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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Richard MARINO and Jody Marino, h/w, Plaintiffs-Appellants,
v.
SEARS, ROEBUCK & CO. and Black & Decker (U.S.) Inc., Defendants-Respondents.

Argued Nov. 13, 2006.
|
Decided Dec. 29, 2006.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-3571-02.

Attorneys and Law Firms

Alexander W. Ross, Jr., argued the cause for appellants (Rakoski & Ross, attorneys; Mr. Ross and Janice L. Heinold, on the brief).

David R. Kott argued the cause for respondents (McCarter & English, attorneys; Mr. Kott, of counsel and on the brief).

Before Judges LINTNER, S.L. REISNER and C.L. MINIMAN.

Opinion

PER CURIAM.

***1** Plaintiff Richard Marino [1] appeals from an adverse jury verdict in a products liability action against Sears, Roebuck & Co. (Sears) and Black & Decker Inc. (Black & Decker). The jury found that the miter saw used by plaintiff was defectively designed but that the defect was not a proximate cause of the accident. The jury also found that the manufacturer provided adequate warnings and instructions. We affirm.

The relevant facts are as follows. On May 1, 2000, plaintiff, a contractor, severely injured his left hand while using a Black & Decker miter saw sold under Sears' Craftsman label, which had been purchased by his wife fourteen or fifteen years earlier. The circular blade was covered by a fixed, upper guard and a lower guard that retracted automatically when the operator pushed a guard-release button that permitted the operator to lower the pivot arm onto the material to be cut.

Plaintiff had used the saw on five or six jobs a year, whenever he needed to cut interior trim. On the day of the accident, plaintiff was working with two of his employees on a construction job, finishing inside trim. Because he was unable to get a table in the room, he had set the saw on either a tarp or piece of cardboard on the recently refinished oak floor of the room, and was supporting the strips of molding on two-by-fours while he cut. According to plaintiff, the saw had been working well all day. However, late in the afternoon while he was trying to cut a fourteen-foot piece of wood trim, the accident occurred. At the time of the accident, no one else was present.

Describing the accident, plaintiff testified that he pushed the button and pulled the trigger, making the blade spin. He was holding the wood with his left hand so that the wood would stay against the fence. [2] As he pulled the saw down, "it got a little tight." He "pushed a little harder, not hard at all, and the saw hit the wood and it splintered." As a natural reaction, he took his left hand off the wood, raising it up to his face, palm facing forward, to block the wood from hitting his face and eyes. His left hand hit the blade and "twisted all the way in." He took his hand out and put it against his shirt, at which point he realized he was injured. Afterward, he saw that the lower guard had not come back down to cover the blade, as it was supposed to after the cut was completed. The handle was up but the lower guard was still under the upper guard, exposing the blade. Plaintiff denied that he had accidentally brought the saw down on his hand. He suffered traumatic amputation of the left middle and small fingers, and partial amputation of the left index and ring fingers.

After the accident, Damien DeSomma, one of plaintiff's employees, rushed into the area where plaintiff was located to help him. In an effort to extricate one of plaintiff's amputated fingers from the saw, he "bent something or pulled something up" and "busted open the saw." On direct examination, DeSomma testified that he

had a conversation with plaintiff in the hospital. Plaintiff told him that the saw jammed and it kicked back and his fingers were cut when he put his hand up to protect his face.

***2** On cross-examination, the defense brought out that DeSomma's deposition testimony contradicted his testimony on direct that after the accident he noticed that the lower blade guard was in the up position. At his deposition, when asked whether the lower blade guard was in the up or down position, DeSomma responded, "I don't remember. I honestly don't remember. No, I don't remember. I don't want to guess at anything."

Plaintiff's theory was that safety warnings were inadequate and that a design defect had prevented the blade guard from returning to its position after retracting to cut the molding, exposing his left hand to the rotating blade. Plaintiff's mechanical engineering expert, Joseph Shelley, opined that the saw was not designed in a safe manner because the lower guard was attached with a smooth-shanked rivet instead of a threaded screw with a threaded nut. According to Shelley, the accident was caused when, after long wear from ordinary use, the rivet head pressed against the wall of the upper guard, jamming the lower guard in the open position. He concluded that, at the time, plaintiff was using the saw in the ordinary foreseeable way.

Defendant's theory was that there were adequate warnings, no design defect and, even if the rivet was a design defect, the saw guard did not malfunction at the time of the accident. Daniel Montague, a Black & Decker production engineer, gave testimony concerning the instructions provided in the owner's manual. Among the manual's "SAFETY RULES" were, "**DON'T FORCE TOOL**" and "**KEEP HANDS OUT OF PATH OF SAW BLADE.**"

Walter Painter, a defense expert, disagreed with Shelley's conclusion that the rivet was not a proper fastener. Painter testified that there were adequate warnings and no design defect because a tooth push-on retaining ring was utilized, which prevented the rivet from pressing up against the guard. Painter also testified that from his inspection the lower guard was working properly.

Gary Deegear, a physician, also testified for the defense. He was presented as an expert in accident reconstruction and forensic science and biomechanics, which he described as "a melding of biological organisms with mechanical systems." Deegear inspected the saw and, based on blood-spatter analysis, determined that the lower blade guard was functioning properly at the time of the accident. He also reviewed the X-rays of plaintiff's hand and the amputated fingers, as well as the treating medical doctors' reports. Deegear concluded that the accident did not occur as plaintiff described it, with his hand up blocking his face, but instead with his hand down, holding the wood in the plane of the blade as it came down.

On appeal, plaintiff first argues that because the jury found that the saw was designed in a defective manner and there was a safer alternative design, specifically, the use of a threaded screw rather than a rivet, the question of proximate cause should not have been presented to the jury and that error invited an inconsistent verdict. By including proximate cause, plaintiff asserts that the defendants effectively introduced comparative negligence into the case, which is precluded under *N.J.S.A.* 2A:58C-3a(2) when an employee is injured on the job.

***3** Plaintiff argues that *N.J.S.A.* 2A:58C-2 "does not require that the design defect be ... a proximate cause of the accident ... [to] an 'employee-plaintiff.' " (emphasis omitted). *N.J.S.A.* 2A:58C-2 provides:

> A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product *causing the harm* was not reasonably fit, suitable or safe for its intended purpose because it ... was designed in a defective manner. (emphasis added).

Plaintiff relies on *Saldana v. Michael Weinig, Inc.*, 337 *N.J.Super.* 35, 49 (App.Div.2001), where we held that "[t]he manufacturer can use neither the obviousness of the product's danger nor the plaintiff's conduct as a shield to avoid liability for an otherwise defective product." Plaintiff posits that that passage stands for the proposition that an employee-plaintiff's conduct cannot be used by a manufacturer as a basis for avoiding liability for a defective product used in a workplace setting. Plaintiff's interpretation is incorrect.

In *Saldana,* we explained that because "[t]he determination of whether a product is defectively designed centers on the condition of the product at the time it left the hands of the manufacturer," an injured employee-plaintiff's conduct is "irrelevant to the determination of design defect." *Id.* at 48-49. In this regard, the risk-utility analysis that is used as a framework for determining whether a product is defective includes as the fifth factor " '[t]he user's ability to avoid danger by the exercise of care in the use of the product.' " *Johansen v. Makita U.S.A., Inc.,* 128 *N.J.* 86, 96 (1992) (quoting *O'Brien v. Muskin Corp.,* 94 *N.J.* 169, 174 (1983)). It is well settled that the fifth factor refers to a hypothetical user of the product and not the particular plaintiff in the case under consideration. *Id.* at 101. It is an objective test of foreseeability by the designer of the product, not dependent on the specific conduct of the individuals involved in the case. *Ibid.* Thus, it was in the context of determining whether a product is defective that we noted in *Saldana* that the conduct of a particular plaintiff is not relevant to the issue of defect. *Saldana, supra,* 128 *N.J.* at 48-49. In other words, a safe design must take into consideration the foreseeable use or misuse of the product by the consumer. *Johansen, supra,* 128 *N.J.* at 95.

Although a particular plaintiff's conduct is irrelevant to the determination of whether the product is defective, it may, even in the workplace setting, be considered on the issue of proximate cause. *Johansen, supra,* 128 *N.J.* at 102; *Grier v. Cochran W. Corp.,* 308 *N.J.Super.* 308, 324 (App.Div.1998); *Congiusti v. Ingersoll-Rand Co.,* 306 *N.J.Super.* 126, 135 n. 1 (App.Div.1997). Thus, plaintiff's conduct may be considered where there are sufficient proofs to establish that it was the sole proximate cause of the accident and not a contributing cause. *Grier,* 308 *N.J.Super.* at 325. "So long as the jury is properly instructed that the use of plaintiff's conduct in its deliberations is limited to the proximate causation analysis, there is no impediment to the consideration of the fifth ... risk/utility factor[ ] in determining whether a product is defective in its design, which focus[es] on the average user." *Ibid.*

***4** After defining proximate cause, the trial judge gave the following instruction from the *Model Jury Charge (Civil),* § 5.34G.2, on proximate cause as it related to plaintiff's conduct:

> You have heard evidence about how plaintiff, Richard Marino, was using the subject miter saw. *When deciding whether the miter saw was defective you are not permitted to consider Richard Marino's conduct.* If you find that the product was defective [then] you must decide whether the defect was a proximate cause of the accident. *At that point you may consider the plaintiff's conduct.* If you decide that the product defect was ... the only cause of the accident ... [then] you must find that the defect proximately caused the accident. *If you decide that the miter saw defect was a partial or contributory cause then you must also find that the miter saw defect was a proximate cause of the accident, even if Richard Marino's conduct was also a partial or contributory cause.*
>
> On the other hand, *if you decide that Richard Marino's conduct was the only cause [then] you must find that the miter saw defect was not the proximate cause of the accident.*
>
> (emphasis added).

The judge gave the same limiting instruction at the beginning of defendant's case immediately prior to the testimony of Montague.

The manner in which plaintiff's accident happened and whether the guard actually failed were hotly contested. To be sure, whether (1) the rivet was a proximate cause of the accident by preventing the lower guard from functioning at the time of the accident and (2) the accident occurred as described by plaintiff or as reconstructed by defendants' expert, were issues bearing on the determination of proximate cause and properly before the jury. Moreover, the judge properly instructed the jury that plaintiff's conduct could not be used to determine whether the product was defective and, in order to find for defendants, it must find that plaintiff's conduct, not the defect, was the sole cause of the accident.

Plaintiff's contention that the judge should have given the jury the *Model Jury Charge (Civil),* § 5.34G.2 limiting instruction before the testimony of each defendant witness, is devoid of merit. As we have previously noted, the judge gave the instruction at the beginning of defendants' case and again in her charge. Indeed, after giving the limiting instruction the first time, the judge specifically asked if anyone on the jury needed her to read the instruction again. The record indicated that everyone on the jury responded "no."

Contrary to plaintiff's contention, the judge's instructions did not invite an inconsistent verdict such as we found in *Truchan v. Nissan Motor Corp.,* 316 *N.J.Super.* 554, 568 (App.Div.1998) (holding that the instructions to the jury were confusing where the trial court charged separately on the issues of defect and proximate cause, but incorporated proximate cause into the instruction on defect). The judge's charge correctly distinguished the concepts of design defect and proximate cause.

***5** Equally unavailing is plaintiff's conclusory statement that the judge improperly permitted the jury to consider comparative negligence of plaintiff under the guise of proximate cause. Plaintiff's motion in limine to strike defendants' comparative fault defense was granted prior to jury selection. Here, unlike the facts in *Johansen, supra,* 128 *N.J.* at 102, the parties were aware from the outset that comparative fault was not in the case. Accordingly, the defense did not argue that plaintiff could have avoided injury by using common sense or due care as the defendant argued in *Johansen.* Furthermore, because the trial judge emphasized in her charge that plaintiff's conduct could not be used in determining the existence of a defect but only in determining proximate cause, there was no danger, as there was in *Johansen,* of the jury considering plaintiff's lack of care in deciding the question of design defect. The judge gave the appropriate limiting instruction, telling the jury that plaintiff's conduct could only be considered on the issue of proximate cause and not on the issue of design defect. There is a presumption that the jury followed the judge's instructions. *State v. Manley,* 54 *N.J.* 259, 270 (1969). The jury's determination that the product was defectively designed indicates that it understood the judge's instruction.

Plaintiff next contends that the judge erred by not submitting a separate interrogatory to the jury whether "at the time of the accident, the product was being used for an intended or reasonably foreseeable purpose, that is, that it was not being misused or had not been substantially altered in a way that was not reasonably foreseeable." Plaintiff also repeats his argument regarding the inapplicability of proximate cause, asserting that if plaintiff's misuse of the product was foreseeable, proximate cause is established as a matter of law.

Initially, we note that at the charge conference plaintiff specifically objected to a question being submitted to the jury on the issue of reasonable foreseeable use. Responding to the judge, plaintiff's counsel stated he was "not sure that this should be a fundamental question." He argued that misuse "goes to proximate cause.... I think, looking at it from [defense counsel's] most favorable perspective, they could find that yes, it was defectively designed, but no, it was not a proximate cause of the accident ... because he misused the saw, or did not use the saw properly, or what have you." The judge then rhetorically asked, "You're saying it shouldn't be a separate question because it's already contained therein in the proximate cause questions?" Counsel responded, "Yes. Exactly." After defense counsel stated his position that the question should be asked, plaintiff's counsel responded:

> The jury could easily find, from [the defense's] perspective that yes, the saw was defective, but no, it was not a proximate cause. Why? Because-he's getting ... two bites at the apple.
>
> ***6** If they find there's no proximate cause that would encompass the misuse. Why does he get another bite at that, as to the plaintiff's conduct?

The judge agreed and the special interrogatory was not used.

Plaintiff argues that because the jury was never asked the special interrogatory, it was deprived of determining the foreseeability of plaintiff's use of the product, which all parties conceded was foreseeable. Plaintiff relies on *Jurado v. W. Gear Works,* 131 *N.J.* 375, 389 (1993), where the Court stated:

> If the jury finds that the product is defective, it must then decide whether the misuse proximately caused the injury. In cases in which the product is defective solely because of a foreseeable misuse, the determination of defect predetermines the issue of proximate cause. In other cases, however, where a product is defective for reasons other than the particular misuse, the jury must separately determine proximate cause.

"A [party] cannot request the trial court to take a course of action, and upon adoption by the court take his chance

on the outcome of the trial, and, if unfavorable, then condemn the very procedure which he urged, claiming it to be error and prejudicial." *State v. Sykes,* 93 *N.J.Super.* 90, 95 (App.Div.1966). Like judicial estoppel, the doctrine of invited error "is designed to prevent [a party] from manipulating the system." *State v. Jenkins,* 178 *N.J.* 347, 359 (2004). It is applied if the trial court relies on a party who is able to convince or mislead the court into taking a position which the party later urges is error on appeal. *Ibid.* Where "after-criticized judicial action was reasonably thought to secure a trial or tactical advantage," it will not constitute reversible error. *State v. Harper,* 128 *N.J.Super.* 270, 277 (App.Div.), *certif. denied,* 65 *N.J.* 574 (1974). Plaintiff's strategy was clearly evident in his trial argument that he did not want defendant to get "two bites at the apple" on the issue of misuse. Accordingly, we would normally forego further discussion. Nevertheless, we conclude in the context of this case that plaintiff's argument lacks substantive merit.

A verdict sheet does not provide grounds for reversal unless it is misleading, confusing, or ambiguous. *Sons of Thunder, Inc. v. Borden, Inc.,* 148 *N.J.* 396, 418 (1997). "The purposes [for] submitting interrogatories to the jury 'are to require the jury to specifically consider the essential issues of the case, to clarify the court's charge to the jury, and to clarify the meaning of the verdict and permit error to be localized.' " *Id.* at 419 (quoting *Wenner v. McEldowney & Co.,* 102 *N.J.Super.* 13, 19 (App.Div.), *certif. denied,* 52 *N.J.* 493 (1968)). Similar to a jury charge, a party is not entitled to have an interrogatory framed in the party's own words.

All witnesses agreed that plaintiff's use of the machine to cut trim was appropriate. Moreover, the jury's finding that the machine was defective was based upon the use of a rivet instead of a threaded screw. The Court in *Jurado, supra,* 131 *N.J.* at 389, held that the determination of defect predetermines the issue of proximate cause only "[i]n cases in which the product is defective solely because of a foreseeable misuse." Here, the defect claimed had nothing to do with foreseeable misuse, but instead the manner in which the lower guard was attached. Moreover, during the judge's jury instructions on defect and plaintiff's obligation to show foreseeable misuse, the judge made it clear that the test was objective foreseeability when discussing defendants' contention that plaintiff misused the product in failing to follow the owner's manual by attempting to force the tool. The jury's finding that the product was defective was tantamount to the rejection of defendant's assertion that plaintiff's conduct in pulling down the handle was not a foreseeable misuse. Whether the use of a rivet caused the guard to hang up, as plaintiff claimed and thus proximately caused the injury, remained an issue for the jury.

***7** Equally unavailing is plaintiff's contention that defendants' experts rendered net opinions. Generally, the competency of a witness to testify as an expert is within the sound discretion of the trial judge and will not be reversed on appeal "[a]bsent a clear abuse of discretion." *Carey v. Lovett,* 132 *N.J.* 44, 64 (1993). Expert opinion testimony is admissible

> [i]f 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.
>
> [*N.J.R.E.* 702.]

N.J.R.E. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

However, a "net opinion," an expert's opinion unsupported by factual evidence, is not admissible. *Lanzet v. Greenberg,* 126 *N.J.* 168, 186 (1991); *Nesmith v. Walsh Trucking Co.,* 123 *N .J.* 547, 549 (1991); *Buckelew v. Grossbard,* 87 *N.J.* 512, 524 (1981). The 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, supra,* 87 *N.J.* at 524.

Thus, "the net opinion rule requires the expert witness 'to give the why and wherefore of his expert opinion, not just a mere conclusion.' " *Kaplan v. Skoloff & Wolfe, P.C.,* 339 *N.J.Super.* 97, 102 (App.Div.2001) (quoting *Jimenez v.*

GNOC, Corp., 286 *N.J.Super.* 533, 540 (App.Div.), *certif. denied,* 145 *N .J.* 374 (1996)); *see New Brunswick Cellular Tel. Co. v. Borough of S. Plainfield Bd. of Adj.,* 160 *N.J.* 1, 16 (1999) (expert opinion not supported by any studies or data that presence of a communications monopoly would "derail" development was a net opinion).

Painter's testimony, which essentially focused on the use of a tooth push-on retaining ring, provided not only an explanation on how the ring worked but also how it would prevent the rivet from pressing up against the guard. Likewise, Deegear provided a detailed explanation on his use of ultra violet light technology to examine and view blood and tissue spatter and how it helped to establish the position of the guard and plaintiff's hands at the time, as well as how the various X-rays of plaintiff's hand and fingers were consistent with his conclusions. The testimonies given by those experts were not "based merely on unfounded speculation and unquantified possibilities." *Vuocolo v. Diamond Shamrock Chems. Co.,* 240 *N.J.Super.* 289, 300 (App.Div.), *certif. denied,* 122 N.J. 333 (1990). They did not constitute net opinions.

***8** Plaintiff next asserts that the judge erred in allowing defendants' experts, principally Deegear, to testify to subject matter not covered in their reports. Again, we disagree. The purpose of an expert's report is to forewarn the opposing party of the expected contents of the expert's testimony to enable and facilitate the preparation and presentation of a response. *Maurio v. Mereck Constr. Co.,* 162 *N.J.Super.* 566, 569 (App.Div.1978). We abhor trial by ambush. "Our procedures for discovery are designed to eliminate the element of surprise at trial by requiring a litigant to disclose the facts upon which a cause of action or defense is based." *McKenney v. Jersey City Med. Ctr.,* 330 *N.J.Super.* 568, 588 (App.Div.2000), *rev'd on other grounds,* 167 *N.J.* 359 (2001). Although an expert's testimony may be confined to the opinions found in the expert's report, testimony concerning "the logical predicates for and conclusions from statements made in the report are not foreclosed." *McCalla v. Harnischfeger Corp.,* 215 *N.J.Super.* 160, 171 (App.Div.), *certif. denied,* 108 *N.J.* 219 (1987). The decision whether to preclude testimony on subject matter not covered in a written report is left to the sound discretion of the trial judge. *Ratner v. Gen. Motors Corp.,* 241 *N.J.Super.* 197, 202 (App.Div.1990). Testimony that logically flows from and is related to the information contained in the expert's report should not be precluded. *Congiusti, supra,* 306 *N.J.Super.* at 133; *McCalla, supra,* 215 *N.J.Super.* at 172.

Deegear's two reports indicated his conclusion that the accident happened with plaintiff's hand on the wood in a palm-down position. He also indicated that he reviewed X-rays and the medical reports in arriving at his conclusion and that blood and tissue evidence on the subject saw indicated that the guard was functioning properly at the time of the accident. Painter noted that the saw had been destroyed and that the external push-on retaining ring was missing, but that in his opinion the saw functioned correctly. We are therefore satisfied that the experts' testimonies did not deviate significantly from their reports but instead were logically related to the conclusions and opinions reported. Had plaintiff taken defendants' experts' depositions, the full scope of their opinions would no doubt have been revealed. *See McCalla, supra,* 215 *N.J.Super.* at 172.

Finally, we see no merit in plaintiff's attack on Deegear's qualifications or the contention that the field in which Deegear was qualified is an "arcane and dubious science." Biomechanics is defined as "[t]he study of the application or relation of the laws of mechanics to the body, especially to muscular activity, locomotion, etc.; the laws of physics and kinetics (movement) that operate in living organisms." J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder* B-112 (2005). Biomechanical engineers have been recognized as experts for damage analysis in crashworthiness cases. *See Poliseno v. Gen. Motors Corp.,* 328 *N.J.Super.* 41, 50 (App.Div.), *certif. denied,* 165 *N.J.* 138 (2000). Deegear was a licensed physician who was employed by Biodynamic Research Corporation, received formal and informal training, and taught biomechanics. He had been qualified as an expert in biomechanics a significant number of times in courts of law. His occupational experience and medical degree provided a firm basis for his qualifications. *See Correa v. Maggiore,* 196 *N.J.Super.* 273, 282 (App.Div.1984). Contrary to plaintiff's contention on appeal, the trial judge did not mistakenly use her discretion in qualifying Deegear as an expert in biomechanical engineering, forensic science, and accident reconstruction.

***9** Affirmed.

All Citations

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Footnotes

1 As Richard suffered the accident and asserted injury, we will refer to him as plaintiff.

2 The “fence” is the part of the saw that guides the wood.