

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2604-13T2

JOSEPH YANKILEVICH and his wife,
TATYANA YANKILEVICH,

Plaintiffs-Appellants,

v.

DIANA D. SACHAKOVA, ROUTE 18 MART, INC.
and EXXON MOBIL CORPORATION,

Defendants-Respondents,

and

NATALYA SACHAKOVA, TOWNSHIP OF EAST
BRUNSWICK and EXXON GAS STATION,

Defendants.

Argued December 2, 2014 – Decided April 13, 2015

Before Judges Fisher and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-753-12.

Michael Confusione argued the cause for
appellants (Hegge & Confusione and Law
Offices of Vlasac & Shmaruk, attorneys; Mr.
Confusione and Boris Shmaruk, of counsel and
on the brief).

Michael T. Kearns argued the cause for
respondent Route 18 Mart, Inc. (Hoagland,
Longo, Moran, Dunst & Doukas, LLP,

attorneys; Mr. Kearns, of counsel and on the brief; Dawn P. Marino, on the brief).

D. Scott Conchar argued the cause for respondent Exxon Mobil Corporation (Law Offices of William E. Staehle, attorneys; Mr. Conchar, of counsel and on the brief; Karin J. Ward, on the brief).

PER CURIAM

This appeal arises out of a car accident in East Brunswick on Route 18, just south of Rues Lane. Defendant driver Diana D. Sachakova was pulling out of the Exxon station onto Route 18 when she collided with the car driven by plaintiff Joseph Yankilevich. Yankilevich's car overturned in the crash, resulting in the amputation of his left arm. Plaintiff settled his case against Sachakova.

This appeal concerns plaintiff's suit against defendants Exxon Mobil Corporation and its franchisee, defendant Route 18 Mart, Inc., (collectively defendants) which the court dismissed on summary judgment. The question presented is whether the court was correct in ruling on the undisputed facts that three flags at the edge of defendants' property along Route 18 were not a proximate cause of the accident. Because we believe that question is squarely controlled by the Supreme Court's recent opinion in Townsend v. Pierre, ___ N.J. ___ (2015), we affirm.

The accident occurred at about five o'clock on a clear but somewhat windy November afternoon in 2011. Sachakova, seventeen

years old, had stopped at the Exxon Station to allow her friend, Andrew, to buy cigarettes. She testified at deposition that she stopped at the station, which was about ten minutes from her home, two or three times a week. According to Sachakova, on the day of the accident she pulled her car to the curb line of the driveway exit, stopped and looked left for about two seconds. Intending to turn right to go south on Route 18, she saw the traffic light for Route 18 southbound was red and a car stopped on Rues Lane with its right blinker on waiting to turn onto Route 18 southbound. Seeing no cars coming south on Route 18, she pulled onto the highway and was immediately struck by plaintiff's car.

Sachakova's passenger Andrew was also deposed. He testified that Sachakova was inching up to the end of the driveway and stopped for a second or two with the nose of her car just about to cross the line onto Route 18. Her car was angled to the right. Acknowledging that he was looking at the smart phone in his lap after he got back into the car, he testified that he looked up straight ahead just as Sachakova was pulling out. He saw cars traveling south in the furthest two lanes and noticed she was looking to the right as she pulled onto the highway. Andrew estimated that the back tires of

Sachakova's car were just rolling off the lot when plaintiff's car hit them at the front left fender.

The investigating officer testified at deposition that he interviewed Sachakova immediately after the accident, and she told him "that she had pulled out and never saw the car coming." He cited her for careless driving and improper exit of a driveway. In his report of the accident, the officer wrote "[t]here were several flags posted in the 'right of way' along the Rt. 18 side of the Exxon [g]as station property. Although it was not determined, these flags could have impeded a driver's view when exiting the gas station onto Rt. 18." He testified that Sachakova never mentioned to him that the flags hindered her view of the highway, and he never determined whether they had done so. The officer explained he mentioned the flags in his report,

[o]nly for the fact that you know depending on[,] which I don't know that night[,] how the wind was blowing or whether the driver had, how she had looked, where she was coming out from when she pulled out, if she came to a complete stop. I don't know any of that, but you have something that is obviously there, it is point-blank that the flags are within that view when a driver is looking out to look up the highway northbound.

Sachakova, however, was unequivocal in her testimony that the flags had not impeded her view of the highway. She

explained that she was very familiar with the flags, which she described as three "medium large" flags on poles sticking out of the ground in the grass strip separating the gas station from the highway, because she drove by them every time she stopped to get gas. She testified that on the day of the accident, she saw the flags "out of the corner of [her] eye but [she] wasn't looking at them. [She] could see pas[t] them." When pressed by plaintiff's counsel, Sachakova acknowledged the flags were "halfway fluttering" or "slightly in motion," but was adamant that "[t]hey did not obstruct [her] view."

Plaintiff's counsel revisited the topic of the flags later in the deposition when he asked Sachakova about seeing the flags fully extended in the wind on days other than the one on which the accident occurred. Sachakova admitted that on prior occasions she had to wait for the flags to stop waving "to see if there was traffic turning right from Rues Lane." When counsel asked if the flags fully waving would also impede her view of traffic moving south in the rightmost lane of Route 18, Sachakova replied, "[t]hey would impede it but like if I was driving I would have noticed that they were completely waving and I would stop. Like they weren't blocking my view so I continued to go."

In his opposition to defendants' motions for summary judgment, plaintiff presented the report of his accident reconstruction expert Robert D. Klingen. In addition to reviewing the deposition testimony summarized above, Klingen conducted a physical inspection of the area of the crash and observed the placement of the flags, which remained in the same location in 2013 as on the day of the accident. He made observations "from a typical driver's eye height of approximately 3.5 feet above ground level from a location where a driver would have been located with the front end of his or her vehicle positioned at the westerly curb line of the highway." Based on his inspection, Klingen "determined that the unfurling of the flags at times created a sight obstruction in being able to observe the right southbound lane of the highway, north of the Rues Lane intersection."

Plaintiff relied on the four following specific opinions from Klingen.

12. Although Ms. Sachakova testified that she made observations of oncoming southbound traffic, she clearly failed to make proper observations of the approaching Yankilevich Scion prior to moving out onto the highway.

. . . .

14. During an inspection of the accident location conducted on July 9, 2013, it was observed that during wind currents of 4 to 9 miles per hour, the presence of [the three]

waving flags created momentary, but at times significant, sight obstructions of oncoming southbound traffic traveling along the right lane of the highway. On the date of the accident, the reported wind speeds were from 4 to 21 miles per hour and certainly would have caused the flags to be unfurling or waving.

15. Based upon a review of all the information and materials provided, which included Ms. Sachakova's specific testimony that she did make observations to her left but failed to see the approaching Scion, her acknowledgement that the fluttering flags would have created a visual obstruction along the right lane (deposition pg. 78-80)¹, and the observations made during our on-site inspection, there is no other conclusion in the record that could have led to the happening of the collision other than a scenario in which her view of approaching right lane traffic was obstructed by the waving flags.

16. The failure of Diana Sachakova to make proper observations in combination with the flags waving in front of the service station which created momentary sight obstructions for Ms. Sachakova in being able to observe traffic approaching along the right lane were the proximate causes of this collision event.

After considering the undisputed facts presented on the summary judgment record and hearing argument of counsel, the

¹ Sachakova actually said the flags would impede her view of the right lane only if they were "waving completely," which she stressed repeatedly was not the case on the day of the accident. She went on to explain, "but like if I was driving I would have noticed that they were completely waving and I would stop. Like they weren't blocking my view so I continued to go."

court granted defendants' motion dismissing the complaint. The court characterized the issue as whether "there is any basis for a reasonable finder of fact to find that the flags had anything to do with the accident." After reviewing Sachakova's deposition testimony about the flags, the court concluded, "[t]he testimony is clear, it's concise, it's unvarying. The flags had nothing to do with the accident." Addressing the expert's report, the court stated,

[a]gain, [Sachakova is] saying I can see. [The expert is] saying maybe you couldn't. There's a probability you couldn't. But she's saying on that day those flags I could see [past]. The flags had nothing to do with it, she said at least three different times.

The court concluded that "in the face of her testimony, and absolutely no . . . testimony contradicting it," no reasonable fact finder "could impose liability on the property owner [or] the lessee for those flags under these facts."

We review summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). As the parties agreed on the material facts for purposes of the motion, our task is limited to determining whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608

(1998). Reduced to its essence, the trial court ruled no rational jury could reasonably find the flags to be a proximate cause of the accident in light of Sachakova's unequivocal and unrefuted testimony that the flags did not obstruct her view. Having reviewed the record and the applicable law, we conclude the trial judge was correct, and that summary judgment for defendants was appropriate.

Our task has been made decidedly easier by the Court's decision in Townsend, a case remarkably similar to this one. There, overgrown shrubbery planted along a road blocked the view of drivers approaching a stop sign at the adjacent intersection. Townsend, supra, ___ N.J. at ___ (slip op. 5). The defendant driver stopped at the stop sign before attempting a left turn. Ibid. Finding her view of the traffic approaching the intersection from her left blocked by the hedgerow, she "edged up" into the intersection to a point where the shrubbery no longer impeded her view before initiating her turn. Ibid. Immediately after commencing her left turn, defendant collided with a motorcycle, killing the rider. Id. at 7. A passenger in defendant's car corroborated her account of having inched past the stop sign to a point where the hedgerow no longer impeded her view before starting her turn. Id. at 6.

In opposing the driver's summary judgment motion, the motorcyclist's estate presented the testimony of an expert who, like the expert in this case, conducted a site inspection, took measurements and photographs and opined that "[t]he restricted substandard and unsafe intersection sight distance was a significant contributing cause" of the accident. Id. at 10. Also as in this case, the plaintiff's expert in Townsend considered and rejected the defendant driver's testimony that her view was unobstructed, opining that "given [the defendant driver's] testimony that the bushes [at the stop line] obstructed her view of eastbound traffic on Levitt Parkway, and given that she never saw the approaching motorcycle, I reasonably conclude that she did not have an unobstructed view of Levitt Parkway when she proceeded into the roadway." Id. at 11 (alterations added).

The Townsend Court determined that the plaintiff's expert's opinion as to the hedgerow having obstructed the defendant driver's view of approaching traffic was unsupported, and indeed contradicted, by the undisputed facts in the record and thus an inadmissible net opinion on the critical issue of proximate cause of the accident. Id. at 24-25.

We come to the same conclusion here. As plaintiff concedes the trial court properly found, Sachakova testified

unequivocally that the flags did not obstruct her view of oncoming southbound traffic in the moments before the accident. Plaintiff's expert's view to the contrary is thus unsupported, and indeed contradicted, by the undisputed facts in the record. Because, as Townsend teaches, "[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 21, it follows that plaintiff's reliance on its expert to establish prima facie proof that the flags were a proximate cause of the accident is unavailing. Thus summary judgment dismissing the complaint was appropriately entered by the trial court.

We acknowledge the facts here differ slightly from those presented in Townsend, because there the object of the obstruction was stationary and the flags in this case would flutter in the wind. But as in Townsend, defendant driver here testified she could see past the alleged obstruction. Kligen did not opine that his measurements proved that impossible, but only that the flags were capable of providing "momentary, but at times significant, sight obstructions of oncoming southbound traffic traveling along the right lane of the highway."² Kligen

² In that respect, the expert report is weaker than the one considered in Townsend because implicit in Kligen's opinion is
(continued)

speculates based on that possibility and the happening of the accident that Sachakova was wrong when she testified that she could see the right lane clearly in the moments before the accident. Klingen's speculation that the flags must have obstructed Sachakova's view merely because they could have done so is at odds with Sachakova's unequivocal testimony that they did not do so. Like the expert in Townsend, Klingen's opinion rests solely on the jury disbelieving Sachakova's undisputed testimony that the flags did not obstruct her view. Because Klingen's opinion is based on speculation that is contradicted by the undisputed testimony in the record, the trial court was correct in finding his opinion insufficient to carry plaintiff's prima facie burden on the motion to prove proximate cause.³

We also reject plaintiff's new argument that even though the flags did not obstruct Sachakova's view of the road, they

(continued)

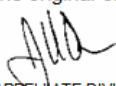
the acknowledgment that Sachakova's view may not have been subject to the "momentary" obstruction posed by a waving flag, just as she testified.

³ Defendants did not move to exclude Klingen's opinion on the basis of the net opinion rule and the trial court was thus not called upon to first address that evidentiary issue before ruling on the substance of the summary judgment motion. See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010). We are nevertheless satisfied, after reviewing the transcript of the oral argument, that the trial judge effectively undertook the proper inquiry in determining plaintiff's expert report insufficient to stave off summary judgment.

"distracted" her sufficiently to make them a proximate cause of the accident. In addition to not having been raised to the trial court, see Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973), there is nothing in the summary judgment record to support the argument. Enriquez v. W. Jersey, 342 N.J. Super. 501, 523 (App. Div. 2001). In light of our holding that plaintiff failed to establish its prima facie burden of proving the flags a proximate cause of the accident, we need not address its alternate argument that the motion was premature as discovery as to defendants' breach of duty in the placement of the flags was ongoing.⁴

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

⁴ The parties dispute whether defendants' placement of the flags in the right-of-way breached a duty to plaintiff. Because plaintiff was required to establish all four elements in order to sustain his cause of action for negligence, "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages," his failure to prove any one is fatal to his claim. Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008) (alterations omitted).