

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3853-13T1

NARENDRA PAPAIYA and KAILAS PAPAIYA,

Plaintiffs-Appellants,

v.

NORTH HUDSON REGIONAL FIRE RESCUE  
(N.H.R.F.R); EMMA GAVIDIA,  
individually and as OWNER OF 1303  
PALISADE AVENUE, UNION CITY; and  
UNITED WATER COMPANY,<sup>1</sup>

Defendants-Respondents,

and

THE CITY OF UNION CITY,

Defendant.

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Argued September 29, 2015 – Decided October 29, 2015

Before Judges Reisner, Hoffman and Whipple.

On appeal from the Superior Court of New  
Jersey, Law Division, Hudson County, Docket  
No. L-2002-12.

Tomas Espinosa argued the cause for  
appellants.

John R. Dineen argued the cause for  
respondent North Hudson Regional Fire Rescue

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<sup>1</sup> Defendant United Water New Jersey Inc. was incorrectly  
designated as United Water Company.

(Netchert, Dineen & Hillmann, attorneys; Cassia J. Beierle, on the brief).

John J. Grossi III, argued the cause for respondent Emma Gavidia (Carey & Grossi, attorneys; Mr. Grossi, of counsel; Mr. Grossi and Ashley A. Harris, on the brief).

Brian R. Ade argued the cause for respondent United Water New Jersey, Inc. (Rivkin Radler LLP, attorneys; Mr. Ade and Alexander G. Pappas, on the brief).

PER CURIAM

Plaintiffs Narendra and Kailas Papaiya appeal from a series of trial court orders dated October 25, 2013, striking plaintiffs' supplemental expert report; December 6, 2013, denying reconsideration; and March 14, 2014, striking the original expert report as a net opinion and granting summary judgment in favor of defendants. Plaintiffs present the following points of argument, which we list as they appear in plaintiffs' brief:

POINT I

THERE SHOULD BE A REVERSAL OF THE ORDER DENYING RECONSIDERATION OF JUDGE COSTELLO OF APPELLANTS' EXPERT WHICH DENIED THE ACCEPTANCE OF THE SUPPLEMENTAL REPORT OF APPELLANTS' EXPERT DANIEL RODRIGUEZ IN THE INTEREST OF JUSTICE.

POINT II

THE COURT BELOW ABUSED ITS DISCRETION WHEN IT ENTERED THE ORDER OF OCTOBER 25, 2013 AND WHEN IT DENIED THE RECONSIDERATION OF THE ORDER.

The movant's reasons for the requested extension of discovery.

The movant diligence in pursuing discovery.

The type and nature of the case including factual issues that may give rise to discovery problems.

Any prejudice which would inure to Appellees if an extension was denied.

The Age of the Case.

The type and extend of discovery to be completed.

Any prejudice in which may inure to non-moving parties if an extension is granted.

### POINT III

THE ABUSE OF DISCRETION WAS SHOWN ALSO IN THE COURT DECISION TO DENY THE MOTION FOR RECONSIDERATION LEGAL UNDERPINNING TO THE MOTION FOR RECONSIDERATION.

### POINT IV

EXPERT TESTIMONY WAS IMPORTANT TO ASSIST A TRIER OF FACTS TO SHOW THAT THERE WAS NO EFFORT BY APPELLEE UNITED WATER TO TEST AND MAINTAIN THE WATER FLOW AND THE PRESSURE THAT THE EYE WITNESSES HAD STATED TO HAVE AFILED AT THE TIME OF THE FIRE.

### POINT V

DANIEL RODRIGUEZ WAS QUALIFIED TO RENDER AN OPINION OF THE FAILURE TO UNITED WATER TO PROVIDE SUFFICIENT WATER SUPPLY WITH PROPER WATER PRESSURE.

POINT VI

DANIEL RODRIGUEZ'S OPINION WAS NOT A NEW OPINION.

POINT VII

THE COURT ERRED IN NOT ALLOWING THE CASE TO PROCEED BY THE COMBINATON OF THE LAY WITNESS TESTIMONY, LAY WITNESSES OPINION TESTIMONY AND DANIEL RODRIGUEZ TESTIMONY.

POINT VIII

NHRFR IS NOT IMMUNE UNDER THE TORT CLAIMS ACT.

THE IMMUNITY.

POINT IX

THE EXPERT TESTIMONY SHOULD NOT HAD BEEN BARRED.

POINT X

APPELLANT NARENDRA PAPAIYA SHOULD HAD BEEN ALLOWED TO GIVE A LAY OPINION.

After reviewing the record in light of the applicable law, we find no merit in any of those contentions. In particular, we find no abuse of Judge Mary K. Costello's discretion in barring the supplemental expert report. See Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 371 (2011) (addressing the abuse of discretion standard). We also find no abuse of discretion or other error in Judge Jeffrey R. Jablonski's conclusions that plaintiffs could not establish defendants' liability without an expert report, plaintiffs' expert report

stated only net opinions, and plaintiff Narendra Papaiya could not provide expert testimony. See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010). Based on our de novo review of the summary judgment record, we conclude that summary judgment was properly granted. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014) (appellate review of a summary judgment order is de novo, using the same standard employed by the trial courts).

I

We briefly summarize the facts, viewed in the light most favorable to plaintiffs. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On April 18, 2010, a vehicle parked near a building owned by defendant Emma Gavidia caught fire, possibly due to an unidentified person leaving a barbecue grill burning unattended near the vehicle.<sup>2</sup> The fire quickly spread to Gavidia's building and then reached and destroyed the building next door, which was owned by plaintiffs. In response

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<sup>2</sup> The police reported that they personally observed a burning vehicle. However, the information about the unattended barbecue grill was based on an interview with one of plaintiffs' neighbors. Plaintiffs, however, never obtained a certification from the neighbor about what she claimed she saw. Instead, plaintiffs attempted to prove the truth of the neighbor's statement by offering the police report, which for that purpose was inadmissible hearsay. See N.J.R.E. 801(c); N.J.R.E. 802; Estate of Hanges, supra, 202 N.J. at 375 n.1. Nonetheless, we include the allegation as background.

to 911 calls, the North Hudson Regional Fire Rescue agency (Fire Rescue) dispatched several fire companies to the scene. Less than two minutes after the initial 911 call, four engine companies, two aerial ladder companies, two chief officers, a four-person rescue company, and a fire safety officer all arrived at the scene. However, they were unable to extinguish the blaze, which quickly grew into a four-alarm fire. Firefighting units from multiple surrounding municipalities were needed to finally bring the blaze under control.

Plaintiffs relied on an unauthenticated YouTube video, unauthenticated comments on "social media" websites, and a certification of Narendra Papaiya, as evidence that some of the fire fighters could not draw a sufficient amount of water from the hydrant nearest to the fire. The contemporaneous official reports from Fire Rescue and the Fire Marshal did not corroborate that allegation.

## II

We next address plaintiffs' challenges to the orders barring their supplemental expert report, striking the expert's initial report, and granting summary judgment. To put the issues in context, we briefly review the history of the litigation. In 2012, plaintiffs filed a complaint alleging, in pertinent part, that Fire Rescue supplied inadequate personnel

to fight the fire; United Water New Jersey, Inc. (United Water) supplied inadequate water pressure and volume to the fire hydrant nearest to the building; and Gavidia was negligent in allowing the fire to start in or near her building.

After multiple discovery extensions and a motion to compel the filing of plaintiffs' expert report, plaintiffs' counsel finally served the July 21, 2013 report of Daniel Rodriguez, a State-licensed fire official who operated a private fire prevention contracting business. The report was issued one day before a court-ordered July 22 deadline. In his report, Rodriguez opined as to the negligence of each of the above-named defendants. However, as Judge Jablonski later concluded, Rodriguez's report amounted to little more than a series of unsupported assertions that the fire must have been the result of defendants' negligence.

Rodriguez alleged that Gavidia violated building codes and parking ordinances. However, he based that opinion on unsubstantiated claims that she had an illegal apartment in her building and that cars were illegally parked on her property. Rodriguez concluded: "Whether the fire originated in the illegal apartment if [sic] existed, or by an explosion of the illegally parked cars in [sic] the sidewalk of [sic] the back of the building, the fire was initiated by the negligent operation of

the building by Emma Gavidia." However, he did not cite any codes or ordinances to support his general assertions that Gavidia acted illegally or negligently.

Rodriguez opined that United Water was negligent for failing to provide sufficient water volume, pressure and supply necessary to properly combat the fire. However, his report did not set forth the water volume, pressure, or supply that United Water provided. Nor did the report specify what water volume, pressure, or supply should have been provided under the circumstances. His report did not refer to any pertinent regulatory or industry standards governing water utilities or the specific water pressure they were required to provide to fire hydrants. Nor did his report or resume indicate that Rodriguez had any expertise in or knowledge about the operation of a water utility.

As to Fire Rescue, Rodriguez stated, in conclusory fashion, that the recent closures of certain fire stations, as well as Fire Rescue's faulty response to the fire, contributed to plaintiffs' damages. He did not, however, explain how long it should have taken Fire Rescue to respond to the fire, or what personnel and equipment should have been used. Nor did he set forth any professional firefighting standards that were violated, or the source of such standards.



After plaintiffs served the expert report, Judge Costello issued a final case management order setting September 30, 2013 as the deadline for Rodriguez's deposition.<sup>3</sup> All counsel agreed to conduct the deposition on September 30 at 1:00 p.m., but plaintiffs' counsel failed to appear for the deposition, although his adversaries and Rodriguez were all present and prepared to proceed. After they had been waiting for ninety minutes, plaintiffs' counsel called at 2:30 p.m., to say that he was detained at a foreclosure mediation and needed to reschedule the deposition.

On October 2, 2013, without seeking leave of court or providing any advance notice to his adversaries, plaintiffs' counsel faxed defendants' attorneys a supplemental expert report from Rodriguez dated September 30, 2013. The supplemental report relied in large part on discovery documents that defense counsel had provided to plaintiffs' attorney on April 23, 2013, months before Rodriguez issued his initial report. However, Rodriguez claimed that he had not seen those documents before issuing the initial report.

Rodriguez also relied on the August 27, 2013 deposition of

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<sup>3</sup> The case management order further provided: "The discovery schedule shall not be changed without a notice of motion and a showing of exceptional circumstances. All discovery not completed will be deemed waived."

United Water's supervisor of system maintenance, Richard Tecchio,<sup>4</sup> who testified that the hydrants used to fight the fire had not been tested for water pressure and supply in the two years prior to the fire. However, Tecchio also stated that he had reviewed the 2010 pump flow, pump pressure, discharge pressure, and discharge flow data from the pumping station nearest to the site of the fire, and that data showed the station was operating normally. He explained that the pumping station helped to keep the water pressure up in the area the station served. He further testified that United Water had never received any complaints from Union City asserting that the water pressure or supply from the fire hydrants was inadequate.

In his supplemental report, Rodriguez claimed that after he authored his first report, he suddenly recalled that he had personal knowledge of facts relevant to the case. He stated that in 2009 he had been involved in consulting on a private fire protection project for a building located across the street from plaintiffs' property. At that time, he received a report issued in 2008 stating that the fire hydrant located across the street from plaintiffs' building had inadequate water pressure. Based on that 2008 report, he inferred that in 2010, when the

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<sup>4</sup> Plaintiffs included Tecchio's entire deposition transcript in their appellate appendix.

fire occurred, the hydrant must have had insufficient water pressure. Based on hearsay in police reports, Rodriguez also opined that Gavidia must have permitted "unbridled barbecuing" in the parking lot behind her building, thus purportedly demonstrating her negligence.

Defendants filed a motion to bar the supplemental expert report and to preclude Rodriguez from testifying at the trial. Plaintiffs filed a cross-motion seeking leave to serve the supplemental report and to extend the time to take the expert's deposition.

In an oral opinion issued on October 23, 2013, Judge Costello found no exceptional circumstances justifying the late filing of the supplemental expert report. She considered that most of the documents on which Rodriguez relied for the supplemental report had been provided to plaintiffs' counsel before Rodriguez issued his first report, and the attorney had not explained why he failed to provide the documents to his expert in a timely manner. The judge concluded that the attorney's failure to provide Rodriguez with the documents did not justify the untimely production of the supplemental report. Judge Costello rejected the attorney's explanation that the expert had been ill, because that did not explain the failure to provide him with the documents before he authored his first

report.

The judge further noted the pattern of delay by plaintiffs' counsel throughout the discovery period, and noted that at least one scheduled trial date had been adjourned to accommodate discovery extension requests.<sup>5</sup> She stated:

It's clear to me that the supplemental report was served after the Court-ordered deadline of July 22nd. I don't accept the explanation of the plaintiff that the material was just received and he . . . didn't get it until after the deadline. These things were out there as part of discovery, as part of the case. With the exception of this sprinkler report which it would appear that Mr. Rodriguez himself generated and gave to [plaintiffs' counsel] as [opposed] to the other way around.

Applying the standards set forth in Vitti v. Brown, 359 N.J. Super. 40, 51 (Law Div. 2003), later adopted in Rivers v. LSC P'ship, 378 N.J. Super. 68, 79 (App. Div.), certif. denied, 185 N.J. 296 (2005), Judge Costello barred the supplemental report. She did not bar Rodriguez from testifying at the trial based on his initial report, but held that his testimony would be restricted to the four corners of that report. The judge denied plaintiffs' motion for yet another extension of discovery, and ordered plaintiffs' counsel to pay his

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<sup>5</sup> The judge stated that the case was previously scheduled for trial on October 29, 2013.

adversaries' fees for the aborted deposition.<sup>6</sup>

Thereafter, defendants filed motions to strike the initial expert report and for summary judgment, contending that plaintiffs needed expert testimony to establish liability and Rodriguez's report stated a series of net opinions. Fire Rescue asserted immunity under the Tort Claims Act, N.J.S.A. 59:9-2, and argued that, in failing to specify any applicable standards for the operation of a fire rescue agency, plaintiffs failed to show that Fire Rescue acted in a palpably unreasonable manner. Gavidia also argued that plaintiffs produced no legally competent evidence of her negligence.

In an oral opinion issued on March 14, 2014, Judge Jablonski concluded that Rodriguez's report stated only net opinions, devoid of supporting references to any industry, professional or other recognized codes or standards. Reasoning that plaintiffs could not prove their causes of action without expert testimony, Judge Jablonski granted summary judgment in favor of all defendants.<sup>7</sup>

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<sup>6</sup> Judge Costello denied plaintiffs' reconsideration motion on December 6, 2013, noting that the moving party had presented "no new facts or law . . . to warrant reconsideration."

<sup>7</sup> Judge Jablonski also concluded that the claim against Fire Rescue was barred by the Tort Claims Act, because there was no proof that Fire Rescue acted in a palpably unreasonable manner.

### III

Our review of Judge Costello's decision is deferential. "We generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Rivers, supra, 378 N.J. Super. at 80 (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997)). We apply that deferential standard to a trial judge's decision to deny a discovery extension. Pomerantz Paper, supra, 207 N.J. at 371. We find no abuse of discretion or other error here.

"The right of a trial court to manage the orderly progression of cases before it has been recognized as inherent in its function." Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 488 (App. Div.), certif. denied, 165 N.J. 607 (2000). Judge Costello set clear and specific deadlines in the final case management order. Plaintiffs did not comply. Nor did they show extraordinary circumstances, or even good cause, for the late filing of the supplemental report. Plaintiffs' counsel gave no explanation for failing to provide the expert with documents that were available long before the expert began preparing his initial report. We find no abuse of discretion in Judge Costello's decision to restrict Rodriguez's trial testimony to his initial report.

We review Judge Jablonski's evidentiary rulings for abuse of discretion. Estate of Hanges, supra, 202 N.J. at 382. We review his summary judgment decision de novo. Davis, supra, 219 N.J. at 405. We agree with Judge Jablonski that the initial report stated a net opinion. The principles underlying the net opinion rule are well understood:

Our Rules have fixed, clear guidelines that govern the admissibility of expert opinions and against which trial courts must make their evaluations. See N.J.R.E. 702, 703. Expert testimony must be offered by one who is "qualified as an expert by knowledge, skill, experience, training, or education" to offer a "scientific, technical, or . . . specialized" opinion that will assist the trier of fact, see N.J.R.E. 702, and the opinion must be based on facts or data of the type identified by and found acceptable under N.J.R.E. 703.

Of particular importance for this appeal, a court must ensure that the proffered expert does not offer a mere net opinion. That is, an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered. The admissibility rule has been aptly described as requiring that the expert "give the why and wherefore" that supports the opinion, "rather than a mere conclusion."

[Pomerantz Paper, supra, 207 N.J. at 372 (citations omitted).]

Significantly, an expert must explain the professional or industry standards on which he bases his opinions. An expression of the expert's personal views, untethered to a

recognized standard relevant to the subject on which he is opining, is a net opinion. Id. at 373; Davis, supra, 219 N.J. at 410. "It is insufficient for . . . [an] expert simply to follow slavishly an 'accepted practice' formula; there must be some evidential support offered by the expert establishing the existence of the standard." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999) (citing Buckelew v. Grossbard, 87 N.J. 512, 528-29 (1981)).

Applying those standards, we agree with Judge Jablonski that Rodriguez's initial report stated only net opinions. The report did not cite a single regulation, code, or professional or industry standard from which any of the defendants allegedly departed. The report did not explain what expected water pressure or volume the hydrants should have produced based on a recognized industry standard, what pressure and volume would have been required to prevent the fire from spreading, or what industry or regulatory standards, if any, applied to United Water in this situation. See Fanning v. Montclair, 81 N.J. Super. 481, 486-87 (App. Div. 1963). The report did not specify the industry standards that applied to Fire Rescue, or how Fire



Rescue violated those standards. Nor did the report specify any code or regulation that Gavidia allegedly violated.<sup>8</sup>

We find no merit in plaintiffs' arguments that they did not need expert testimony to prove their case, and that Mr. Papaiya, who was never named as an expert witness, should have been permitted to offer "lay opinions" concerning defendants' negligence. Plaintiffs' contentions are without sufficient merit to warrant further discussion. See R. 2:11-3(e)(1)(E).

We conclude that Judge Costello did not abuse her discretion in striking the supplemental expert report, and Judge Jablonski correctly granted summary judgment. Plaintiffs' remaining appellate arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION

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<sup>8</sup> After reviewing the supplemental report, we conclude it was only superficially less flimsy than the original. Rodriguez continued to state net opinions rather than providing the well-supported and explained analysis that a jury would find helpful. See N.J.R.E. 702; N.J.R.E. 703. Moreover, like the initial report, the supplemental report relied heavily on factual assumptions for which plaintiffs had produced no legally competent evidence.