defendant's design, operation and training manuals, various industry standards and manuals, OSHA regulations, as well as the designs of other forklifts by defendant and other manufacturers.

Sarrett concluded "[t]o a reasonable degree of engineering certainty" that the forklift's design was defective and that this defect caused plaintiff's injury. He also cited the absence of adequate safety measures to protect the operator. He contended

[1] The complaint also alleged negligent manufacture, construction, and marketing of the forklift, but these claims have not been pursued on appeal. In addition, plaintiff filed a complaint against the other named defendant in this matter, Material Handling Supply, Inc., on July 12, 2012. Material Handling Supply settled with plaintiff on November 12, 2014.

four feasible design enhancements would have prevented the injury: (1) a retractable safety lanyard to keep the driver within the cabin,[2] (2) mirrors "provid[ing] 360° of visibility," (3) a closed circuit TV camera system pointing backwards to provide a rear view for the driver while facing forward, and (4) a safety bar to keep the driver within the cabin.

In addition, Sarrett concluded the forklift's safety warnings were "ineffective, confusing and contradictory." He opined that defendant should have "provide[d] both clearer training and warnings concerning the proper method of emergency braking" as well as the danger of "short or emergency stops."

Defendant also produced its own expert report, dated January 31, 2014. The report was written by Charles B. Watkins, Ph.D., P.E., and critiqued Sarrett's findings. He noted, in particular, that the RR 5520's open cabin allowed greater visibility, and the operator's ability to exit the cabin without obstruction or restraint promoted safety if the forklift tips over. Watkins opined that Sarrett's designs would make the forklift less safe. In addition, he argued that there was nothing inadequate about the safety warnings.

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[2] Notably, the tether he proposed would restrain an operator's upper body; consequently, it is unclear how it would prevent an operator's foot from being propelled out of the cabin.

Defendant deposed Sarrett on March 26, 2014, raising issues regarding the basis for his opinions. In August 2014, defendant then moved for summary judgment, contending Sarrett's opinion was an inadmissible net opinion. In response to defendant's motion, the trial court ordered a Rule 104 hearing to further examine Sarrett's opinion. During the hearing, Sarrett was subjected to further questioning from both defense counsel and the court.

The questioning of Sarrett at his deposition and at the hearing revealed gaps in the empirical basis for his conclusions. For example, although Sarrett's report referenced numerous OSHA regulations and industry standards regarding forklift design and training, he admitted Crown's design did not violate them. Sarrett also acknowledged his recommended alternative designs had never been used on stand-up forklifts such as the RR 5220. Instead, he based his suggested alternative designs on features found on other forklift models.

Despite the novelty of his redesigns, Sarrett performed no testing to compare their relative safety risk or impact. Nor did he create detailed designs or prototypes to demonstrate how the designs would be implemented on the RR 5220, with one exception: a photo image of a forklift rider with a harness attachment connected to his upper back. But the image portrayed a different stand-up forklift model, which had an overhead roof and no cabin.

The image also lacked any markings, measurements, or explanation as to how the harness system would work in the RR 5220's roofless cabin, which required that the operator's back be pressed against the cabin wall.

Sarrett's opinion regarding the product's safety warnings was subjected to similar, but briefer, scrutiny. He admitted there was "no empirical or objective data that support[ed] [his] position . . . that the warning is deficient." He also noted that he had not prepared alternative, improved warnings.

After the hearing, the court barred Sarrett from presenting expert testimony. First, the judge found Sarrett's general engineering expertise did not qualify him to provide expert testimony on the particular machine at issue. Second, the court found that Sarrett's opinions lacked an adequate factual basis, noting they were unsupported by testing, prototypes, cost-benefit analyses, manuals or other protocols.

The court further noted that plaintiff's action involved matters "beyond the ken of an average jury," and thus required expert testimony. Thus, the disqualification of plaintiff's sole expert meant that he could not establish a prima facie case. Accordingly, the court granted summary judgment dismissal. This appeal followed.

II.

"We apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). We must "generously sustain that decision, provided it is supported by credible evidence in the record." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010). Our deferential standard of review applies to decisions regarding an expert's qualifications. State v. Krivacska, 341 N.J. Super. 1, 33 (App. Div.), certif. denied, 170 N.J. 206 (2001). Furthermore, a judge's factual findings after a N.J.R.E. 104 hearing are entitled to deference. State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010), certif. denied, 205 N.J. 78 (2011). However, our review is de novo when the trial court "fails to apply the proper test in analyzing the admissibility of proffered evidence." Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012) (internal quotation marks and citation omitted).[3]

[3] Plaintiff does not challenge the determination that summary judgment was warranted if Sarrett's opinion is barred. Therefore, we need not reach that issue. See Estate of Hanges, supra, 202 N.J. at 384-85 (describing this mode of analysis where summary judgment is predicated on evidentiary decision).

The trial court grounded its conclusion on two independent bases: (1) Sarrett's lack of expertise in the design of the particular forklift at issue and (2) the insufficient evidentiary basis for his conclusions regarding its alleged design defects and inadequate safety warnings. Accordingly, plaintiff must demonstrate the court abused its discretion on both counts.

We acknowledge there may be persuasive reasons for finding that Sarrett was qualified to render an expert opinion on the design of the forklift in question. A mechanical engineer like Sarrett, with significant experience examining a vast array of complex machines, may develop sufficient expertise in design to opine even on machines he has infrequently encountered. Presumably, there are considerations and concerns common to all such designs that require only general expertise in engineering. See, e.g., Knight v. Otis Elevator Co., 596 F.2d 84, 87-88 (3d Cir. 1979) (finding that registered engineer could testify about safety of elevator mechanism despite lack of prior experience in design or manufacture of elevators). But we need not resolve this matter because we agree with the trial court's second basis for barring Sarrett: he presented an inadequate evidentiary basis for his conclusions.

Under N.J.R.E. 703, experts may rely on otherwise inadmissible evidence if it is "of a type reasonably relied upon

by experts in the particular field in forming opinions or inferences upon the subject. . . ." An expert's opinion may also be based on "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial . . . ." State v. Townsend, 186 N.J. 473, 494 (2006) (Townsend) (internal quotation marks and citation omitted). A corollary to N.J.R.E. 703 is the net opinion rule: that is, the court shall exclude "an expert's conclusions that are not supported by factual evidence or other data." Townsend, supra, 186 N.J. at 494.

The net opinion rule requires an expert to "give the why and wherefore that supports the opinion, rather than a mere conclusion." Townsend v. Pierre, 221 N.J. 36, 54 (2015) (Pierre) (internal quotation marks and citation omitted). Our courts have recognized a wide array of sources that may satisfy this requirement, including the witness's own extensive education, training and experience, see Townsend, supra, 186 N.J. at 495; Scully v. Fitzgerald, 179 N.J. 114, 129 (2004); other scholarship within the field, see Hisenaj v. Kuehner, 194 N.J. 6, 24 (2008); "handbooks, manuals, treatises, articles or trade publications" within a particular industry, Pomerantz, supra, 207 N.J. at 374; criteria found in government or private standard-setting organizations, see Grzanka v. Pfeifer, 301 N.J. Super. 563, 582 (App. Div.), certif. denied, 154 N.J. 607 (1997); and trade-

specific customs, see Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 413 (2014).

Regardless of the expert's source, the obligation remains the same: "to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Pierre, 221 N.J. at 55 (internal quotation marks omitted) (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). Conversely, "an expert's bare opinion that has no support in factual evidence or similar data is mere net opinion which is not admissible and may not be considered." Pomerantz, supra, 207 N.J. at 372. An expert cannot offer a safety standard that is "personal" and lacks "objective support." Id. at 373; see also Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007) (stating that expert "must be able to point to a generally accepted, objective standard of practice, and not merely to standards personal to the witness" (internal quotation marks and citation omitted)), certif. denied, 194 N.J. 272 (2008).

Applying these standards, we affirm the trial court's decision to bar Sarrett's opinion that defendant's safety warnings were inadequate. Sarrett's conclusion referred to none of the resources we have permitted from experts. Sarrett admitted his opinion was not based on "any empirical or objective data." Nor

did he provide his own, alternative warnings. In other words, Sarrett offered nothing more than bare assertions. See Id. at 526-27 (rejecting as net opinion expert's opinion regarding inadequate warning where it complied with existing government and industry standards and expert "collected no epidemiological data and conducted no empirical research or analysis").

Sarrett's assertions regarding the RR 5220's defective design fare no better. In design defect claims raised against a manufacturer, expert testimony is an essential part of the plaintiff's prima facie case. "Plaintiffs who assert that the product could have been designed more safely must prove under a risk-utility analysis the existence of an alternative design that is both practical and feasible." Lewis v. Am. Cyanamid Co., 155 N.J. 544, 571 (1998). The expert must therefore present "an opinion, substantiated by empirical evidence, that" more lives would be saved by adopting the design than lost because of it. DiLuzio-Gulino v. Daimler Chrysler, 385 N.J. Super. 434, 438-39 (App. Div. 2006); see also Smith v. Keller Ladder Co., 275 N.J. Super. 280, 285-86 (App. Div. 1994) (rejecting expert testimony that merely alleged in conclusory terms that a product was defective, "without indicating how defendant could have eliminated its unsafe character . . . without impairing its usefulness or

making it too expensive to maintain its utility" (internal quotation marks and citation omitted)).

As plaintiff notes, design defect experts need not always ground conclusions on their own, self-generated work. For example, we did not require an expert to support his opinion with his own prototype or testing when the defendant had already safety tested a version of the proposed design. Green v. General Motors Corp., 310 N.J. Super. 507, 524-25 (App. Div.), certif. denied, 156 N.J. 381 (1998). Additionally, prototypes may not be necessary if the alternative design is already on the market, performing "the same or very similar function at lower risk and comparable cost." Id. at 524 (quoting Restatement (Third) of Torts: Products Liability § 2 comment f). But this flexibility does not relieve experts of the obligation to provide a factual basis for their opinion.

Sarrett failed to meet this requirement. Though Sarrett researched and reviewed pertinent materials, such as OSHA regulations and industry standards, none of these supported his opinion that defendant's design was defective. To the contrary, Sarrett admitted that the RR 5220's design did not violate any OSHA or industry standard.

Although Sarrett proposed alternative designs, he provided no objective basis to analyze their feasibility. As already noted, Sarrett's recommendations would create an entirely new stand-up

rider forklift design. Yet, despite his innovative suggestions, Sarrett provided no prototypes or drawings to illustrate how the changes should be implemented — aside from a single image of a driver using the safety lanyard in a different model forklift. A jury would be left to speculate how defendant might, for example, append a system of mirrors providing 360° of visibility to a cabin that is entirely open from the chest up.

Sarrett's opinion also lacked an evaluation of the relative safety gains and losses of any of the alternative designs. As defendant's expert noted, the designs that Sarrett contends are defective provide competing safety benefits. For example, the lift's open cabin operated at a side stance allows the operator to see both forward and backward with ease and without obstruction. And its open entrance allows an operator to exit the cabin quickly in case of a tip over.

Even if Sarrett's proposed design alternatives might improve safety in some circumstances, they could create new and greater perils. For example, constructing a system of mirrors would obstruct the operator's previously unimpeded sight lines. Use of digital monitors may pose a distraction to the operator, with

obvious safety risks.[4] Installing personal restraints and a bar across the entrance, which Sarrett proposed to prevent the driver from being ejected from the cabin, might hinder the driver from exiting the cabin voluntarily during a fall. Sarrett was obliged to provide some basis for concluding that his proposed modifications would, on balance, make the forklift safer, rather than not. He failed to do so.

In sum, while Sarrett researched various sources in drafting his report, none provided factual support for his conclusions. The trial court thus properly found that Sarrett's assertions were inadmissible net opinion.

Affirmed.

[4] As defendant notes (and plaintiff does not contest) the forklift that implements this feature uses it merely to assist the driver in loading objects onto forks, rather than as a means of improving driver safety while the forklift is in motion. Furthermore, use of mirrors or monitors to enable the driver to monitor the trailing load would seem at odds with the OSHA standard Sarrett himself cited in his report, which requires "[t]he driver . . . to look in the direction of, and keep a clear view of the path of travel." 29 C.F.R. § 1910.178(n)(6).