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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3590-12T3

MARIAN BELL,

Plaintiff-Appellant,

v.

ANTHONY TURIELLO, SR.,
LINDA TURIELLO,

Defendants-Respondents.

Argued January 21, 2014 – Decided April 9, 2014

Before Judges Yannotti and Ashrafi.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8833-10.

Patrick M. Sages argued the cause for appellant (Hack, Piro, O'Day, Merklinger, Wallace & McKenna, attorneys; Mr. Sages, on the brief; Christine M. McCarthy, on the brief).

Kevin F. Colquhoun argued the cause for respondents (Colquhoun & Colquhoun, attorneys; Moira E. Colquhoun, on the brief).

PER CURIAM

Plaintiff appeals from summary judgment dismissing her claim for personal injuries in this sidewalk trip-and-fall case.

The trial court ruled that plaintiff's expert engineering report contained inadmissible net opinions. It also ruled that, because of the general immunity of residential property owners for the condition of public sidewalks, defendants are not liable to plaintiff. Plaintiff contends her expert report and the photographs of the area where she fell demonstrate factual issues as to whether affirmative acts of defendants or the prior owners of the property caused the cracked and uneven condition of the sidewalk slabs on which she fell. We find no error in the trial court's decision and affirm its order dismissing plaintiff's claims.

I.

Because this is an appeal from summary judgment, we view the evidence in the light most favorable to plaintiff as the party who opposed summary judgment. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

On October 30, 2008, plaintiff was working as a mail carrier for the Lyndhurst Post Office, delivering mail to the homes along Post Avenue. She tripped and fell on the public sidewalk in front of defendants' two-family home. She broke her ankle and injured her foot. She sued defendant-property owners alleging that their negligence in maintaining the sidewalk and

in failing to warn pedestrians of the hazard was the cause of her accident and injuries.[1]

The law in New Jersey is well-settled that a residential property owner is generally immune from liability for accidents resulting from naturally-caused conditions of public sidewalks abutting the property. Luchejko v. City of Hoboken, 207 N.J. 191, 195, 211 (2011); Wasserman v. W.R. Grace & Co., 281 N.J. Super. 34, 38 (App. Div. 1995). However, a residential property owner may be found liable if the owner's affirmative act caused the defective condition of the sidewalk. Deberjois v. Schneider, 254 N.J. Super. 694, 703 (Law Div. 1991), aff'd o.b., 260 N.J. Super. 518 (App. Div. 1992). Liability can also be imposed based on the affirmative act of a specified predecessor in title that caused the hazardous condition of the sidewalk. See Yanhko v. Fane, 70 N.J. 528, 532 (1976).

In this case, defendants cannot be held liable to plaintiff unless they or a specified prior owner of the property did something affirmatively to cause a dangerous condition of the sidewalk. Plaintiff has no direct evidence that defendants or a prior owner did anything to cause the sidewalk to crack. Her

[1] Plaintiff also made a claim for workers' compensation benefits and disability. We have no information about the results of that claim, and it is not relevant to the legal issues before us on this appeal.

evidence in support of such an allegation consists entirely of the proposed testimony of her engineering expert, as supported by photographs, and the deposition testimony of defendant Anthony Turiello, Sr., and the prior owner of the property, Rose DePasquale.

As shown by the photographs, the area of the sidewalk where plaintiff fell is on the right side of defendants' property when viewed from the street. At that location, the sidewalk was cracked and parts of it had buckled up to 3/4 inches above the rest of the slab sections. The curb alongside the street was also broken and crumbled in that area. There were no other cracks in the sidewalk and curb fronting defendants' property, but there was some broken curbing in front of a neighboring property.

DePasquale sold the house to defendants in July 2003. In 1987, when she and her ex-husband owned the property, they contracted for the building of an addition on the right side of the house. DePasquale recalled that a backhoe was used in the construction. She also recalled that a drainage pipe existed in the righthand corner of a retaining wall in the front lawn near the area where plaintiff fell. She had no knowledge of how the sidewalk came to be cracked and buckled.

Defendant Turiello testified that, in 2004, he and his brother-in-law replaced the railroad-tie retaining wall with a wall constructed in the same location with stone blocks. They placed two drainage pipes on the left side of the yard to drain water out of the front yard. As shown on photographs, the two drainage pipes protruded together from the retaining wall at a location away from the area of plaintiff's fall. The photographs do not show a drainage pipe near the area of the fall, as DePasquale had described, but an earlier photograph of the house copied onto a municipal tax assessment document appears to show the prior drainage pipe.

Plaintiff produced an expert report by Michael Natoli, a professional engineer. Natoli reviewed the record of the case, and he investigated the property and took photographs in April 2011, thirty months after the accident. In his report, Natoli explained the sidewalk design and the requirements of the municipal code with respect to sidewalks. He reported his observations of the condition of the sidewalk, curb, retaining wall, and drainage pipes. Most relevant to this appeal, Natoli opined that the cracks in the sidewalk were caused by three contributing factors: (1) heavy construction vehicles driven over the sidewalk during the DePasquales' construction of the addition in 1987; (2) commercial vehicles driven over the

sidewalk during defendants' replacement of the retaining wall in 2004; and (3) water flow from the drainage pipes seeping into the substrata of the sidewalk. Natoli concluded that these three factors caused the settling and cracking of the sidewalk and the protrusions that caused plaintiff to trip. He also concluded that defendants were negligent in causing the deterioration of the sidewalk, and that their negligence was the sole cause of plaintiff's injuries.

II.

Because plaintiff's case depends on the admissibility of Natoli's proposed expert testimony, we must consider whether the trial court erred in ruling that the Natoli report contained inadmissible net opinions.

Expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue" and the expert is qualified to provide such testimony. N.J.R.E. 702. Pursuant to this rule, there are three basic requirements for admissibility of expert testimony:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art that such an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

> [Dehanes v. Rothman, 158 N.J. 90, 100 (1999) (quoting State v. Kelly, 97 N.J. 178, 208 (1984)); accord State v. Rosales, 202 N.J. 549, 562 (2010).]

Additionally, expert testimony must be based on the "facts or data . . . perceived by or made known to the expert." N.J.R.E. 703; see also State v. Townsend, 186 N.J. 473, 494-95 (2006) (explaining the bases for expert testimony). In fact, expert testimony that is not based on "factual evidence or similar data" constitutes inadmissible "net opinion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011). The net opinion rule "requires an expert 'to give the why and wherefore' of his or her opinion, rather than a mere conclusion." 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)). It prohibits testimony that is "based on mere speculation or possibility." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 299 (App. Div.), certif. denied, 122 N.J. 333 (1990).

Here, much of Natoli's report contains opinions that are beyond the scope of his engineering expertise or that are otherwise inadmissible. For example, Natoli's report explains the mechanics of a "trip occurrence" and concludes that the sidewalk caused plaintiff to trip. To reach that conclusion,

Natoli finds that "the surrounding walking surfaces eluded the plaintiff's perceptive view" because "her field of view was transfixed on the approaching general area." He states that "the 3/4 inch protruding slab edge restricted the natural movement of the plaintiff's foot [and] created an upset in the plaintiff's natural stride." Describing plaintiff's accident as "a disruption of the gait cycle," Natoli concludes that she actually tripped, stumbled, and fell.

As we have stated, expert testimony is limited to matters that are "beyond the ken of the average juror." Dehanes, supra, 158 N.J. at 100. The mechanics of a trip and fall are well within the common knowledge of the average juror. A jury does not need an expert's testimony about how a person trips. Plaintiff can testify about the facts leading to her fall. Those aspects of Natoli's proposed testimony are inadmissible because Natoli has no personal knowledge of what happened, and his opinions on those matters are of no help to the jury.

Natoli also concludes that the hazardous sidewalk was "attributed to negligent maintenance" by defendants. As we have stated, however, the law generally does not impose upon residential property owners a duty to maintain public sidewalks. Luchejko, supra, 207 N.J. at 195; Yanhko, supra, 70 N.J. at 534-38; cf. Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 157-60

(1981) (imposing a duty to maintain sidewalks only upon commercial property owners or businesses that benefit economically from abutting public sidewalks). Therefore, defendants' alleged negligence in failing to maintain the sidewalk could not be the basis of admissible expert testimony.

In fact, Natoli cannot testify in accordance with his report that defendants were negligent and their negligence caused plaintiff's injuries. Those conclusions are not within the scope of his expertise as an engineer. A jury would have to decide negligence and causation issues based on all the evidence and the court's instructions on the law.

If qualified as an engineering expert, Natoli could explain the construction of the sidewalk and the drainage pipes. He could explain the sidewalk design, describe his own observations of the site, discuss the municipal code, and opine as to whether the sidewalk in front of defendants' property complies with the code. But the municipal code has little relevance in this case because defendants did not build the sidewalk and have no general duty to repair and maintain it.

Natoli could presumably render an opinion that water seeping under the sidewalk and large construction vehicles driving over it could cause damage as shown in the photographs. Cf. Nash v. Lerner, 311 N.J. Super. 183, 193-94 (App. Div. 1998)

(Rodríguez, J.A.D., dissenting) (homeowners were not liable because of deterioration of the sidewalk in the area where their car passed over the sidewalk as it entered their driveway), adopted by Nash v. Lerner, 157 N.J. 535 (1999). However, Natoli's testimony on those subjects would not be sufficient to prove that affirmative acts of defendants or their predecessors in title caused the deteriorated condition of the sidewalk.

Plaintiff relies on Natoli's conclusions regarding what caused the sidewalk to deteriorate as proving affirmative acts of the property owners. We agree with the trial court that those parts of Natoli's report constitute inadmissible net opinions.

First, Natoli concludes that large construction vehicles damaged the sidewalk by driving over it during the 1987 construction. The remodeling and addition the DePasquales built necessitated the use of a backhoe. Natoli concludes that a backhoe and other large construction vehicles must have traversed the curb and sidewalk onto the grassy area on that side of the home in order to gain access to the work site. But Rose DePasquale had no recollection of whether a backhoe or any other construction machinery entered her side yard over the curb and sidewalk. Defendants presented evidence that construction vehicles could also have reached the construction site by two

other routes: up the driveway on the left side of the property or through the back yard from the street behind defendants' property.

Natoli contends the vehicles drove over the cracked area of the sidewalk because that was the shortest route to the construction site, the sidewalk cracks line up with curb cracks and the construction site, and there are no other sidewalk or curb cracks in front of defendants' property. Without more evidence supporting his conclusion, Natoli's opinion in this regard was too speculative to be admitted before a jury. The construction occurred some twenty-four years before Natoli's inspection of the site and preparation of photographic evidence. There was no testimony as to how long the cracked and buckling condition of the sidewalk had been present. Moreover, there was no evidence that the contractors who used construction vehicles would have taken the shortest route as opposed to the two other possible routes to their work site. Additionally, there is similar curb damage in front of the neighboring property at a location that construction vehicles would not have used.

Although it is possible that vehicles drove over the curb and sidewalk, an expert opinion must be based on more than mere possibility. Vuocolo, supra, 240 N.J. Super. at 299. The factual evidence is insufficient to support Natoli's conjecture

that heavy construction vehicles drove over the sidewalk and damaged it many years before plaintiff's accident.[2]

Second, Natoli asserts that defendant Turiello and his brother-in-law caused the sidewalk cracks by driving vehicles over the curb and sidewalk during their construction of the new stone retaining wall. Turiello testified that he and his brother-in-law removed the old railroad ties from the property with a pickup truck. He did not testify that the pickup truck was driven over the curb and sidewalk. Natoli speculates further that the stone blocks that replaced the railroad ties were likely delivered by a commercial vehicle and kept in a staging area on the grassy right side of the property. He concludes that a commercial vehicle would have driven over the sidewalk and curb to deliver the stones to that grassy area, thus damaging the sidewalk.

Like his conclusion about the 1987 construction vehicles, this statement of Natoli is an inadmissible net opinion. There is no evidence that defendants used the grassy side yard as a staging area. The driveway could also have been used as a staging area if one was in fact used. There is also no evidence

[2] Because the parties have not raised the issue, we do not consider whether defendants could be held liable for the alleged affirmative acts of independent construction contractors who worked on the property more than twenty years earlier and who were not hired by defendants.

that a commercial vehicle delivered the stones or that the stones were delivered all at once. Natoli's conclusion is mere speculation, an inadmissible net opinion.

Third, Natoli states that defendants caused or exacerbated the sidewalk cracks by increasing the water flowing from the drainage outlets in the retaining wall and onto the sidewalk. Turiello and his brother-in-law modified the existing drainage system by replacing the single drainage outlet with a double outlet that extended four inches further out of the retaining wall. They also installed a "splash pad" below the outlets because water flowing from the outlet was causing erosion of the soil.

Although there is some evidence that defendants increased the water flowing from the drainage outlets, there is no evidence that the two drain pipes ever caused "a 'double barrel' shotgun blast of water onto the walkway areas," as Natoli states. Natoli had no information about how much water drained from the pipes and what path it took when it was discharged. Water would have had to flow across the width of the two-paver splash pad and down almost the entire length of sidewalk fronting defendants' property before it reached the area of cracked sidewalk. Natoli did not take any measurements or perform any drainage tests. Nor did he explain why the drainage

water damaged only the area that plaintiff fell and no other parts of the sidewalk in front of defendants' property. Without drainage testing or other measurements showing that the water flowed in a way that would uniquely damage that part of the sidewalk, this aspect of Natoli's report is also unsupported by the necessary facts or data and, therefore, inadmissible as a net opinion. Vuocolo, supra, 240 N.J. Super. at 299.

We also note that defendants' modification of drainage from the yard occurred some seventeen years after a backhoe or other heavy construction vehicles allegedly drove over the sidewalk. Natoli's report does not adequately account for the time and sequential variation between the water flow that allegedly affected the substrata of the sidewalk and caused its settling and the heavy machinery that would have caused damage to the sidewalk slabs.

The trial court correctly ruled that the parts of Natoli's anticipated testimony offered to prove the property owners' affirmative acts were based on his inadmissible net opinions. Without Natoli's testimony in that regard, plaintiff could not prove the necessary affirmative acts that allegedly caused the dangerous condition of the sidewalk.

Defendants are entitled to summary judgment because of their general immunity from sidewalk liability as residential

property owners and because of insufficient evidence from which a jury could rationally conclude that their affirmative acts caused a dangerous condition of the sidewalk.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION