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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Thomas M. PERINA, Plaintiff-Appellant,
v.
Allen B. CATBAGAN, Danilo L. Catbagan, New Jersey Highway Authority/The Garden State Parkway, Tilcon New York, Inc., HNTB Corporation, Statewide Striping Corporation, Defendants-Respondents.
Maria Diaz, Plaintiff-Respondent,
v.
Thomas M. Perina, Defendant-Appellant,
and
Allen B. Catbagan, Danilo L. Catbagan, New Jersey Highway Authority/The Garden State Parkway, Tilcon New York, Inc., HNTB Corporation, Statewide Striping Corporation, Defendants-Respondents.
State Farm Insurance Company a/s/o Thomas Perina, Plaintiff-Respondent,
v.
Danilo Catbagan and Allen B. Catbagan, Defendants-Respondents.

Argued Feb. 9, 2010.
|
Decided July 7, 2010.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-1300-05, L-2222-05; Hudson County Docket No. L-664-06.

Attorneys and Law Firms

Stephen J. Foley, Jr., argued the cause for appellant Thomas M. Perina (Campbell, Foley, Lee, Murphy and Cernigliaro, attorneys; Mr. Foley, on the brief).

Kathleen S. Murphy argued the cause for respondents Danilo Catbagan and Allen B. Catbagan (Connell Foley, LLP, attorneys; Ms. Murphy, of counsel and on the brief).

Alex J. Keoskey argued the cause for respondent New Jersey Turnpike Authority, Garden State Parkway Division as successor to the New Jersey Highway Authority (DeCotiis, FitzPatrick, Cole & Wisler, attorneys; Mr. Keoskey, of counsel and on the brief).

Frank A. Viscomi argued the cause for respondent HNTB Corporation (Baumann, Lynes & Viscomi, attorneys; Mr. Viscomi, on the brief).

Lamb, Kretzer, Reinman & Roselle, attorneys for respondent Tilcon New York, Inc. (John A. Fearns, on the brief).

Kulick, Brennan, P.A., attorneys for respondent Statewide Striping Corporation (Gerard M. Brennan, on the brief).

Levinson Axelrod, P.A., attorneys for respondent Maria Diaz, join in the brief of appellant Thomas M. Perina.

David E. Rehe & Associates, attorneys for respondent State Farm, join in the brief of respondents Allen B. Catbagan and Danilo L. Catbagan.

Before Judges PARRILLO, LIHOTZ and ASHRAFI.

Opinion

PER CURIAM.

***1** Thomas Perina appeals from judgments of the trial court dismissing on summary judgment his claims against the New Jersey Highway Authority and three contractors and denying a new trial against remaining defendants. Perina was both plaintiff and defendant in these consolidated cases arising out of a motor vehicle accident. The jury found Perina solely liable for the accident that injured him and his passenger. We affirm.

The accident occurred on October 23, 2004, after 11:00 p.m., on the northbound Garden State Parkway just before the roadway passes over the Driscoll Bridge in Sayreville. The New Jersey Highway Authority had recently removed northbound toll collection booths located about 1.1 miles south of the bridge. Defendant contractors were awarded public contracts to remove the toll plaza and reconfigure the roadway.[1] At that location, seven northbound lanes merged from the express and local lanes into a single roadway of six lanes going over the bridge. When the toll plaza was present, traffic slowed to pay tolls before the lane reduction. After the reconstruction, there was no mechanism to reduce speed as traffic merged and entered the bridge.

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Perina alleged that he was driving in the far right lane with Maria Diaz riding as his passenger. He claimed that his lane ended suddenly without adequate warning signs, and he was forced to move to the left. As he did so, his car was struck in the rear by a car owned by defendant Danilo Catbagan and driven by defendant Allen Catbagan. The collision caused Perina's car to spin around and strike the highway divider on the bridge. Perina and Diaz alleged injuries caused by the negligent driving of Catbagan and the negligence of the State defendants in creating a dangerous condition of the roadway. In her separate complaint, Diaz also named Perina as a defendant and alleged that his negligent driving was also a cause of the accident. [2]

After discovery was completed, the State defendants filed motions for summary judgment claiming immunity under New Jersey's Tort Claims Act, *N.J.S.A.* 59:1-1 to 12-3. Specifically, they claimed they were immune under *N.J.S.A.* 59:4-6 for plan and design of the highway improvements and under *N.J.S.A.* 59:4-5 for alleged failure to post warning signs.

Perina responded that the State defendants were not entitled to immunity because they had failed to place warning signs in accordance with the approved plan for reconfiguration of the roadway. In addition to an expert engineering report, Perina proffered photographs taken nine days after the accident to show that the two warning signs intended by the approved plan were not in place at the locations designated. The court granted summary judgment to the State defendants both on the ground that the photographs did not prove the warning signs were not present nine days earlier when the accident occurred and also on the ground that Tort Claims Act immunities applied.

The case against the Catbagans went to trial before a jury and a different judge, but only on the issue of comparative negligence and responsibility for the accident as between Perina and Catbagan. Diaz agreed to be bound by the jury's verdict without participating as a party at the trial. Before trial began, the court granted Catbagan's motion in limine to bar testimony by Perina's accident reconstruction expert, James Eastmond. The only witnesses at trial were Perina, Diaz, and Allen Catbagan.

***2** Perina testified that he only saw a flashing arrow pointing to the left but did not see any signs or lane markings warning that the far right lane was ending, and he was forced to move his car suddenly to the left. Diaz also testified that she did not see any warning signs or lane markings on the highway. Both testified they did not see Catbagan's car before the collision. Both also testified they heard and felt two impacts to the rear of Perina's car before it was spun around and struck the divider.

Catbagan testified that he was traveling at about sixty-five miles-per-hour in the third lane from the right as he approached the Driscoll Bridge. He saw Perina's car ahead and one lane to his right. He believed it was moving faster than his car. He intended to change lanes to the left to move further away from traffic and engage his cruise control. He briefly looked to his left to check the blind spot to his side. As he turned his head back to the front, Perina's car was suddenly coming into his lane and he could not avoid hitting it in the left rear side with the right front of his car. He testified there was only one impact, and he denied striking the rear of Perina's car.

The jury was asked to answer five special interrogatories. The first four questions asked whether Perina and Catbagan were each negligent and whether their negligence was a proximate cause of the accident. The fifth question, to be answered only if all four prior answers were “yes,” asked the jury to designate by percentages the responsibility of Perina and Catbagan for the accident.

After deliberations, the jury returned with a verdict finding both Perina and Catbagan negligent but answering “no” to whether Catbagan's negligence was a proximate cause of the accident. Despite the “no” answer, the jury answered the fifth question, finding Perina 80% and Catbagan 20% responsible for the accident.

The court did not accept the verdict. It informed the jury that its answers were inconsistent and did not comply with the court's instructions. It sent the jury back to resume deliberations and to resolve the inconsistency. When the jury returned with a revised verdict sheet, it had changed its answers and found that Catbagan was not negligent.

As a result of the jury's verdict, Perina had no cause of action against Catbagan for his own injuries, and Diaz could recover for her injuries only from Perina. Subsequently, Diaz settled her claims against Perina. Perina moved for a new trial, which the trial judge denied, concluding that the jury's verdict was not inconsistent.

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Perina now appeals from the orders dated October 19, 2007, granting summary judgment to the State defendants and the order dated August 4, 2008, denying a new trial.

I.

In reviewing a grant of summary judgment, an appellate court applies the same standard under *Rule* 4:46-2(c) that governs the trial court. *See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 *N.J.* 436, 445-46 (2007); *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 *N.J.Super.* 162, 167 (App.Div.), *cert. denied*, 154 *N.J.* 608 (1998). The court must "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." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995). The court's function is not to weigh the evidence, but rather to determine whether there is a genuine issue requiring trial. *Ibid.*

***3** With respect to the State defendants, Perina argues that genuine issues of fact exist regarding the presence and location of warning signs and whether, as a result, defendants had created a dangerous condition of the roadway subjecting them to liability under *N.J.S.A.* 59:4-2. Defendants argue they were entitled to immunity under the plan and design, *N.J.S.A.* 59:4-6, and the traffic sign, *N.J.S.A.* 59:4-5, provisions of the Tort Claims Act. We agree with defendants.

The Tort Claims Act provides general immunity for all governmental bodies, except where the Legislature has provided for liability. *See N.J.S.A.* 59:1-2 and 2-1; *Bell v. Bell*, 83 *N.J.* 417, 423 (1980); *Malloy v. State*, 76 *N.J.* 515, 519 (1978). The immunities provided under the Tort Claims Act, if applicable, prevail over any provision under which a claim is made against a public entity. *N.J.S.A.* 59:2-1; *Malloy, supra*, 76 *N.J.* at 519.

Private parties can also raise the Tort Claims Act as a defense. "When a public entity provides plans and specifications to an independent contractor, the public contractor will not be held liable for work performed in accordance with those plans and specifications." *Vanchieri v. N.J. Sports and Exposition Auth.*, 104 *N.J.* 80, 86 (1986); *accord Cobb v. Waddington*, 154 *N.J.Super.* 11, 18 (App.Div.1977), *certif. denied*, 76 *N.J.* 235 (1978) (private contractor entitled to the immunities where his selection of barricades and placement of them on a highway was pursuant to Department of Transportation specifications).

Under *N.J.S.A.* 59:4-6, a public entity, or a private contractor acting pursuant to public authority, is not liable for any injury caused by:

> the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by ... the governing body of a public entity or ... a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

In *Manna v. State*, 129 *N.J.* 341, 354-55 (1992), the Court noted the perpetual nature of plan and design immunity and stated further that " 'changed' or 'unanticipated' circumstances do not defeat the plan-or-design immunity."

In this case, the undisputed evidence establishes that the plan for the roadway reconfiguration was modified and approved by authorized State personnel before the accident. Therefore, Perina cannot make a claim against the State defendants based on improper design of the lane reconfiguration leading to the bridge.

Perina argues, however, that his claim against the State defendants is based on their failure to adhere to the specific warning sign designations required by the approved plan. He cites *Kolitch v. Lindedahl*, 100 *N.J.* 485, 495 (1985), for the proposition that immunity is not available where the State action challenged is failure to carry out operational or ministerial duties rather than a discretionary decision, such as planning and designing the highway improvements.

***4** In support of this argument, Perina relies on testimony and reports describing the construction plans and the conditions of the roadway. The northbound toll plaza had been located at milepost 125 .85, just north of where the express and local lanes merge into a single roadway. The base of the Driscoll Bridge is at milepost 126.97. About halfway between the two, at milepost 126.3, Exit 125 is located on the right of the roadway. The seven lanes reduce to six after the exit ramp.

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When the toll plaza was removed, the lane markings had to be changed. The modified plan and design for reconfiguration of the lanes, approved just four days before the accident, included placement of a sign stating "Right Lane Ends 1000 Feet" south of Exit 125 and a second sign with a "lane drop" symbol north and just past the exit. However, photographs taken by the State nine days after the accident show that the "lane drop" sign was placed before the exit to its south, and they do not show any additional warning sign. In other words, there was no evidence that a sign warning "Right Lane Ends 1000 Feet" was placed in accordance with the plan and the "lane drop" sign was placed in a location different from the plan. Perina contends these failures to place warning signs in accordance with the approved plan were not a discretionary decision entitled to immunity but operational and ministerial failures of the State defendants.

The motion judge ruled the photographs did not prove the absence of signs in accordance with the plans on the date of the accident. Perina argues correctly that, at the summary judgment stage where the evidence must be viewed most favorably to the party opposing summary judgment, the photographs and the testimony of Perina and Diaz that they saw no warning signs were sufficient to establish a genuine disputed issue of fact as to whether signs had been placed in the locations designated by the plan.

The absence of warning signs, however, did not negate the immunity of the State defendants. A public entity has immunity under *N.J.S.A.* 59:4-5 for failing to provide ordinary traffic signals or warning signs. That statute states: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices."

In *Kolitch, supra,* 100 *N.J.* at 496-97, the Supreme Court held the traffic sign immunity applies to the posting of a fifty miles-per-hour speed limit sign within 200 feet of a dangerous "vertical sag curve" and the State's failure to post a sign warning motorists to reduce speed at the dangerous curve. In other words, the nature and location of the speed limit sign, and the absence of a warning sign, were discretionary plan and design decisions of the State entity that were immunized by the Tort Claims Act.

In *Aebi v. Monmouth County Highway Dept.,* 148 *N.J.Super.* 430, 433 (App.Div.1977), we held that reduction in width of roadway leading to a bridge may have created a dangerous condition, but the public entity was immune from liability for failure to post warning signs. We noted in *Aebi* that *N.J.S.A.* 59:4-5 is "clear and unambiguous," and we stated further that "[t]he determination as to the advisability or necessity of a traffic sign or warning device at any particular place requires the exercise of discretion, and hence *N.J.S.A.* 59:4-5 simply specifies one particular type of discretionary activity to which immunity attaches." *Id.* at 433; *see also Manna, supra,* 129 *N.J.* at 355 (*N.J.S.A.* 59:4-5 grants immunity for the failure to post warning signals); *Johnson v. Twp. of Southampton,* 157 *N.J.Super.* 518, 519, 525 (App.Div.) (municipality immune from liability for failing to post warning signs at "T" intersection), *certif. denied,* 77 *N.J.* 485 (1978). *But see Pandya v. State, Dept of Transp.,* 375 *N.J.Super.* 353, 367, 370 (App.Div.2005) (where plan and design immunity under *N.J.S.A.* 59:4-6 was not available to the State, immunity under *N.J.S.A.* 59:4-5 also did not apply to accident caused by lane markings that created a two-lane road where roadway around curve could not accommodate two lanes).

***5** We disagree with Perina's argument that failing to place the signs as designated on the plan was an operational or ministerial action that was not subject to immunity. In *Weiss v. New Jersey Transit,* 128 *N.J.* 376, 384 (1992), the Court held the entity's long delay in placing a traffic signal at a railroad track that resulted in the death of decedent "ha[d] been specifically immunized by *N.J.S.A.* 59:4-5." The Court referred to *Hoy v. Capelli,* 48 *N.J.* 81, 87 (1966), which endorsed immunity where installation of a traffic signal was delayed. *Weiss, supra,* 128 *N.J.* at 383. If delay in placing signals and warning signs according to plans does not take the State action outside the immunity provision of the statute, then neither does placing the signs in a location other than designated in the plan. [3]

More generally, in *Pico v. State,* 116 *N.J.* 55, 62 (1989), the Court held the State was entitled to "weather immunity" under *N.J.S.A.* 59:4-7 despite the negligence of its employee in failing to sand the icy roadway as he undertook to do. The Court also stated: "Although a public entity is generally liable for the ordinary negligence of its employees in performance of ministerial duties, *N.J.S.A.* 59:2-2; *N.J.S.A.* 59:2-3d, that liability yields to a grant of immunity." *Pico, supra,* 116 *N.J.* at 62 (citing *Malloy, supra,* 76 *N.J.* at 520-21).

We conclude the State defendants are entitled as a matter of law to immunity under *N.J.S.A.* 59:4-5 and -6 for the absence of warning signs, as well as the plan and

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design of the roadway. The motion judge correctly granted summary judgment and dismissed the claims against the State defendants for that reason.

II.

Perina argues next that the trial judge erred in excluding testimony from his accident reconstruction expert, James Eastmond. The expert's lengthy report included his curriculum vitae reciting his experience, training, and career as a police officer and a consultant in accident investigations and reconstruction. It described the evidence he reviewed in this case and provided explanations of data and principles of accident reconstruction that he utilized, including the nature and location of damage to Perina's car, the configuration of the roadway, information from police reports, photographs of the accident scene, distance calculations, studies and conclusions of average perception/reaction times, coefficient of friction and the drag factor after collisions as affecting calculation of distances and speeds, and relevant traffic laws. Also, Eastmond reviewed the deposition testimony of Perina, Diaz, and Catbagan, as well as a statement given to the police by a witness to the accident and the contents of an anonymous 911 call.

From these data, principles, and calculations, Eastmond reached nine conclusions:

1. The location of the area of impact was around milepost 126.9 [immediately before the base of the bridge].

***6** 2. Both Mr. Perina and Mr. Catbagan were driving in excess of the posted 45 mph speed limit.

3. Both vehicles were located in the same travel lane with the Catbagan vehicle behind the Perina vehicle.

4. There were two impacts to the rear of Perina vehicle by the Catbagan vehicle with the first being an impact directly to the rear of the Perina vehicle.

5. Mr. Catbagan failed to make proper observations before changing lanes in violation of *N.J.S.* 39:4-97.

6. Mr. Catbagan improperly began changing travel lanes without first ascertaining it was safe to do so in violation of *N.J.S.* 39:4-88b.

7. Mr. Catbagan was driving inattentively in that he failed to monitor the movement of the Perina vehicle located in front of him before moving toward the left travel lane.

8. The actions of Mr. Catbagan were the proximate cause of the crash.

9. Confusion experienced by Mr. Perina as he traveled through the construction zone may have been a causative factor.

The conclusions numbered one, two, and nine are not in dispute. Catbagan moved to exclude the other conclusions, arguing that they were inadmissible as expert opinions about the credibility of witnesses, which is the province of the jury, and that Eastmond had not examined photographs of damage to the Catbagan vehicle in reaching his conclusions about the number and nature of impacts and resulting fault of Catbagan.

The trial court granted the motion, stating that the expert relied on only “half the pieces ... of the jigsaw puzzle” in evaluating vehicle damage as the basis of reaching his conclusions. The court also ruled that the probative value of the proposed expert testimony was “far exceeded by the prejudice it would cause by his various conclusions as to credibility.” On appeal, Perina argues prejudicial error in exclusion of Eastmond's testimony.

“Ordinarily, the competency of a witness to testify as an expert is remitted to the sound discretion of the trial court.” *Carey v.. Lovett,* 132 *N.J.* 44, 64 (1993). Likewise, the admissibility of particular expert testimony is generally within the discretion of the trial court. *Ripa v. Owens-Corning Fiberglas Corp.,* 282 *N .J.Super.* 373, 389 (App.Div.), *certif. denied,* 142 *N.J.* 518 (1995). Unless an appellate court finds a clear abuse of discretion, it will not interfere with the exercise of that discretion. *Ibid.*

N.J.R.E. 702 provides:

> 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.

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There are three basic requirements for the admission 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 such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." *Hisenaj v. Kuehner*, 194 *N.J.* 6, 15 (2008).

***7** Expert testimony is not admissible, however, if it is a "net opinion." *See Buckelew v. Grossbard*, 87 *N.J.* 512, 524 (1981). An expert must provide the "why and wherefore" of his opinions. *Rosenberg v. Tavorath*, 352 *N.J.Super.* 385, 401 (App.Div.2002). The trial court may exclude expert opinions that are not adequately supported by factual data or reasoning. *See Johnson v. Salem Corp.*, 97 *N.J.* 78, 91 (1984); *Dombroski v. City of Atlantic City*, 308 *N.J.Super.* 459, 470-73 (App.Div.1998).

In this case, there is no challenge to Eastmond's qualifications or the admissibility of accident reconstruction testimony in general. Rather, Catbagan disputes Eastmond's proposed opinion testimony as infringing upon the jury's function to determine credibility as between witnesses. Citing *State v. Vandeweaghe*, 177 *N.J.* 229, 239 (2003), Catbagan contends an expert is not permitted to testify about credibility of witnesses and that Eastmond's conclusions were essentially a rejection of Catbagan's credibility and version of the accident.

We reject the argument that Eastmond was precluded from testifying because his ultimate conclusion was that Catbagan's version of how the accident occurred was not true. Eastmond's proposed testimony was not an opinion about the capacity or inclination of Catbagan to tell the truth or to lie, as was the basis of the inadmissible expert opinion in *Vandeweaghe, supra*, 177 *N.J.* at 236. Nor was it an expert's assessment of the general credibility of a witness in the sense of ability to perceive events or to tell the truth. *See State v. Jamerson*, 153 *N.J.* 318, 341 (1998); *State v. J.Q.*, 252 *N.J.Super.* 11, 39 (App.Div.1991), *aff'd*, 130 *N.J.* 554 (1993). Rather, it was a contradiction of Catbagan's version of the accident based on specific factual evidence. That type of expert testimony is admissible because it contradicts facts rather than attacks credibility of the witness.

Nevertheless, we discern no abuse of discretion in the trial court's ruling that Eastmond's conclusions were based on insufficient information and, therefore, were potentially more prejudicial than probative. *See Dawson v. Bunker Hill Plaza Assocs.*, 289 *N.J.Super.* 309, 324 (App.Div.), *certif. denied*, 146 *N.J.* 569 (1996).

Eastmond's conclusions relied heavily on his observation of damage to the right rear of the Perina vehicle. He stated:

> The right side of the rear bumper cover shows evidence of contact damage as does the right rear taillight lens assembly which is broken. The right side of the quarter panel between the rear bumper cover and the right rear wheel well shows signs of buckling which would be consistent with induced damage from the contact to the rear bumper.

Had Eastmond been permitted to testify, he presumably would have stated the following opinion based on the damage to the right rear of Perina's car that he described:

> [T]he damage profile to the rear of the Perina vehicle indicates the most likely scenario was the following. Mr. Catbagan desired to move over to the left to pass the slower moving Perina vehicle and at the same time Mr. Perina also decided to move over to his left. As Mr. Perina began moving over after looking in his mirrors and seeing no oncoming traffic to his left Mr. Catbagan, thinking the Perina vehicle was going to remain in the lane they shared, was looking over his shoulder to check for oncoming vehicles to his left. When he looked back forward his vehicle, which was traveling at a speed greater that that of Mr. Perina, had closed the gap between them and struck the rear of the Perina vehicle.

***8** The trial judge acted within his discretion when he concluded that the scope of these opinions ventures substantially beyond the factual information upon which they were based. We agree that the quoted opinions about how the accident occurred could be excluded from the trial because they were too speculative and based on inadmissible net opinions.

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Catbagan's version was that his right front initially collided with the left rear side of Perina's car as Perina moved to the left into his lane of travel. Catbagan denied being in the same lane as Perina before the collision and hitting the Perina car directly from behind. Eastmond rejected Catbagan's version, relying almost entirely on the fact that Perina's car was also damaged in its right rear. But Eastmond did not examine photos of the Catbagan vehicle to determine whether damage to its front end was or was not consistent with an initial direct rear end hit of the Perina vehicle. At trial, Catbagan presented in evidence the photos of his car showing damage only to the right front side, consistent with his version. Also, Eastmond seems to have ignored Diaz's statement in deposition that she believed the initial hit was to the left rear side of Perina's car. [4]

In addition, Catbagan's position at trial was that damage to the right rear of Perina's car could have occurred during its spinning and striking of the divider. To exclude that possibility, Eastmond placed undue emphasis on the police report as indicating no secondary impact with the highway divider other than where the front of the Perina car had hit the divider. Despite his acknowledgment that the police report contained inconsistencies with his findings, [5] and despite the lack of evidence that the police were conducting an investigation of the number and location of impacts, Eastmond converted the absence of information in the police report into a conclusion of his own-that the right rear of the Perina car could not have been damaged in any way except by an initial direct hit from the rear by the Catbagan car traveling in the same lane as Perina.

That preliminary conclusion, upon which all the other disputed conclusions and theories of the Eastmond report are based, does not have adequate factual support in his report. It is not supported by any witness statement and, in fact, is inconsistent with the statements of any witnesses who claimed to have seen the collision. It is not supported by Eastmond's personal examination of the physical evidence or by police investigation focused on initial impact. In sum, it is not adequately explained by the evidence that Eastmond relied upon. Yet the preliminary conclusion that Catbagan must have been traveling in the same lane as Perina and hit him first directly from the rear is essential to all the other far-reaching opinions contained in Eastmond's report.

We agree with the trial court that Eastmond's conclusion about the cause of damage to the right rear of Perina's car is undermined by his reliance on “half” the damage evidence. “An expert's conclusion is considered to be a ‘net opinion,’ and thereby inadmissible, when it is a bare conclusion unsupported by factual evidence.” *Creanga v. Jardal*, 185 *N.J.* 345, 360 (2005). While it would be incorrect to describe Eastmond's opinion as without any factual support, his far-reaching opinions went beyond the scope of the available factual evidence. His conclusions setting forth an entire set of circumstances only on the basis of unexplained damage to the right rear of the Perina car was overly speculative and therefore properly excluded.

***9** The trial court has broad discretion to exclude evidence under *N.J.R.E.* 403 if its potential for prejudice substantially outweighs its probative value. “The trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature.” *Green v. N.J. Mfrs. Ins. Co.*, 160 *N.J.* 480, 492 (1999). A trial court's ruling under *N.J.R.E.* 403 will not be reversed on appeal “in the absence of palpable abuse thereof.” *State v. Thompson*, 59 *N.J.* 396, 420 (1971). The trial judge in this case did not abuse his discretion in weighing the potential prejudice in Eastmond's evaluation of Catbagan's version against the probative value of his opinions based on insufficient information.

We reject Perina's claim that he is entitled to a new trial because of error in excluding the testimony of his accident reconstruction expert.

III.

Finally, Perina argues that the trial court gave erroneous instructions to the jury after the jury returned with an inconsistent verdict finding that Catbagan was not a proximate cause of the accident but attributing twenty percent responsibility to him. We disagree and conclude that this contention does not require extensive discussion. *R.* 2:11-3(e)(1)(E).

The trial court's instruction to the jury to resume deliberations and to address the inconsistency in its initial answers was fully in conformity with *Mahoney v. Podolnick*, 168 *N.J.* 202, 222 (2001). We discern no error in the court's response to the initial jury verdict or its rejection of a motion for a new trial on that ground.

Affirmed.

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All Citations

Not Reported in A.2d, 2010 WL 2696733

Footnotes

1 Because the contractors have the same interests and defenses as the New Jersey Highway Authority, we will refer to them collectively as the State defendants.

2 State Farm Insurance Company, as assignee of Perina, filed another complaint against the Catbagans based on its potential liability to Perina for underinsured motorist benefits. The Catbagan insurance policy had a $100,000 limit of liability and that amount was deposited into the court by the insurance carrier. Perina claimed that the policy limit was insufficient to compensate his injuries and those of Diaz. State Farm did not actively participate at trial but is bound by the court's rulings and the jury's verdict. On this appeal, State Farm joins in the arguments of the Catbagans.

3 The State defendants argue that placing the “lane drop” sign before rather than after the exit enhanced safety by increasing the driver's time to heed the warning, and they also contend that the revised location was orally approved by authorized personnel. Although that evidence would be relevant at trial, we do not rely on it to reach our conclusions on the granting of summary judgment.

4 At trial, Diaz testified inconsistently with her deposition that the first impact was to the rear passenger side of Perina's car.

5 Besides inaccurately designating the precise milepost where the collision occurred, the police report stated that Perina had been in the lane second from the right, and it described the initial impact as a sideswipe without attributing fault to either party.

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