SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5073-14T4

JAIME STRUMEIER,

Plaintiff-Appellant,

v.

JOHN and NANCY LENARD,
EAST JORDAN IRON WORKS, INC.,
BORO OF HIGHLAND PARK, COUNTY OF
MIDDLESEX, STATE OF NEW JERSEY,
DEPARTMENT OF PUBLIC WORKS,
NEW JERSEY TRANSIT/AMTRAK,
and ABC MAINTENANCE COMPANY,

Defendants,

and

F&P CONTRACTORS and
J. FLETCHER CREAMER & SON, INC.

Defendants-Respondents.

Argued November 2, 2016 – Decided December 1, 2016

Before Judges Fuentes and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1531-13.

Ralph E. Polcari argued the cause for appellant (Drazin and Warshaw, attorneys; Mr. Polcari, on the brief).

Michael T. Kearns argued the cause for respondent F&P Contractors, Inc. (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Mr. Kearns, of counsel and on the brief; Dawn P. Marino, on the brief).

Melanie Rowan Quinn argued the cause for respondent J. Fletcher Creamer & Son, Inc. (Malapero, Prisco, Klauber & Licata LLP, attorneys; Evi Kallfa, on the brief).

PER CURIAM

Plaintiff Jamie Strumeier commenced a personal injury action alleging that on October 6, 2011, she injured her left shoulder when she fell in a hole adjacent to a storm drain on Harrison Avenue in Highland Park. Defendant F&P Contractors, Inc. (F&P) is a general contractor that was previously hired by the Borough of Highland Park to perform road and sewer work in the area. F&P in turn hired defendant J. Fletcher Creamer & Son, Inc. (Creamer) as a subcontractor to install a guide rail on Harrison Avenue, close to where plaintiff fell a year after the work was performed. Plaintiff contends that the machine used by Creamer to install the guide rail exerted pressure on a sewer plate, thereby causing the plate to crack and the dirt beneath it to erode, creating the hole in which plaintiff fell.[1]

[1] Also named as defendants in this action were John and Nancy Lenard (the Lenards), East Jordan Iron Works, Inc., the Borough of Highland Park (Highland Park), the County of Middlesex, the Department of Public Works of the State of New Jersey, and New (continued)

Plaintiff now appeals from orders entered by the trial court on May 1, 2015, dismissing plaintiff's complaint against F&P and Creamer on summary judgment. She argues that: (1) expert testimony is not required to establish defendants' liability; (2) sufficient direct and circumstantial evidence exists from which a reasonable jury can infer liability on the part of F&P and/or Creamer; and (3) F&P's conduct and actions constitute an adoptive admission of its liability. Having considered plaintiff's arguments in light of the record and applicable legal standards, we affirm.

I.

In February 2010, Highland Park hired F&P to perform work on its municipal roadway project entitled "2009 ROADWAY IMPROVEMENTS." The work contracted for included resurfacing and reconstructing roads, speed bump installation, and storm and sanitary sewer structure improvements. Among its other terms, the contract provided that F&P "shall bear all direct, indirect and consequential costs" of correcting or removing any defective

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(continued)
Jersey Transit/Amtrak. We are advised that plaintiff's claims against these other defendants have either settled or been dismissed, thus leaving F&P and Creamer as the sole remaining parties to this appeal.

work.

F&P subcontracted with Creamer to replace an existing guide rail at the Millbrook culvert in the area of 444 Harrison Avenue. On October 18, 2010, Creamer removed the existing guide rail and installed a new one in its place. Keith McDonald, a project manager employed by F&P, acted as superintendent on the project. McDonald testified at his deposition that the machine used to install the guide rail is "similar to a pile driver" in that it "drives the post into the ground."

On October 6, 2011, Plaintiff fell after stepping into a hole located in the vicinity of the guide rail in front of 444 Harrison Avenue. Donald Rish, the Superintendent of Public Works for Highland Park, was deposed on September 20, 2013. Rish testified that he visited the accident site in January 2012, shortly after he was made aware of plaintiff's injury. Rish accompanied Highland Park's code enforcement officer to the fall site and observed a hole in the ground approximately nine inches deep. On a separate visit to the site, Rish was accompanied by Bruce Koch, a licensed professional engineer employed by CME Associates, the consulting engineers for Highland Park and the designers of the 2009 ROADWAY IMPROVEMENTS project. When asked whether he formed any conclusions at that inspection as to what caused the hole, Rish responded: "I

believe [Koch] had said that it may have been caused by some equipment. He would notify the contractor." Rish further testified that neither he, Koch, nor the code enforcement officer did any probing or forensic investigation to determine the cause of the hole.

In January 2012, Rish was interviewed by Jamie Campbell of Amica Mutual Insurance Company, the insurance carrier for the adjoining property owners, the Lenards. Rish testified that the "substance of the statement[s that he] gave [to Amica]" was based on what he learned from Koch. Rish confirmed that Koch said it was "possible" that the pressure of the machine used by F&P to install the guide rail cracked the plate underneath the dirt, thereby causing the hole. Rish also testified that, after F&P was contacted, it "came out to [the] scene, replaced [the] plate[,] and refilled [the] hole."

Koch provided deposition testimony on September 20, 2013, and June 18, 2014. Koch was responsible for putting the roadway improvement project out to bid and providing construction management services for the project. Although Koch is a licensed engineer and professional planner in New Jersey and Pennsylvania, he was not named as an expert witness.

Koch testified that, at the time he learned of the existence of the hole, he "speculated" that it was caused by

Creamer in the process of installing the guide rail. Koch elaborated that the hole could have been caused by stabilizing devices that keep the guide rail installation machine from rocking or tipping, or that it could "potentially" have been created by the "boom that pushes . . . the posts down into the ground." Koch further testified that his "speculation" was based on his "engineering education and [] knowledge" and that it was premised on the fact that the plate in the ground that cracked, thereby causing the hole, was in three pieces, which is consistent with being broken during heavy construction.

Koch conceded that he never personally witnessed the installation of the guide rail and that he did not know the means or the methods used in its installation. He also admitted that he never personally inspected the broken plate nor conducted a "forensic review" of what caused it to break, and that he could not state definitively whether the work performed by F&P and/or Creamer caused the plate to break. Koch further indicated that neither Highland Park nor CME Associates undertook to determine whether the back plate was structurally sound before replacement of the guide rail began.

Plaintiff retained Wayne Nolte, P.E., as an engineering expert. In his report, Nolte did not mention either F&P or Creamer or attribute any liability to them. Rather, Nolte

concluded that Highland Park's "failure . . . to maintain this surface in a safe condition and to provide warning that the hole existed was palpably unreasonable."

In turn, Highland Park's expert engineer, Stan Pitera, P.E., concluded that a broken or collapsed back plate would have created the hole where plaintiff fell, and that the damage to the back plate was consistent with an impact force striking the top of the plate. Pitera did not elaborate as to the type of machine that could have create such damage, or the amount of force needed to cause it. Notably, Pitera also made no mention of either F&P or Creamer in his report.

In granting summary judgment to defendants, Judge Vincent LeBlon found that Koch's "conclusions and findings are not only speculative, but they are unsupported by any applicable or relevant codes, statutes or regulations." The judge further noted that Koch "admitted that he never personally inspected the broken back plate and that [he] never made any effort to determine what caused the back plate to break by performing any type of forensic analysis." The judge also determined that Nolte failed to establish any basis to impose liability on F&P or Creamer.

Judge LeBlon completed his in-depth analysis by finding that, even when plaintiff was afforded all reasonable

inferences, the evidence only established that she fell into a hole and was injured. The judge noted that the mere happening of an accident is not proof of negligence. He concluded:

> Plaintiff has been unable to provide the [c]ourt proofs as to how [] F&P and [Creamer] were negligent in the happening of [p]laintiff's accident and failed to make a [prima facie] showing that [d]efendants breached any alleged duty owed to [p]laintiff. Here, there are no witnesses to any negligent actions or inactions by [d]efendants. Furthermore, the expert opinions are purely speculative and conclusory.

The court entered memorializing orders dismissing plaintiff's claims against F&P and Creamer on May 1, 2015. This appeal followed.

II.

We review a grant of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We 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." Davis

v. Brickman Landscaping,Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008)).

A.

Plaintiff argues that expert testimony is not required in this case as the subject matter can be understood by jurors using their common knowledge and judgment. She asserts that the testimony that a pile driver-like machine was used near the back plate, and that the back plate subsequently cracked thereby causing the hole into which she fell, together create an inference of negligence that is sufficient to withstand defendants' summary judgment motions. We disagree.

The admissibility of expert testimony is governed by N.J.R.E. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may

> testify thereto in the form of an opinion or otherwise.

"In general, expert testimony is required when 'a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) (quoting Wyatt ex rel. Caldwell v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987)); accord Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982).

Plaintiff relies on Dodge v. Johns-Manville Sales Corp., 129 N.J.L. 65 (E. & A. 1942), in support of her position that expert testimony is not required. In Dodge, the plaintiff sued for personal injuries she suffered in coming down a movable ladder from the attic to the second story of her home while defendant's employees were installing insulation in the attic. Ibid. In affirming the trial court's decision to nonsuit the plaintiff, the Court of Errors & Appeals[2] determined that the fact that the plaintiff climbed up or down the ladder three times without incident negated any inference that defendants

[2] The Court of Errors and Appeals was our State's highest court under the 1844 Constitution. N.J. Const. of art. VI, § 2. The adoption of the 1947 Constitution abolished the Court of Errors and Appeals and established our current Supreme Court. N.J. Const. art. VI, § II, P 1. See DePascale v. State, 211 N.J. 40, 73 (2012).

"miss-positioned" the ladder. Id. at 67-68. While the workers' hammering may have jarred the ladder out of position, nothing indicated that was an act of negligence. Id. at 68. Notably, the Court of Errors & Appeals further ruled that the trial court should not have permitted expert testimony that the ladder was jarred by the pounding, because it was within the common knowledge of the jury. Id. at 69. Nonetheless, the Court of Errors & Appeals deemed the error harmless because there was no proof in any event that defendants were negligent. Ibid.

Plaintiff's reliance on Dodge is misplaced. While the fact that hammering may cause a ladder to shift position can fall within a juror's common judgment and experience, such a scenario is categorically different from determining, based on common knowledge and experience, that the use of heavy machinery can cause a back plate to break and produce a sink hole. Simply put, the capacities of a "pile-driver-like" machine, and the force needed to destroy a back plate and cause a hole of the size and character involved here, are esoteric matters that require expert testimony for an average juror to meaningfully comprehend.

Like the trial court, we conclude that expert evidence was needed to show defendants were negligent and that such negligence was a proximate cause of plaintiff's injury. See

Ford Motor Credit Co., LLC v. Mendola, 427 N.J. Super. 226, 236-37 (App. Div. 2012). In light of the highly technical nature of the machinery used and the duties attached to proper guide rail installation, the trial court aptly ruled that expert testimony was required to establish defendants' liability.

B.

Plaintiff next argues that there is sufficient direct and circumstantial evidence in the record to allow a reasonable juror to infer that F&P and/or its subcontractor Creamer acted negligently and proximately caused her injuries. Plaintiff contends that the following facts support her position: the hole at issue is only a few feet from the guide rail; the installation of the guide rail was part of a contract that included road reconstruction and resurfacing along the relevant portion of Harrison Avenue; the contract provided that F&P would correct all defective work at its sole cost and expense; that Koch and Rish went to examine the hole sometime after plaintiff's fall; during the inspection and in his deposition testimony, Koch speculated that the hole was created by pressure exerted on the ground during the installation of the guide rail; guide rail posts are driven into the ground to a depth of almost four feet using high power machinery; Koch speculated that the action of the boom forcing the posts into the ground could have

cracked the plate; Highland Park's expert, Pitera, stated that the type of damage seen at the top of the hole was consistent with an impact force striking the plate; Koch advised F&P of the hole, which F&P then remediated; F&P never charged Highland Park for the remediation; and defendants did not introduce any testimony that there may have been other equipment at the scene that could have created the hole.

"'[A] negligence cause of action requires the establishment of four elements: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages.'" Davis, supra, 219 N.J. at 406 (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). Plaintiff bears "'the burden of establishing those elements by some competent proof.'" Townsend, supra, 221 N.J. at 51 (quoting Davis, supra, 219 N.J. at 406). Simply showing the occurrence of an incident causing the injury sued upon is not alone sufficient to support a finding of an incident of negligence. Long v. Landy, 35 N.J. 44, 54 (1961). "Negligence is a fact which must be shown and which will not be presumed." Ibid. "In an ordinary negligence case, the plaintiff bears the burden of showing the unreasonableness of the defendant's conduct (in other words, the defendant's breach of a duty owed)." Feldman v. Lederle Lab., 132 N.J. 339, 349-50 (1993).

"A duty is an obligation imposed by law requiring one party 'to conform to a particular standard of conduct toward another.'" Acuna v. Turkish, 192 N.J. 399, 413 (2007) (quoting Prosser & Keeton on Torts: Lawyer's Edition § 53, at 356 (5th ed. 1984)), cert. denied, 555 U.S. 813, 129 S. Ct. 44, 172 L. Ed. 2d 22 (2008); see also Restatement (Second) of Torts § 4 (1965) ("The word 'duty' . . . denote[s] the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause."). Whether a duty of care exists "is generally a matter for a court to decide," not a jury. Acuna, supra, 192 N.J. at 413.

Here, in the absence of expert testimony, there is simply no competent evidence establishing the standard of care that defendants were required to conform to in performing their work, or that they breached that standard of care and, in so doing, violated a duty owed to plaintiff. Plaintiff's failure to adduce such competent proofs defeats her negligence claim. We conclude the judge properly entered summary judgment for defendants.

C.

Finally, plaintiff argues that F&P's actions in remediating the fall site at no cost to Highland Park constitute an adoptive admission of its liability pursuant to N.J.R.E. 803(b)(2). This argument lacks sufficient merit to warrant discussion in our opinion. R. 2:11-3(e)(1)(E). We add only the following comments.

N.J.R.E. 803(b)(2), which governs adoptive admissions, provides:

> A statement offered against a party which is a statement whose content the party has adopted by word or conduct or in whose truth the party has manifested belief [is not excluded by the rule against hearsay].

However, even assuming the truth of plaintiff's contention that F&P "responded promptly and corrected the defect," such evidence, offered to prove defendants' negligence, is plainly barred by N.J.R.E. 407, which provides that "[e]vidence of remedial measures taken after an event is not admissible to prove that the event was caused by negligence or culpable conduct."

Affirmed.