Not Reported in A.2d, 2007 WL 3119454 (N.J.Super.A.D.)
(Cite as: 2007 WL 3119454 (N.J.Super.A.D.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Foster NASSY and Shirley Nassy, Plaintiffs-Appellants/Cross-Respondents,
v.
PATTERSON-KELLEY CO., General Machine Co. of New Jersey, Inc., Champion Trading Corp., Keith Machinery Corp., Patterson Pump Co., Lowe Industries, Inc., O'Hara Technologies, Inc., Paul O. Abbe, Division of Aaron Process Equipment Co., Defendants,
and
Louisville Ladder Group, LLC, Defendant-Respondent/Cross-Appellant.
Argued Oct. 2, 2007.
Decided Oct. 26, 2007.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, L-4119-02.
Eric D. Katz argued the cause for appellants (**Mazie** Slater Katz & Freeman, attorneys; Mr. Katz, of counsel; Mr. Katz and Randee M. Matloff, on the brief).

Joseph DiRienzo argued the cause for respondent (DiRienzo & DiRienzo, attorneys; Joseph DiRienzo , on the brief).

Before Judges COBURN, GRALL and CHAMBERS.

PER CURIAM.

***1** In this personal injury, products liability case, the jury returned its verdict by answers to specific interrogatories. In answer to the first two questions, the jury found that the product had a design defect but it was not a proximate cause of the accident; and in answer to the second two questions, the jury found that the product had inadequate warnings but they were not a proximate cause of the accident. Plaintiffs' motions for judgment notwithstanding the verdict or a new trial were denied, and plaintiffs appeal, offering the following arguments:

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS JNOV OR A NEW TRIAL ON PROXIMATE CAUSE AS THIS ISSUE WAS PREDETERMINED AS A MATTER OF LAW ONCE THE JURY FOUND A DESIGN DEFECT.

POINT II

THE TRIAL COURT'S DENIAL OF PLAINTIFFS' IN LIMINE MOTION TO BAR EVIDENCE RELATED TO COMPARATIVE NEGLIGENCE COUPLED WITH A CONFUSING JURY CHARGE ON PROXIMATE CAUSE RESULTED IN JURY CONFUSION RELATED TO THE PROPER CONSIDERATION OF MR. NASSY'S CONDUCT AS A POSSIBLE INTERVENING CAUSE.

POINT III

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS JNOV OR A NEW TRIAL ON FAILURE TO WARN PROXIMATE CAUSE.

A. Plaintiffs Were Entitled To A Directed Verdict Because Louisville Did Not Rebut The Heeding Presumption.

B. Assuming The Trial Court Correctly Determined That The Heeding Presumption Was Properly Before The Jury, The Court's Charge Misallocated The Burden Of Proof As Though The Defendant Had Been Granted A Directed

Verdict On This Issue.

Defendant cross-appealed, claiming that the judge erred by (1) admitting an accident report into evidence as substantive proof in support of plaintiffs' case; (2) failing to dismiss plaintiffs' case on the ground that their liability expert's testimony was a net opinion; and (3) rejecting plaintiff's comparative negligence as a defense.

I

On August 30, 2001, plaintiff Foster Nassy was working, as he had been for a number of years, as a quality control inspector for Nutro Laboratories, a vitamin manufacturing company in South Plainfield. His job included inspecting a ten cubic foot blender, which is shaped in a "V" and has two barrels. The smaller barrel could be examined from the ground, but, according to Nassy, his routine practice for inspecting the larger barrel was to climb a "rolling" ladder. This ladder had wheels that would not move while a person was standing on it and was about 30 inches high, 18 inches wide, and had three steps. To inspect the larger barrel, Nassy would step from the ladder onto the blender's horizontal support beams, which were about five feet off the ground. After inspecting the larger barrel, he would step back on the ladder and climb to the floor. He did not expect that the ladder could move as he stepped down onto the top step. Rather, he believed that the ladder would lock in place once he stepped on to it. Nassy's testimony that it was his practice to use the ladder to inspect the blender was contradicted by his supervisor, who testified that Nassy inspected both barrels while standing on the ground, and that if she had seen Nassy using a ladder to climb onto the blender, she would have stopped him.

***2** On August 30, Nassy was found laying unconscious on the floor of the blending room two feet to the left of the blender. Defendant's "rolling" ladder was two feet to Nassy's left. As a result of his head hitting the floor, Nassy suffered permanent neurological impairment, among other injuries. Nassy had no recollection of the accident, and no one saw him fall. Apart from Nassy's testimony about the way he routinely inspected the blender barrels, the only evidence he offered about how this accident actually happened was a report prepared the day after the accident by one of Nutro's supervisors, who had the responsibility for investigating accidents and filing reports on them with the company. The only description of the accident in this one-page report is this:

> [NASSY] FELL FROM SUPPORT OF SMALL BLENDING MACHINE[,] STRIKING FOREHEAD AND NOSE ON GROUND (WAS ATTEMPTING TO STEP FROM SUPPORT BEAM TO ROLLING LADDER-LADDER ROLLED AWAY. NASSY LOST BALANCE AND FELL.)

The writer of the report did not testify, and there is no indication in the record of the source for the information contained in that report, or, indeed, if there was a source at all. In other words, the report may have been nothing but the writer's conjecture. Nonetheless, it was admitted into evidence, over defendant's strenuous objection, as substantive evidence of how the accident occurred.

Plaintiffs' engineering and safety expert testified that defendant's failure to either install a locking mechanism on the wheels, a tilt and roll mechanism, or a guardrail, made the ladder unsafe for its foreseeable and intended purposes. He also opined that the ladder was unsafe because it did not have a sign warning users not to step from the top step of the ladder to another surface or from another surface to the top step of the ladder.

Defendant provided contrary expert testimony to support its contentions that the ladder was reasonably safe for its intended and reasonably foreseeable purposes, and that if the ladder was involved in the accident, the use was not reasonably foreseeable.

At this point, we will turn to the arguments raised by plaintiffs, which can be considered without further reference to the expert testimony.

II

Plaintiffs' first point, that the judge erred in denying their motion for judgment notwithstanding the verdict on the defective design claim, is without merit. The judge properly ruled that the motion was procedurally barred because plaintiffs had not moved for judgment or its equivalent during the trial. *Velazquez v. Jiminez,* 336 *N.J.Super.* 10, 33-34 (App.Div.2000), *aff'd on other grounds,* 172 *N.J.* 240 (2002). Plaintiffs rely on footnote 4 of our opinion in *Velazquez,* which reads as follows:

> We do not hold that a trial judge may never *sua sponte* enter judgment n.o.v. or invite such a motion, even orally. However, in order to support such a ruling there should be clear and compelling reasons grounded in the evidence presented.
>
> ***3** [*Id.* at 34 n. 4.]

But by its own terms, that footnote is limited to *sua sponte* action by the trial judge, which did not occur here. Furthermore, this is not a case in which there were clear and compelling reasons for consideration of plaintiffs' motion on the merits.

Although the judge could have denied plaintiffs' motion solely on procedural grounds, he also found that they were not entitled to judgment on the merits on this point because the jury could have based its verdict of no proximate cause on a finding that Nassy was not using defendant's product when the accident occurred. Plaintiffs argue that the judge erred in that respect. We disagree.

Plaintiffs argue that once a design defect was proven in the circumstances of this case, as the jury so found, proximate cause was predetermined. In support of that proposition, they cite two cases, *Jurado v. Western Gear Works,* 131 *N.J.* 375 (1993), and *Truchan v. Nissan Motor Corp.,* 316 *N.J.Super.* 554 (App .Div.1998). However, neither case is on point. Here, unlike the situation in those cases, one of the defenses was that the product was not being used at all, or, if it was being used as a means of access to the blender's support beams, the fall did not occur in the manner indicated by the accident report.

The trial judge properly recognized that in deciding a motion for judgment notwithstanding the verdict, he was obliged to accept as true the evidence supporting the party defending against the motion, to accord that party the benefit of all legitimate inferences, and to deny the motion if reasonable minds could differ. *Dolson v. Anastasia,* 55 *N.J.* 2, 5-6 (1969); *Lewis v. Am. Cyanamid Co.,* 155 *N.J.* 544, 567 (1998). Since Nassy had no recollection of how the accident happened, there were no known witnesses, and the accident report could have been nothing more than the writer's speculation, the jury was entitled to find that the defect was not a proximate of the accident because Nassy did not fall as a result of the ladder moving.

Plaintiffs' second point is that the charge given was plain error because the jury was "not instructed that proximate cause could only be found lacking if they determined that Mr. Nassy's conduct was the *only* cause of the accident." In that regard, the judge's charge began with this proposition:

> In the course of this trial you heard testimony from defense counsel that Mr. Nassy's conduct was the cause of his accident. I have made a legal determination, and therefore, instruct you that you are not to consider Mr. Nassy's conduct on any issue that you-you have to decide in the course of your deliberations, except that Mr. Nassy's conduct may be considered by you on the issue of proximate cause. That is, whether the plaintiff's conduct was an intervening cause. I will explain that further in this charge.

The judge's explanation of an intervening cause included this statement: "To be an intervening cause, the independent act must be the immediate and sole

cause of the accident." And the judge also charged that reasonably foreseeable conduct could not be considered as a proximate cause.

***4** Although this charge was not given in the precise words of the model jury charge on which plaintiffs now rely, Model Jury Charge (Civil), 5.34G(2), "Products Liability" (1955), we are satisfied that the relevant legal principles were adequately conveyed to the jury.

Plaintiffs' third point concerns the role of the heeding presumption in failure to warn cases. They argue that the judge erred in denying their motions on this issue for a directed verdict and for judgment notwithstanding the verdict or a new trial. While we agree that the judge erred by failing, in these circumstances, to give plaintiff the full benefit of the heeding presumption, the only available relief on this point would be a new trial. We reach the latter conclusion because the jury found a lack of proximate cause and that finding could have been based on a determination that the accident was not caused by Nassy stepping down on to the top step of the ladder. In other words, as noted above, the jury was not obliged to accept the accident report as a true account of this accident.

For purposes of this part of our discussion, we will assume that the opinion of plaintiffs' expert, that the ladder was defective because it did not contain a warning against stepping from or to the top step, was not a net opinion.

In a failure-to-warn products liability case, a plaintiff is entitled to a rebuttable presumption that had an adequate warning been given, he would have followed it. *Coffman v. Keene Corp.*, 133 *N.J.* 581, 603 (1993). To rebut that presumption, defendant must produce evidence that plaintiff would not have heeded the warning. *Ibid.* Here, all the defendant proved was that Nassy knew the ladder could move on its wheels, and not that he knew it could move as he stepped from or to the top step. Since there was no evidence rebutting the heeding presumption, the judge should have determined as a matter of law, that the warning would have been heeded. In essence, the judge should have charged the jury that if the accident occurred as indicated in the accident report, and if the warning should have been on the ladder to make it reasonably safe, proximate cause was present as a matter of law. *Id.* at 603-04; *Sharpe v. Bestop, Inc.*, 314 *N.J.Super.* 54, 67 (App.Div.1998), *aff'd on other grounds*, 158 *N.J.* 329 (1999).

Without entirely admitting that the judge erred on this issue, defendant's response is based, not on the cases involving the heeding presumption, but on its claim that we should consider the ruling harmless error because there are other grounds on which the judgment can be affirmed. Consequently, we turn to the points raised by defendant in its cross-appeal.

Defendant's first point is that that the trial judge erred by admitting the accident report as substantive evidence of how the accident happened. We agree. The issue is governed by *N.J.R.E.* 803(c)(6) (emphasis added), which reads as follows:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation *by a person with actual knowledge or from information supplied by such a person,* if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

***5** Defendant admits that this was a business report, but argues that the statements contained in it describing how the accident happened were not admissible because they were not "made at or near the time of observation by a person with actual knowledge or from information supplied by such a person." *Ibid.* Neither the report itself, nor the other evidence in the case, would support the conclusion that the report writer observed the events. Assuming that the report writer received information

about the accident from another person, there is no indication of who the person was and, more importantly, there is no indication that the person had "actual knowledge" of the happening of the accident. *See Carden v. Westinghouse Elec. Corp.*, 850 *F.*2d 996, 1003 (3d Cir.1982) (declarations of unidentified persons are rarely admitted). When an otherwise admissible business report includes hearsay, the hearsay must be stricken unless it is otherwise admissible itself. *Fagan v. City of Newark*, 78 *N.J.Super.* 294, 319 (App.Div.1963). *Liptak v. Rite Aid, Inc.*, 289 *N.J.Super.* 199 (App.Div.1996), on which plaintiffs rely, is not to the contrary. Although the judge found that the report was reliable, that finding was only sufficient for admissibility of the report in general. We specifically stated in *Liptak* that the "source of the information ... must justify allowing [the statement] into evidence." *Id.* at 219 (citing *Feldman v. Lederle Labs*, 132 *N.J.* 339, 354 (1993). Here, with no clue as to the identity of the source of the information or how the source obtained the information, there was no basis for introducing the statements in question into evidence.

Defendant's next point is that plaintiffs' expert's testimony was a net opinion that ought to have been stricken as requested. However, in presenting that argument, defendant focuses solely on the opinions offered about design defects. Since we have left the jury's verdict undisturbed on that issue, on which defendant prevailed, the point is moot. Since defendant has not argued that the expert's testimony on the failure-to-warn theory was inadmissible, there is no reason for us to consider that subject.

Defendant's last argument is that it was entitled to a full comparative fault charge in this case. Although this was a workplace accident, the defense evidence indicated that the inspection could and should have been done without climbing on the blender at all. Comparative fault is only eliminated in the workplace when the employee has "no meaningful choice." *Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 167 (1979). Here, there was at least a fact question on whether Nassy had a meaningful choice. Therefore, if this case is retried, and the record is essentially the same on this point, comparative fault should be charged to the jury.

Since plaintiffs are entitled to a new trial on the failure-to-warn claim, they are also entitled to offer new evidence on how the accident happened. *Franklin Disc. Co. v. Ford*, 27 *N .J.* 473, 492 (1958); *Murphy v. Implicito*, 392 *N.J.Super.* 245, 256 (App.Div.2007).

***6** The judgment on the design defect claim is affirmed; the judgment on the failure-to-warn defect is reversed and remanded for trial.

N.J.Super.A.D.,2007.
Nassy v. Patterson-Kelley Co.
Not Reported in A.2d, 2007 WL 3119454 (N.J.Super.A.D.)

END OF DOCUMENT