NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0963-12T1

FAIRFAX FINANCIAL HOLDINGS LIMITED and CRUM & FORSTER HOLDINGS CORP.,

Plaintiffs-Appellants/
Cross-Respondents,

v.

S.A.C. CAPITAL MANAGEMENT, L.L.C., S.A.C. CAPITAL ADVISORS, L.L.C., S.A.C. CAPITAL ASSOCIATES, L.L.C., SIGMA CAPITAL MANAGEMENT, L.L.C., STEVEN A. COHEN, ROCKER PARTNERS, L.P., COPPER RIVER PARTNERS, L.P., DAVID ROCKER, THIRD POINT L.L.C., DANIEL S. LOEB, JEFFREY PERRY, INSTITUTIONAL CREDIT PARTNERS, L.L.C., WILLIAM GAHAN,[1] JAMES S. CHANOS, and KYNIKOS ASSOCIATES, L.P.,

Defendants-Respondents,

and

EXIS CAPITAL MANAGEMENT, INC., EXIS CAPITAL, L.L.C., EXIS DIFFERENTIAL PARTNERS, L.P., EXIS INTEGRATED PARTNERS, L.P., ADAM D. SENDER, ANDREW HELLER, and MORGAN KEEGAN & COMPANY, INC.,

Defendants-Respondents/
Cross-Appellants,

APPROVED FOR PUBLICATION

April 27, 2017

APPELLATE DIVISION

[1] Defendants Institutional Credit Partners, L.L.C. and William Gahan entered into a stipulation of dismissal with plaintiffs prior to oral argument.

years later, there is nothing to suggest any substance to plaintiffs' claims against the Rocker defendants.

Consequently, we conclude that the trial judge did not err in granting summary judgment to the Rocker defendants, and we find plaintiffs' arguments to be without sufficient merit to warrant further discussion in this opinion. R. 2:11-3(e)(1)(E).

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LOST PROFITS AND THE ELSON REPORTS

In September 2012, the last judge to preside over the matter addressed the maintainability of plaintiffs' disparagement claim. The judge found sufficient evidence for a jury to find that defendants had intended to harm plaintiffs' interests; he further found those interests consisted of plaintiffs' "ability to sell their insurance policies," which involved their "actual business dealings" rather than just their reputations. Product disparagement, however, as we have held, required proof of "special damages," and the trial judge ruled that only one alleged kind of loss could satisfy it, namely, C&F's injury from "products that were not sold." He concluded that plaintiffs' general financial losses, such as losses arising from plaintiffs' offering of securities or the market trading in their securities, were the indirect results of

defendants' disparagement rather than the "direct and immediate" results of more targeted misconduct, and therefore could not be included in the disparagement claim. The judge found the same was true of plaintiffs' increased auditing costs and D&O insurance premiums, plaintiffs' inability to finance strategic acquisitions, and any legal costs. As a general matter, we agree with this conceptualization.

These rulings narrowed the alleged cognizable "special damages" to C&F's lost customers. Plaintiffs proffered Echemendia's in-house report that named approximately 180 lost customers from whom C&F would have earned profits of $19 million. Earlier, we concluded that plaintiffs' assertions as to the 180 alleged lost customers were sufficient to survive summary judgment. See Section IV(B)(3), supra.

But plaintiffs also offered Craig Elson's expert report on the value of the share of the insurance market that C&F would have secured but for defendants' alleged misconduct. The trial judge found Elson's expert report to be a net opinion, which failed to show the special damages required by law, leaving only the 180 lost customers named in Echemendia's report. As to those customers, the judge found "a complete absence of proof that any of the brokers in question actually made the decision . . . not to sell [C&F] insurance" products "based on the alleged

statements," i.e., a failure of proof on proximate cause, which compelled dismissal of what remained of plaintiffs' entire case.

We reject the judge's determination that plaintiffs could not continue to pursue its claim to the 180 alleged lost customers for reasons already expressed, but we agree with the argument that Elson's theory of recovery as to a lost market share cannot constitute damages permitted by way of plaintiffs' New York common law claims because New York law requires proof of the specific customers whose present or future relationship with plaintiffs was impinged, frustrated or precluded. It is for this reason alone that we affirm the judge's determination to bar the testimony Elson would have provided had the case gone to trial.

Although not necessary for our disposition of the appeal concerning Elson's report, we nevertheless consider and address other concerns about that report and Elson's proposed expert testimony. The judge, as we have noted, barred Elson's expert testimony because he found it to be a net opinion. Plaintiffs additionally argue the trial judge erred in failing to conduct a hearing pursuant to N.J.R.E. 104. We agree the judge erred in finding Elson's proposed testimony constituted a net opinion but we find no error in the judge's decision not to conduct a N.J.R.E. 104 hearing.

1. General Principles

N.J.R.E. 702 provides that when "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." Although the facts upon which a qualified expert's testimony is based need not be admissible, those facts must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.J.R.E. 703. Consequently, expert opinions must satisfy three requirements:

> (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
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> (3) the witness must have sufficient expertise to offer the intended testimony.
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> [Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992).]

A corollary of these principles — the net opinion rule — forbids the admission of an expert's conclusions when unsupported by factual evidence or other data. State v.

Townsend, 186 N.J. 473, 494 (2006). An expert witness is required "to give the why and wherefore of [an] expert opinion, not just a mere conclusion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). The "key to admission" is the validity of the expert's "reasoning and methodology," and in that regard, a court's function "is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs." Landrigan, supra, 127 N.J. at 414.

2. The Judge's Disposition Of the In Limine Motion Regarding Elson's Expert Testimony

Even in relatively simple cases, determining whether a proffered expert opinion passes the "why and wherefore" test described above often proves difficult. On appeal, a dispute about admissibility — even considering an appellate court's reticence in intervening absent an abuse of discretion, Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008) — can prove perplexing. See, e.g., Townsend, supra, 221 N.J. at 53-57. And it doesn't get any better when a trial judge has failed to fully explain the grounds for exclusion; such is the case here.

The trial judge found Elson lacked the requisite expertise because, although highly educated, he did not possess experience

in the insurance industry. The judge also deemed Elson's methodology to be unreliable by highlighting the lack of any objective data or evidence to demonstrate a causal link between an insurance company's rating and its market share growth. The trial judge, however, did little more than express this view in a conclusory fashion.

On the return date of an in limine motion, the judge provided only the following to guide us in determining whether he soundly exercised his discretion. First, the judge stated that "Mr. Elson is an MBA with no experience in the insurance business or anything relating to the insurance business at all[,] as is clear from his report and perfectly clear from his testimony." The judge then referred to an obligation "in cases of this kind" for a plaintiff — whether applying New York or New Jersey law — to prove "actual loss of business." The judge followed that with an acknowledgement that "New Jersey law allows for an alternative approach when you can't prove . . . actual lost business." But, because, as the judge observed, "plaintiff was capable of proving actual loss of business involving approximately 180 producers of business, who it claims chose not to place insurance with [C&F] subsidiaries because of the so-called noise or negativity in the market," he apparently concluded that plaintiffs could not take an alternative approach

when actual lost business cannot be proven. And the judge lastly, through citation to some brief excerpts from Elson's deposition testimony, found Elson's methodology — viewed as being based on a "proposition that because companies are similarly rated by rating agencies and are similar in various respects, that, therefore, they would have grown at the same rate" — to constitute a theory that is "counterintuitive" and "simply . . . not supported by any standard."

The judge's brief oral decision provides little that demonstrates to us how — in this particularly complex aspect of the case — the expert's opinion should be barred for theoretical reasons. The judge's opinion does not demonstrate how Elson's opinion is "counterintuitive" or unsupported by known standards.

The judge stated at the outset of his oral decision that he would "expand" on his reasoning by way of "a written opinion to follow," but that written opinion never issued. If Elson's testimony was not barred because of the application of New York law, and if admissibility turned on the net-opinion determination, we would simply remand for further amplification from the trial judge on this question. But, in light of the considerable time, expense and energy devoted to bringing the case to this point, we instead have analyzed the parties' arguments about the sufficiency of Elson's credentials and

methodology. Based upon our review of the record, we conclude his expert testimony did not constitute one or more net opinions, although, as we have already mentioned, the damages claimed by way of the Elson report are not recoverable.

3. Our Ruling

Elson provided two detailed expert reports that were explored at a lengthy deposition. In essence, he compared C&F's sales and growth rates to comparable competitors. Except in certain respects not relevant here, the admissibility of evidence is governed by the law of the forum. See Restatement (Second), supra, § 138.

Elson may not have previously provided an opinion of this nature in the insurance setting — a fact greatly relied upon by the trial judge[48] — but that is not dispositive. See Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 372 (App. Div. 2012) (observing that it "was not necessary for . . . a well-qualified economist quantifying plaintiff's alleged losses [to also] be an expert on employability"); see also Hammond v. Int'l Harvester Co., 691 F.2d 646, 652-53 (3d Cir. 1982) (holding that an engineer, whose only qualifications were sales experience in the

[48] The trial judge held: "In order to give expert testimony . . . you have to have knowledge, experience, training, something in the area about which you're testifying. He has nothing with respect to insurance, nothing at all."

field of automatic and agricultural equipment and teaching high school automobile repair, could testify in a products liability action involving tractors); Knight v. Otis Elevator Co., 596 F.2d 84, 87-88 (3d Cir. 1979) (holding that an expert could testify that unguarded elevator buttons constituted a design defect despite the expert's lack of a specific background in design and manufacture of elevators). Although the determination as to whether our evidence rules permit admission of a particular expert's testimony lies within the sound exercise of the trial judge's discretion, see Hisenaj, supra, 194 N.J. at 16, we agree the trial judge mistakenly rested his order excluding Elson's testimony on Elson's lack of expertise in the insurance industry. Any gaps in his conclusions about the damage caused to C&F that were dependent on the jury's understanding of the insurance industry could be supplied by other witnesses or evidence, as N.J.R.E. 703 clearly permits. See, e.g., Indus. Dev. Assocs. v. Commercial Union Surplus Lines Ins. Co., 222 N.J. Super. 281, 296-97 (App. Div. 1988). Consequently, we conclude the trial judge mistakenly exercised his discretion in excluding Elson's testimony solely on the basis of his lack of expertise in the insurance industry.

The judge also excluded Elson's testimony on another premise. The judge recognized that a plaintiff may prove damages

in this context without showing an "actual loss of business" but, because plaintiffs were able to show the loss of business from approximately 180 producers of business, they could no longer take advantage of a looser standard for damages when the claim is a loss of prospective business. We agree, as we have already held, that a looser standard for damages is barred by the application of New York substantive law to this claim.

The trial judge lastly based his determination on Elson's methodology. He said: "[t]here is nothing in his first report or his reply report that supports the proposition that because companies are similarly related by rating agencies and are similar in various respects, that, therefore, they would have grown at the same rate." Our review of the lengthy and detailed reports reveals that Elson compared C&F's actual performance with the actual weighted average performance of peer companies that were sufficiently similar to provide a meaningful comparison for the benefit of the factfinder. Although significantly more complex than other cases routinely heard and considered by our courts, we see nothing more disqualifying about Elson's methodology than we would with an appraiser quantifying an injury to real estate through comparison to another similar parcel of property, or in quantifying an injury to a restaurant by comparing it to another similar restaurant.

See, e.g., RSB Lab. Servs., Inc. v. BSI, Corp., 368 N.J. Super. 540, 551-53 (App. Div. 2004).

Elson identified those business lines most susceptible to the information disseminated by defendants and then ascertained a similar group of businesses — what he referred to as a cohort group — that compete with C&F in those areas. He then drew conclusions based on the performances of the cohort group in those areas and through consideration of numerous other factors, including historical performance, the ratings provided by entities whose opinions are of a type relied upon in the industry, as well as underwriting strategy, appetite for risk, and product pricing. In calculating the results of these comparisons, Elson determined the weighted average of these cohorts in the specific markets identified and compared that to C&F's performance in those markets to calculate damages. We find nothing disqualifying about Elson's approach.

For the reasons we have outlined, we draw the following conclusions. First, Elson's expert testimony is barred by the application of New York law. But, second, if New Jersey substantive law governed plaintiffs' common law claims, a different conclusion may have been warranted[49] because it has not

[49] As a matter of New Jersey law, a plaintiff's inability to fix "with precision" its lost-profits damages may not always (continued)

been shown that Elson lacked the necessary qualifications or that he provided only net opinions.[50]

(continued)
preclude a recovery of damages, as we have held in different settings. See V.A.L. Floors, Inc. v. Westminster Communities, Inc., 355 N.J. Super. 416, 424 (App. Div. 2002) (quoting Inter Med. Supplies v. EBI Med. Sys., 181 F.3d 446, 463 (3d Cir. 1999)). That is, our courts have held at times that "mere uncertainty as to the amount [of damages] will not preclude the right of recovery." Tessmar v. Grosner, 23 N.J. 193, 203 (1957); see also Am. Sanitary Sales Co. v. State, Dep't of Treas., Div. of Purchase & Prop., 178 N.J. Super. 429, 435 (App. Div.), certif. denied, 87 N.J. 420 (1981). These authorities do not expressly hold that this looser standard would apply to a tortious interference with prospective economic advantage, and we need not determine here whether it should.

[50] Although not necessary for our disposition of this aspect of the appeal, we would further observe in the interest of completeness that we see no error in the judge's refusal to conduct a hearing regarding the admissibility of Elson's expert testimony. We agree that ordinarily the best practice would be for a trial judge to permit the examination of the scope of an expert's opinion — when its admissibility is challenged — at a pretrial N.J.R.E. 104(a) hearing. See Kemp ex rel. Wright v. State, 174 N.J. 412, 432 (2002). We see no error in the failure to conduct such a hearing here because Elson was examined at great length at his deposition about his methodology and that deposition testimony was available to and considered by the trial judge at the time of his ruling. We have no reason to believe — in light of the voluminous record on appeal — that a N.J.R.E. 104(a) hearing would have better amplified the disputes about his expert testimony; indeed, it seems to us that in this particular instance the efficient administration of justice would have been disserved if such a hearing were conducted.