SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4943-14T2

ELAINE ANDEROCCI and WALTER ANDEROCCI, her husband,

Plaintiffs-Appellants,

v.

COACH, INC., REED KRAKOFF, Individually and as servant, agent and/or employees of The Mall at Short Hills, THE MALL AT SHORT HILLS, Individually and as servant, agent and/or employee, TAUBMAN CENTERS, Individually, and as servant, agent and/or employee of The Taubman Company, LLC, and THE TAUBMANN COMPANY, LLC, Individually,

Defendants-Respondents.

Argued October 11, 2016 – Decided October 27, 2016

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5893-13.

Edward McElroy argued the cause for appellants (Eichen Crutchlow Zaslow & McElroy, LLP, attorneys; Mr. McElroy, on the briefs).

Jason S. Feinstein argued the cause for respondents (Eckert Seamans Cherin & Mellott, LLC, attorneys; Mr. Feinstein, of counsel and on the brief; Nicholas M. Gaunce, on the brief).

PER CURIAM

Plaintiffs Elaine and Walter Anderocci[1] appeal the trial court's order granting summary judgment to defendants in this slip-and-fall negligence action. We affirm.

The record furnished on appeal[2] reflects that on April 3, 2012, plaintiff was shopping at the Short Hills Mall in a retail store known as Reed Krakoff, which has an affiliation with co-defendant Coach, Inc.[3] While reaching for a handbag on display on a shelf, she slipped and fell, fracturing her shoulder.

Plaintiff testified at her deposition that she was approached immediately after her fall by two female sales clerks, one of whom

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[1] Since Walter Anderocci is a co-plaintiff in this case only because of his per quod claim deriving from his spouse's injury, we shall refer to Elaine Anderocci solely as "plaintiff."

[2] Defendants have objected to our consideration of the full transcripts of depositions provided by plaintiff because the motion judge was furnished only with excerpts from the transcripts. Consequently, we have only considered the excerpts in our review of the issues. See R. 2:6-1(a)(1).

[3] We hereafter shall refer to Reed Krakoff and Coach, Inc. as "defendants." The additional named defendants listed in the caption (The Mall at Short Hills, Taubman Centers, and The Taubman Company, LLC) have not been shown to have any involvement in the condition of the store flooring, and plaintiff has not presented any argument to support liability on their behalf.

allegedly stated that "a lot of people slip in this store[.]" The other clerk allegedly said to plaintiff, "We all have to wear rubber-soled shoes here." When asked at the deposition what caused her to fall, plaintiff responded, "The very slippery floor. It was like a sheet of glass."

Plaintiff contends that defendants are liable because the store's floor was in a dangerous condition. To support her contention, she obtained a report from an individual presented as an expert in wood flooring. The liability expert issued a three-page written report. His report described the wood flooring as "quartersawn walnut planks" installed in a herringbone pattern and milled with stress relief.

The expert never examined the floor.[4] Nevertheless, he opined that the slippery condition of the floor was attributable to the use of excessive water in cleaning it. The record indicates that it was defendants' practice to have the floor "damp mopped" three times per week. There is no indication in the record of exactly how much water was used in such mopping, or what precisely was meant by the term "damp mopped." As the expert acknowledged in

[4] Apparently at some point after the accident the store closed, and the flooring was removed. Plaintiff has not claimed spoliation of evidence by defendants.

his report, the vague term "damp" is problematic, as it "can mean something different to everyone[.]"

According to plaintiff's expert, if too much water is used when this kind of floor is mopped, the water can cause the wood surface to cup or crown, and thereby create a slippery condition. The expert report cited to National Wood Flooring Association ("NWFA") maintenance guidelines, which state that crowning can be caused by "moisture imbalance" due to excessive water used when cleaning a wood floor.

The motion judge granted summary judgment to defendants for several reasons. The judge first concluded that the plaintiff's expert report comprised an inadmissible net opinion. She also ruled that the alleged hearsay statements that plaintiff attributed to the defendants' employees, which they denied in their own depositions, were inadmissible. In addition, the judge determined that even if those alleged statements were considered, plaintiff still had not presented sufficient proof of the elements of negligence to warrant a trial.

Plaintiff now appeals. She contends that the trial court erred in these rulings and that the issues of liability should be presented to a jury.

In considering these arguments, we are guided by familiar principles. On a motion for summary judgment, we must "consider

whether the competent evidential 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); see also R. 4:46-2(c). We apply the same legal standards on appeal. W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012). With respect to the trial court's evidentiary rulings, we generally will not set them aside unless the court has abused its discretion, including with respect to issues of the admissibility of expert opinion. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008). Nevertheless, we owe no deference to the trial court on its disposition of questions of law, which we evaluate de novo. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The traditional elements of a negligence claim in the context of a business invitee's slip and fall at a defendant's premises are likewise well established. A plaintiff must prove by a preponderance of the evidence: (1) defendant's actual or constructive notice of a dangerous condition; (2) lack of reasonable care by defendant; (3) proximate causation of plaintiff's injury; and (4) damages. Handleman v. Cox, 39 N.J. 95, 111 (1963); see also Model Jury Charge (Civil), 5.10A,

"Negligence and Ordinary Care — General" (1984); Model Jury Charge (Civil), 5.20F, "Duty Owed - Condition of Premises" (2014).

The level of care owed by a defendant in a premises liability case at times can be altered under the multi-factor approach of Hopkins v. Fox & Lazo Realtors, Inc., 132 N.J. 426, 439 (1993), including consideration of the relationship of the parties, the nature of the attendant risk, the defendant's opportunity and ability to exercise reasonable care, and the public interest in the proposed solution. However, it is undisputed in this conventional slip-and-fall case that the usual elements of premises liability apply. Within that substantive framework, issues before us concern the trial court's evidentiary rulings and its application of negligence principles to the summary judgment record.

As an initial matter, we agree with the motion judge that the conclusions set forth by plaintiff's liability expert were inadmissible net opinion. Although the expert appears to be well versed in aspects of wood flooring, the particular opinions he proffered here concerning what might have caused plaintiff's accident are too speculative to be admissible, and were not sufficiently grounded upon factual support in the record. See Townsend v. Pierre, 221 N.J. 36, 55-56 (2015) (emphasizing an expert's obligation to support his or her conclusions with factual

evidence in the record, rather than hypothesized speculation); see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 414 (2014) (similarly upholding the exclusion of a deficient expert report that violated the net opinion doctrine). An expert's conclusion must be excluded "if it is based merely on unfounded speculation and unquantified possibilities." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 N.J. 333 (1990).

As we have already noted, plaintiff's expert did not examine the flooring at the store. He accepted at face value plaintiff's deposition testimony that it was in a slippery condition. None of the deponents stated that the floor, as the expert surmised, was "crowned" or "cupped."

To be sure, the expert's citation to NWFA standards provides some indicia of objective support for his general hypothesis that excessive moisture used in cleaning may cause wood floors to crown. Even so, his specific opinion that excessive water and defendants' maintenance practices caused such a dangerous condition here has no evidentiary nexus to the record.

For instance, the expert does not quantify — and the record is bereft of any proof concerning — how much water was typically used when the flooring was cleaned. He did not establish why defendants' schedule of damp-mopping the floor three times per

week was too frequent, or, conversely, too infrequent. Such details were not generated in discovery, which lasted over 500 days. No cleaning personnel were deposed. The expert had little else to evaluate in rendering his opinion. On the whole, we agree with the motion judge's exclusion of his speculative testimony, because it was not adequately grounded in the record facts.

We disagree, however, with the motion judge's separate ruling that the alleged statements of defendants' employees about the slippery condition of the floor — if found credible by a jury — were inadmissible hearsay. The statements were made by agents of defendants about matters within the scope of their employment, and are thus admissible under the hearsay exception set forth at N.J.R.E. 803(b)(4). See, e.g., Walker v. Costco Wholesale Warehouse, 445 N.J. Super. 111, 115 (App. Div. 2016); Reisman v. Great Am. Recreation, Inc., 266 N.J. Super. 87, 98 (App. Div.), certif. denied, 134 N.J. 560 (1993). The motion judge should not have disregarded these alleged party-opponent statements in her summary judgment analysis.

That leads us to next consider whether plaintiff's cause of action for negligence can be adequately supported by the employees' statements, in combination with plaintiff's own testimony that she found it to be slippery. We conclude that the proofs marshalled by plaintiff are inadequate to provide such a foundation.

With proper evidentiary support, we are satisfied that this simple negligence case could be tried solely with lay testimony and without plaintiff presenting a liability expert. The subject matter is not so esoteric to require expert opinion to assist a fact finder. See Mayer v. Once Upon A Rose, Inc., 429 N.J. Super. 365, 376-77 (App. Div. 2013). Moreover, the statement of the personnel, if believed by a jury, could support the singular element of notice of a dangerous condition.

Nevertheless, even affording plaintiff, as we must, all reasonable inferences from the limited factual record, there is an insufficient evidential basis here to conclude that defendants acted unreasonably in their maintenance practices or otherwise in failing to safeguard customers from the alleged dangerous condition. As we have noted, it is sheer speculation to deduce that defendants' employees mopped the wood floor in an improper manner. Moreover, plaintiff did not argue in her appellate brief or before the motion judge that defendants should have posted signs to warn customers of a slippery floor. Defendants are not strictly liable for the condition of the floor without viable proof of negligence. See Walker, supra, 445 N.J. Super. at 122-23; see also Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 259-60 (2015). That proof is simply lacking here.

Affirmed.