SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0558-16T4

REESE ROTBLAT, an infant by her Guardian ad Litem SCOTT ROTBLAT, SCOTT ROTBLAT and MICHELLE ROTBLAT, individually,

Plaintiffs-Appellants,

v.

OAK HILL ACADEMY,

Defendant-Respondent,

and

ABC DOOR MANUFACTURING, DESIGN, AND/OR MAINTENANCE COMPANY, DEF DOOR MAUFACTURING, DESIGN, AND/OR MAINTENANCE CORPORATIONS, GHT DOOR MANUFACTURING DESIGN, AND/OR MAINTENANCE PARTNERSHIPS and JILL DOOR MANUFACTURING, DESIGN, AND/OR MAINTENANCE LIMITED LIABILITY COMPANIES,

Defendants.

Argued November 2, 2017 – Decided January 31, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3885-14.

Andrew S. Blumer argued the cause for appellants.

Kevin M. Killmurray argued the cause for respondent (Zirulnik, Sherlock & Demille, attorneys; Kevin M. Killmurray, of counsel; Ellen G. Bertman, on the brief).

PER CURIAM

Plaintiffs, Scott Rotblat and his wife, Michelle Rotblat, filed suit individually and on behalf of their minor daughter, plaintiff Reese Rotblat, for damages arising from injuries the child sustained when a closing metal door struck her. The door was located in the private, parochial school she attended that was owned and operated by defendant, Oak Hill Academy (Oak Hill). Plaintiffs appeal from the Law Division's order dismissing their complaint on summary judgment and from the denial of their motion for reconsideration.

The motion judge granted Oak Hill summary judgment and denied reconsideration after he found plaintiffs' claim was subject to the gross negligence standard set forth in New Jersey's Charitable Immunity Act (CIA), N.J.S.A. 2A:53A-7 to -

11,[1] and plaintiffs failed to establish any question as to a material fact about Oak Hill's liability, as plaintiffs' expert's report constituted a net opinion. On appeal, plaintiffs contend the motion judge misapplied the summary judgment standard, used an "erroneous" definition for gross negligence, incorrectly found Oak Hill's duty to the child was delegable, and erred by finding, without conducting a Rule 104 hearing, plaintiffs' expert's report was an inadmissible net opinion.

We have carefully considered plaintiffs' contentions in light of the record on summary judgment and the applicable principles of law. We vacate the entry of summary judgment,

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[1] The CIA states a charitable or educational organization shall not "be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such [organization], where such person is a beneficiary, to whatever degree, of the works of such nonprofit [organization]." N.J.S.A. 2A:53A-7(a). The CIA also provides that immunity is not available for gross negligence or willful conduct. N.J.S.A. 2A:53A-7(c)(1).

Gross negligence is defined as "an act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct. [It] refers to a person's conduct where an act or failure to act creates an unreasonable risk of harm to another because of the person's failure to exercise slight care or diligence." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 364 (2016) (quoting Model Jury Charge (Civil), 5.12, "Gross Negligence" (2009)). "Whereas negligence is 'the failure to exercise ordinary or reasonable care' that leads to a natural and probable injury, gross negligence is 'the failure to exercise slight care or diligence.'" Ibid. (citation omitted).

restore plaintiffs' complaint and remand for reconsideration of the summary judgment motion after the court conducts a Rule 104 hearing as to plaintiffs' expert's report.

We review a trial court's order granting summary judgment de novo, applying the same standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Thus, we examine the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Ibid. To defeat a motion for summary judgment, "[t]he opponent must 'come forward with evidence' that creates a genuine issue of material fact." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)); see also R. 4:46-2(c). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (citations omitted). After consideration of the competent evidence, "[s]ummary judgment should be denied unless" the moving party's right to judgment is so clear that there is "no room for controversy." Akhtar v. JDN Props. at Florham Park,

LLC, 439 N.J. Super. 391, 399 (App. Div. 2015) (quoting Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1994)).

In deciding a summary judgment motion, courts must first resolve any issues relating to the evidence presented before deciding the motion. Townsend v. Pierre, 221 N.J. 36, 53 (2015) ("[A] trial court . . . 'confronted with an evidence determination precedent to ruling on a summary judgment motion' . . . 'squarely must address the evidence decision first.'" (quoting Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010))). In our review of the court's decision, we follow "the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid. (quoting Estate of Hanges, 202 N.J. at 385).

Applying those guidelines, we conclude from our review that the motion judge did not properly confront the evidential issue he found relating to plaintiffs' expert before deciding the motion in Oak Hill's favor, nor did he apply the correct standard on summary judgment.

The facts set forth in the record, viewed in the light most favorable to plaintiffs, Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013), are summarized as follows. According to plaintiffs' answers to interrogatories and deposition

testimony, Reese[2] was enrolled as a fifth-grade student at Oak Hill on November 8, 2013, when she opened a self-closing metal door and it "forcefully slammed shut and abruptly struck the back of her [right] ankle/foot . . . . There was a sharp piece of metal protruding out of the bottom area of the door and there was also no properly working door dampening mechanism." The door caused an adhesion and a torn right Achilles tendon that required surgical repair.

Scott went to Oak Hill a few days after the incident to observe the door and take photographs and a video of its operation. When he inspected the door, he observed a piece of metal extruding from its bottom. When he opened the door and allowed it to close, he explained that the door "closed so fast" that he believed it to be defectively operating. Scott returned to the school about a week after his initial inspection and noticed that the door had since been fixed, as the piece of metal was no longer extruding from the door.

According to Oak Hill's headmaster, Joseph Pacelli, he inspected the door within minutes of the incident being reported and found no imperfections or metal objects protruding from the door or any problems with the way it closed or with its

[2] We refer to plaintiffs by their first names to avoid any confusion caused by their sharing a common last name.

dampening mechanism. He explained that there were no prior reports of anyone being injured by the door, nor were there reports that it was defective in any way, and that no repairs were made to the door after the incident. He stated that the school's Director of Facilities, Glenn Mission was responsible for school maintenance and for servicing the doors if needed. If any repairs were required, the school would also call outside contractors to make them. The school, however, had no policies before or after the incident relating to maintenance of the doors. Pacelli believed Mission inspected the doors annually, although there were no written records of those inspections.

Mission confirmed that he was responsible for maintaining the school's doors. After the incident, however, he did not touch the door or make any changes to it. Mission stated that he had no training on door maintenance and was not aware of how to maintain proper door dampening speed. He would check a door by opening it and explained that if "it didn't shut immediately on me and it closed within a reasonable amount of time [that was acceptable]. Now, what is that time? I do not know, but it would not hit me in the can per se." Mission was also not aware of any standard for how fast the door should close. He described his annual inspection of the school's doors to include looking at the dampeners, checking the oil, checking for overall

soundness and feeling the bottom of the doors with his hand to check for sharp protrusions.

Plaintiffs' expert Theodore Moss, P.E. issued a report concluding that the subject door "closed with substantial . . . force" because the dampening device was not properly slowing the door and Oak Hill's maintenance staff was not competently trained to address the types of door issues he found at the school. According to Moss, due to the door's speed and the staff's lack of training, the door was bound to injure somebody using it. He specifically took issue with Mission's maintenance of the door, or lack thereof, over a period of eighteen years or more. Moss explained that "proper door closure speed and dampening operation must be adjusted, at the time of installation and periodically thereafter, to empirically fit the requirements of the particular door on which it is installed." He noted the importance of the closer unit on the type of door used by Oak Hill, stating that "it is a relatively heavy exterior door located off a hallway within a commercial type structure expected to accommodate relatively heavy use [and c]loser units are normally intended . . . to ensure pedestrian safety by directly control[ling] and dampening door operation/movement."

Moss indicated that he based his opinion on his visit to the school and his review of deposition transcripts and other discovery, including the video and photographs taken of the door by Scott. However, he stated that he did not have the benefit of viewing the video captured by the school's surveillance camera situated above the door that struck Reese because, as Arthur Livingston, a member of the school's security personnel, testified in his deposition, Oak Hill failed to retain the video, as the surveillance system's storage erases automatically every thirty days.

In his report, Moss described the door as metal, using a standard doorknob, with a metal kick plate mounted on the bottom interior of the door, and a metal strip holding weather stripping on the bottom exterior. He compared his observation of the door's speed to that depicted in Scott's video and concluded that the video depicted a door speed two times as fast as what Moss observed, indicating to him that the door had been altered since the incident. He also observed that the right bottom of the "door had clearly been previously damaged" without specification that the door was damaged on the date of the incident as suggested by Scott after his inspection shortly after the incident.

Moss referred to an article that explained "ideally a non-delayed action door closer will close and latch the door in [seven] to [eight] seconds." He stated that "door closer units are normally designed to meet ANSI (American National Standards Institute) and ADA (Americans with Disabilities Act and Architectural Barriers Act) standards" and cited to the National Fire Protection Association Life Safety Code requirements for restricting a door's "rate of closure." Relying on the 2009 International Building Code, which was "adopted as the [S]tate construction code under the New Jersey Uniform Construction Code," Moss also highlighted that the "Code specifically requires that fire doors . . . (like the metal door in question), must have self-closing mechanisms [and i]mplicit in this requirement . . . is the necessity that door mechanism must be maintained to operate . . . safely [and] the force required to move (push, pull, etc.) [the] swinging egress door may not exceed [five] pounds[.]" Therefore, according to Moss, "the door in question was required to operate easily, smoothly, and properly, without high levels of force (either by the user or imparted by the door itself)."

On April 19, 2016, Oak Hill's insurance company requested that Atlantic Professional Services, Inc. (Atlantic) conduct an on-site inspection of the door. Atlantic concluded in its

report that Moss's report was inaccurate, as the information he relied upon, including the video, did not contain the necessary components of reliability, such as timestamping, explanations as to how the door motion started or stopped, and other variables. Atlantic further concluded that there was no evidence, or even testimony, that repairs had been made post-incident, and that Moss's conclusions to the contrary ignored the available proofs. Atlantic also determined that, despite Moss's opinion that standards defined the speed for a door to close, he was incorrect, as no such requirements or standards existed.

Defendant moved for summary judgment on June 23, 2016. Neither defendant's motion nor plaintiffs' opposition were supported by deposition transcripts from either party's expert as only fact witnesses were deposed prior to the motion being filed.

By order dated August 5, 2016, the motion judge granted summary judgment in defendant's favor, and dismissed the action with prejudice. In his oral decision, the judge rejected the facts advanced by plaintiffs and their expert, and instead relied upon those testified to by Oak Hill's representatives. The judge found that the CIA applied to Oak Hill. He analyzed plaintiffs' gross negligence claims, and found that they had not met their burden based upon Oak Hill's alleged annual

inspections of the door and its representative's testimony that no prior incidents involving the door were reported. The judge noted that while "[i]t might not be the greatest inspection, . . . plaintiff[s] could point to no standard that a maintenance person has to have in inspecting doors."

The judge rejected Moss's expert opinion, finding it to be a net opinion, unsupported by the facts of this case. According to the judge, Moss improperly "substitute[d] his views of the facts for [Oak Hill's] views or ignores [Oak Hill's] views rather than just simply commenting on his own." The judge criticized Moss for "substituting his judgment on things . . . and accepting only one set of facts." As an example, the judge cited Moss's reliance on his own observations of the door's condition that led him to conclude there were prior repairs and adjustments to the damper speed. He found Moss's observations unsustainable in light of Pacelli's and Mission's testimony that there were no repairs. According to the judge, Moss's observations did not constitute evidence that plaintiffs could rely upon in opposition to Oak Hill's motion.

The judge also concluded that Moss never discussed any standard that a maintenance person was "supposed to know" when maintaining the door. He acknowledged that Moss cited to specific codes, but found that it was only an attempt to "make

gross negligence there for the plaintiff[s] rather than simply saying something is wrong with the door or the way it was maintained." The judge concluded that plaintiffs "cannot show any type of gross negligence and cannot show negligence in this matter[.]"

Plaintiffs sought reconsideration, which the judge denied on September 16, 2016, for the same reasons set forth in his summary judgment decision. The judge stated that plaintiffs offered no standards relating to the inspection or maintenance of the door, and therefore, his earlier decision to grant summary judgment was correct in all respects.

In deciding the summary judgment motion, the judge clearly recognized that plaintiffs' opposition to the motion was based primarily upon Scott's and Moss's observation of the door and Moss's opinions about its condition and Oak Hill's failure to properly maintain it. It is apparent from the judge's decision that in rejecting Scott's testimony and Moss's report, he did not properly apply the summary judgment standard or address the issues of the admissibility of Moss's report.

First, although confronted by conflicting testimony about the door and whether it was previously repaired or properly maintained, the judge viewed and accepted the facts advanced by Oak Hill rather than viewing the facts advanced by plaintiffs,

the non-movants, in the most favorable light. Angland, 213 N.J. at 577. In doing so, he went beyond his "function [to] not . . . weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). For that reason alone, the judge should have reconsidered his decision on summary judgment. See R. 4:49-2; see also Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (stating that reconsideration is appropriate for a "narrow corridor" of cases in which either the court's decision was made upon a "palpably incorrect or irrational basis, or [where] it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence" (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990))).

Second, turning to Moss's report, where proffered evidence is properly considered, we typically "apply [a] deferential approach to a trial court's decision to admit [or reject] expert testimony, reviewing it against an abuse of discretion standard." Townsend, 221 N.J. at 53 (first alteration in original) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011)). Here, the motion judge did not follow the procedure for properly assessing the evidential value of

Moss's opinions because he did not analyze Moss's findings and opinions following well-settled principles governing the admissibility of expert opinions.

In Townsend, the Court explained the required analysis. It stated:

> When a trial court determines the admissibility of expert testimony, N.J.R.E. 702 and N.J.R.E. 703 frame its analysis. N.J.R.E. 702 imposes three core requirements for the admission of expert testimony:
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> > "(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 such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."
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> N.J.R.E. 703 addresses the foundation for expert testimony. It mandates that expert opinion be grounded in "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts." The net opinion rule is a "corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." The rule requires that an expert "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'"

> [Id. at 53-54 (alteration in original) (emphasis added) (citations omitted).]

In conducting its analysis in the context of a summary judgment motion, a court should not reject an expert's opinion merely because it does not agree with facts advanced by the movant "if he otherwise offers sufficient reasons which logically support his opinion." Id. at 54 (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002)). But, "[a] party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record." Id. at 55.

When, as here, a court's decision as to whether an expert's opinion is evidential "turns on factual issues . . . in the summary judgment context, failure to hold . . . a [Rule 104] hearing may be an abuse of discretion." Kemp v. State, 174 N.J. 412, 428 (2002) (quoting Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999)). "[O]rdinarily the best practice would be for a trial judge to permit the examination of the scope of an expert's opinion—when its admissibility is challenged—at a pretrial N.J.R.E. 104(a) hearing." Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., LLC, 450 N.J. Super. 1, 100 n.50 (App. Div. 2017) (citing Kemp, 174 N.J. at 432) (finding "no error in

the failure to conduct such a hearing . . . because [the expert] was examined at great length at his deposition about his methodology and that deposition testimony was available to and considered by the trial judge at the time of his ruling").

Because an expert may testify at a hearing to "the logical predicates for and conclusions from statements made in [a] report[,]" McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div. 1987), courts must remain mindful of the Supreme Court's caution against barring an expert report, particularly if doing so will be dispositive of a case, when the expert has not had the opportunity to explain his opinions through testimony. See Kemp, 174 N.J. at 432-33 (stating that when "the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing").

> The Rule 104 hearing allows the court to assess whether the expert's opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs . . . . [During the hearing], an expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable.
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> [Id. at 427 (citations omitted).]

We conclude the motion judge mistakenly exercised his discretion by failing to conduct a Rule 104 hearing once he determined there were issues regarding the evidential value of plaintiffs' expert's opinion, which focused on facts relied upon by the expert. If given the proper opportunity, Moss could have addressed the motion judge's concerns about his rejection of Oak Hill's facts and explained his findings to the judge.

Under these circumstances, we are constrained to reverse the motion judge's denial of reconsideration, vacate his award of summary judgment, and remand for reconsideration of Oak Hill's summary judgment motion after a Rule 104 hearing as to the admissibility of Moss's report. In addition, in light of the motion judge's findings, we direct that the matter be considered anew by a different judge. See R. 1:12-1(d); J.L. v. J.F., 317 N.J. Super. 418, 438 (App. Div. 1999) (stating that the Rule "provides that a judge shall not sit in any matter where the judge has given an opinion upon a matter in question in the action" and remanding to a different judge because "the motion judge determined plaintiffs' position was not credible").

Reversed in part; vacated and remanded in part for further proceedings consistent with our opinion. We do not retain jurisdiction.