SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1770-16T2

EDNA DAWKINS,

Plaintiff-Appellant,

v.

ONE BUS,

Defendant-Respondent.

Submitted December 5, 2017 – Decided December 29, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6093-14.

Martin F. Kronberg, attorney for appellant.

Ronan, Tuzzio & Giannone, attorneys for respondent (Michael K. Tuzzio, of counsel and on the brief; John M. Hockin, Jr., on the brief).

PER CURIAM

Plaintiff Edna Dawkins appeals from a December 8, 2016 order granting summary judgment in favor of defendant ONE Bus dismissing her complaint. We affirm.

The following facts are taken from the record. On May 23, 2014, plaintiff boarded a bus operated by defendant traveling on Broad Street in Newark. At a bus stop, located at Broad and Emma Streets, four teenagers, three males and one female, boarded the bus. One teenager boarded at the front door of the bus, while the others boarded at the rear door without paying their fares. According to plaintiff, the teenagers "were standing in the aisle of the bus by the rear door . . . being rude to other passengers [and] . . . talking bad about some passengers." The bus driver informed the teenagers entering at the rear they would have to board via the front entrance and pay their fares, but they refused.

When the bus arrived at plaintiff's stop, she began to exit at the rear door. As she was exiting, one of the male teenagers kicked plaintiff in the back, causing her to slide down the rear steps of the bus. She reentered the bus and asked him why he kicked her, to which he responded, "this is how I'm feeling today." As plaintiff attempted to leave the bus again, the female teenager threw a bottle of bleach in her face, and said "you better watch your back."

Plaintiff filed a complaint, which alleged her injuries occurred as a result of defendant's negligence. Plaintiff served a liability expert report of Ned Einstein in support of her claim. Einstein offered two bases in support of plaintiff's negligence

claim. Einstein opined the driver should have immediately contacted her dispatcher when the teens boarded the bus and failed to pay the fare. He also opined the driver should have contacted the dispatcher when it was obvious the teenagers were harassing the other passengers.

After the conclusion of discovery, defendant filed a motion for summary judgment. The motion judge granted summary judgment in favor of defendant and dismissed plaintiff's complaint. The judge found no link to demonstrate that if the driver had contacted the dispatcher the incident could have been prevented as plaintiff's expert opined. The judge found plaintiff's expert unqualified to render such an opinion, and that his report lacked a foundation based on any objective standard.

On appeal, plaintiff argues the motion judge erred in granting defendant summary judgment because the driver had sufficient information to know the danger posed by the teenagers and should have acted to protect plaintiff's safety. Plaintiff argues she did not need expert testimony to make a prima facie case of negligence. She asserts the motion judge erred by barring her expert's report as a net opinion.

Our review of an order granting summary judgment is de novo. Graziano v. Grant, 326 N.J. Super. 328, 338 (App. Div. 1999). "[W]e review the trial court's grant of summary judgment . . .

under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The court considers all of the evidence submitted "in the light most favorable to the non-moving party," and determines if the moving party is entitled to summary judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The court may not weigh the evidence and determine the truth of the matter. Ibid. If the evidence presented "show[s] that there is no real material issue, then summary judgment should be granted." Walker v. Atl. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987) (citing Judson v. Peoples Bank and Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome [summary judgment]." Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

To sustain a cause of action for negligence, a plaintiff must prove four elements: (1) a duty of care, (2) breach of that duty, (3) proximate cause, and (4) actual damages. Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008). The burden is on the plaintiff to establish these elements "by some competent proof." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citing Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953).

"[T]he question whether there is a 'duty' merely begs the more fundamental question whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." J.S. v. R.T.H., 155 N.J. 330, 338 (1998) (alteration in original) (quoting Weinberg v. Dinger, 106 N.J. 469, 481 (1987)). "[I]mplicated in this analysis is an assessment of the defendant's 'responsibility for conditions creating the risk of harm' and an analysis of whether the defendant had sufficient control, opportunity, and ability to have avoided the risk of harm." Id. at 338-39 (quoting Cidalina O. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 574 (1996); citing Kuzmicz v. Ivy Hill Apts., Inc., 147 N.J. 510, 515 (1997)). "Ultimately, the determination of the existence of a duty is a question of fairness and public policy." Id. at 339 (citing Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 502 (1997)).

Indeed,

> The scope of a duty is determined under "the totality of the circumstances," and must be "reasonable" under those circumstances. Factors to be taken into consideration include the risk of harm involved and the practicality of preventing it. When the defendant's actions are "relatively easily corrected" and the harm sought to be prevented is "serious," it is fair to impose a duty. In the final analysis, the "reasonableness of action" that constitutes such a duty is "an essentially objective determination to be made on the basis of the material facts" of each case.

> [Id. at 339-40 (citations omitted).]

Furthermore,

> [W]hen the risk of harm is that posed by third persons, a plaintiff may be required to prove that defendant was in a position to "know or have reason to know, from past experience, that there [was] a likelihood of conduct on the part of [a] third person[]" that was "likely to endanger the safety" of another.
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> [Id. at 338 (alterations in original) (quoting Clohesy, 149 N.J. at 507).]

"Even as to foreseeable risks, however, it has been cautioned that 'not all foreseeable risks give rise to duties.'" Ivins v. Town Tavern, 335 N.J. Super. 188, 195 (App. Div. 2000) (quoting Williamson v. Waldman, 150 N.J. 232, 251 (1997)).

Determining the existence of "a duty 'involves identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.'" Alloway v. Bradlees, Inc., 157 N.J. 221, 230 (1999) (quoting Hopkins, 132 N.J. at 439). "The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct." Hopkins, 132 N.J. at 439.

Here, no evidence was presented to suggest the driver was aware of any threats to the passengers. Given the totality of the circumstances, there was no evidence it was foreseeable that any harm would come to the passengers, let alone that a passenger would be kicked and then assaulted with bleach. Without any information regarding danger to the passengers, there were no reasonable steps the driver could have taken to protect plaintiff.

As the motion judge noted:

> There's no way for this bus driver to know that these unruly teenagers were going to wind up committing an assault and throw bleach in the face of this young woman and know within the three to five minutes after they got on the bus that that was going to happen. And . . . there was no way to prevent it.

Plaintiff failed to establish defendant owed a duty to her, that the duty was breached, or an actual or proximate cause linking such duty to her injuries. Therefore, the motion judge properly dismissed plaintiff's case for failure to establish a prima facie case of negligence.

Plaintiff contends the trial court erred by barring her expert report as a net opinion. She argues while "expert testimony is not necessary in this matter to make a prima facie case of negligence against [d]efendant[,] . . . Einstein's testimony should not be barred as his testimony could serve as an aid to the jury." She further argues "Einstein relies on bus industry

standards in formulating his opinions. None of his opinions are personal to him and thus constitute 'net opinions.'"

"[I]n reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion[.]" Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (quoting Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008)). "[W]e apply the same 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). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

A net opinion is one rendered with only "an expert's bare conclusions, unsupported by factual evidence[.]" Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). "In essence, the net opinion rule requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion." Vitrano v. Schiffman, 305 N.J. Super. 572, 577 (App. Div. 1997) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)). The net opinion rule "frequently focuses . . . on the failure of

the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Buckelew, 87 N.J. at 524 (citations omitted). "Where . . . an expert offers an opinion without providing specific underlying reasons . . . he ceases to assist the trier of fact and becomes nothing more tha[n] an additional juror." Vitrano, 305 N.J. Super. at 577 (alteration in original) (quoting Jimenez, 286 N.J. Super. at 540). "An expert's conclusion 'is excluded if it is "based merely on unfounded speculation and unquantified possibilities."'" Townsend v. Pierre, 221 N.J. 36, 55 (2015) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)).

"[E]xpert testimony must relate to generally accepted . . . standards, not merely to standards personal to the witness." Fernandez v. Baruch, 52 N.J. 127, 131 (1968). "A standard which is personal to the expert is equivalent to a net opinion." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999) (citing Crespo v. McCartin, 244 N.J. Super. 413, 422–23 (App. Div. 1990)). "In other words, plaintiff must produce expert testimony upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert." Ibid. (citing Fernandez, 52 N.J. at 131).

Einstein offered his report purportedly "as an expert in public transportation, and fixed route transit in particular[.]" The report states:

> At the respondeat superior level, [the] driver . . . did not commit a rash of errors and omissions. But she committed at least episodes or variations of a critical omission that more than likely would have prevented the incident from occurring.
>
> [1] She failed to immediately contact her dispatcher when, after three of [the teenagers] tried to board via the rear door, four passengers failed to pay their fares, and
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> [2] She failed to contact her dispatcher after it was obvious to every passenger commenting on the incident that the four perpetrators were harassing and threatening passengers not only seriously enough to be observable by a driver with two interior, rear-view mirrors, but which should have been audible to the driver of a rear-engine bus.
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> The duty of a bus driver to immediately contact the dispatcher under such circumstances is well-known and universally-accepted as the industry standard practice in the public transit industry throughout the United States.
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> As a starting point, what is most significant about these two omissions is that not committing the first of them (failing to immediately summon her dispatcher when four passengers refused to pay their fares) — even given the shortest amount of time cited during which the perpetrators were harassing and threatening passengers — would more probably than not have permitted enforcement officials to arrive before the incident had occurred. More importantly, the driver's "open" call

> into the dispatcher — i.e., doing so with the interior PA system engaged so that all passengers, including the perpetrators, could have heard it — would more probably than not have induced the perpetrators to either (a) pay their fares and restrain their behavior, or (b) immediately flee the bus. Openly summoning the dispatcher within earshot of the passengers would almost certainly have kept them from screaming at the driver to proceed. Instead, they would have almost certainly have sensed some danger immediately, and been at least "cautioned" into silence or patience as a consequence.
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> [(emphasis omitted) (footnotes omitted).]

Einstein was questioned at his deposition regarding the existence of an objective basis for the conclusions in his report.

> Q. . . . you talked about your personal experience, but is there any other authority that says if you make a statement over the PA, that it stops individuals or makes them pay their fares?
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> A. I don't believe there's ever been a study on that or reading, anything like that. But, you know, I have ridden buses [in] my life for personal use and as well as forensic purposes, and my experience of it — I have vague memories of things that when people are asked — sometimes they're not. But, when they're asked to pay their fares and the driver insists upon them, they generally don't remain on the bus and threaten to cut up or slice up passengers. They generally get off the bus. I don't recall any specific instances where they didn't and a driver had to call the dispatcher. Usually, they have gotten off the bus in my experiences. This is not something I doubt has ever been studied.

> So, it's not a net opinion, for example. It's just one of these things. It's so trivial and minor. And, what to do about it is captured by the industry standard, so there is really no need for anyone to exam[ine] things that are so minor like this even though they're legitimate questions and it did happen.

The motion judge concluded:

> This is all conjecture on the part of the expert. He's not qualified to give any of those opinions and he doesn't have any foundation — he might have the expertise to say when there's trouble on the bus the first thing you do is you call the dispatcher because he owns a bus company, albeit it's a private bus company that transports only special needs people. But the rest of his opinion, the cascading elements that are added to it, and then if you called the dispatcher, the dispatcher would know what to do and the dispatcher would do something that would diffuse the situation and the cops would come and that would deter — this is all just — it's not based on anything in his expertise.
>
> He provides no study, no studies, no information.

We agree. Einstein's report and testimony failed to support his claim that the generally accepted industry standard is for a driver operating under similar circumstances of this case to contact the dispatcher. Rather, Einstein derived a duty and the standard of care from personal experience and speculation. Therefore, the trial court did not abuse its discretion, and properly barred the plaintiff's expert opinion as a net opinion.

Although plaintiff argues the jury would be aided by expert opinion, for the first time on appeal she argues expert testimony was not required in order to establish a prima facie case of negligence. We disagree.

"The test of need of expert testimony is 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 the conduct of the party was reasonable." Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982). Generally, "[a] jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997) (alteration in original) (quoting Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 2 on N.J.R.E. 702 (1996-97)).

In Sanchez v. Indep. Bus Co., Inc., 358 N.J. Super. 74, 80-81 (App. Div. 2003), we stated:

> [A] common carrier . . . would owe a high degree of care for the safety of its passengers so as to avoid dangers that are known or reasonably anticipated. By accepting passengers entrusted to their care the carrier undertakes to use great care consistent with the nature of the undertaking. The issue becomes whether the wrongful act of the third person could have been reasonably anticipated.
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> [(citations omitted).]

To understand the high degree of care owed to passengers plaintiff would have to articulate the industry standard practices and safety standards affecting passengers employed by common carriers. Only an expert can explain these practices and standards to the jury.

Whether the driver should have called the dispatcher and what effect that would have had on plaintiff's injuries required an expert to establish the duty owed under such circumstances and how it was breached. The motion judge's findings demonstrate fact-witness testimony alone could not make the connection between defendant's duty and plaintiff's injuries.

Affirmed.