

**RICHARD TIETJEN, ROBERT H. AHRENS, III, and WAINWRIGHT
ESTATES PARTNERS, LLC, Plaintiffs-Appellants,
v.
RICHARD MAZAWAY, ESQ., Defendant-Respondent.**

No. A-1887-10T3.

Superior Court of New Jersey, Appellate Division.

Submitted September 21, 2011.

Decided January 12, 2012.

McKenna McIlwain, LLP, attorneys for appellants (Keith A. McKenna, of counsel and on the brief).

Margolis Edelstein, attorneys for respondent (Emery J. Mishky, of counsel and on the brief; Adrienne Matthews, on the brief).

Before Judges Cuff and Lihotz.

NOT FOR PUBLICATION

PER CURIAM.

Plaintiffs Richard Tietjen, Robert H. Ahrens, III, and Wainwright Estates Partners, LLC (Wainwright) appeal from the summary judgment dismissal of their legal malpractice complaint against their former attorney, defendant Richard Mazaway. On defendant's motion, the Law Division judge concluded plaintiffs' expert rendered a net opinion when analyzing plaintiffs' negligence claims in a commercial real estate transaction. On appeal, plaintiffs challenge the court's determination as error. We disagree and affirm.

These facts are taken from the motion record and viewed in a light most favorable to plaintiffs as the non-moving party. [Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374](#)

[\(2010\); Estate of Komninos v. Bancroft Neurohealth, Inc., 417 N.J. Super. 309, 313 \(App. Div. 2010\).](#)

Wainwright was formed in June 2005 for the purpose of acquiring property for redevelopment in the City of Newark. Wainwright, as the redeveloper, contracted with the City to acquire several lots in Block 3067 to construct multi-family residential structures (the Development Agreement). The Development Agreement, at Section 701 B, contained a provision restricting the redeveloper's transfer of the realty prior to closing title, characterized by the parties as an "anti-flipping" clause.^[1]

JJMR, LLC (JJMR) owned 100% of the stock of Wainwright. In an effort to acquire the realty and assume its redevelopment without violating the "anti-flipping" clause of the Development Agreement, Tietjen and Ahrens created a construction company, Con Ro Construction, LLC, (Con Ro) to acquire JJMR's interest in Wainwright. A contract was drawn proposing JJMR would sell its "membership interest" in Wainwright, including "all interests to and in the [Newark] Property and the Development Agreement," to Con Ro, its "designees or assignees," for one million dollars (the contract). Upon signing the contract, Con Ro paid JJMR a \$25,000 down payment.

The contract included various requirements regarding closing. For example, signing triggered a thirty-day contingency period during which Con Ro could conduct due diligence and was permitted to cancel the agreement. At the close of the due diligence period, Con Ro was required to remit a \$50,000 deposit, then schedule closing, and pay the balance of the purchase price within thirty days. If Con Ro failed to comply, JJMR had the option of cancelling the contract with the forfeiture of the \$25,000 payment, but would return the \$50,000 payment.

Contemporaneously, Con Ro executed a written legal services agreement retaining defendant to provide legal representation. Defendant advised Con Ro to keep him "fully and completely advised to all financing and investor funding matters." On February 8, 2006, defendant reviewed the contract and issued a written statement of concerns, noting the due diligence period ended on April 7, 2006. Defendant advised Con Ro "against going forward with the transaction," and specifically identified the problems posed by the anti-flipping provision of the Development Agreement and JJMR's failure to obtain approval from the City of Newark for the transfer.

In a second correspondence, dated March 1, 2006, defendant reiterated the difficulties posed for plaintiffs by the terms of the contract with JJMR, stating the provisions would likely result in difficulty obtaining financing. This letter also stated plaintiffs accepted the existing terms of the contract with full understanding of defendant's objections and were determined to proceed with the transaction. Defendant's correspondence again reminded Con Ro that the due diligence period expired on April 7, 2006.

At the conclusion of the due diligence period, Con Ro failed to remit the \$50,000 deposit payment. On April 18, 2006, defendant advised plaintiffs that JJMR had demanded payment, which was past due under the terms of the contract. JJMR also sought to schedule closing for

May 8, 2006. A formal written extension does not appear to have been prepared. In any event, plaintiffs advised "an additional week to ten days" was needed and JJMR issued notice that the "'Time is of the Essence' closing date" was set for May 19, 2006.

On May 19, 2006, Con Ro failed to close. Consequently, JJMR declared Con Ro in default, cancelled the agreement, and retained the initial \$25,000 deposit, pursuant to Section 18 B of the agreement. In late May 2006, defendant ceased his legal representation. Plaintiffs retained a different attorney to resurrect the transaction with JJMR. Because of the default, plaintiffs were required to renegotiate with JJMR. They asserted they paid an additional \$200,000 plus approximately \$20,000 in legal fees to their new counsel and "around \$15,000" as legal fees to JJMR to secure the reinstatement.

On March 27, 2007, plaintiffs filed a complaint against defendant alleging he neglected "to timely comply with the timeframes set forth in [the contract], failed to properly advise [p]laintiffs of the same," did not properly explain communications he received on behalf of JJMR, and "failed to account... [and] return" deposited funds related to "other property transactions." Plaintiffs maintain defendant's actions and omissions frustrated their purchase of JJMR's interest in the Development Agreement and Wainwright.

Plaintiffs produced an expert report prepared by Thomas Ambrosio. After reciting a statement of facts and the various legal standards governing professional negligence claims, Ambrosio then set forth a section entitled "The Malpractice of Defendant...." This portion of the report recited various Rules of Professional Conduct governing New Jersey Attorneys (RPC) and Ambrosio concluded defendant deviated from the standards of practice governing legal counsel, which caused plaintiffs to suffer damages, stating:

I conclude, based upon a reasonable degree of certainty, the attorney defendant deviated from the standards of care in [his] representation of plaintiffs. The attorney defendant:

- (1) Failed to timely comply with the time frames set forth in the written agreement...;
- (2) Failed to properly advise [p]laintiffs of the same and to cause the [a]ssignment to remain in full force and effect;
- (3) Failed to explain the significance of the communications from [JJMR's] counsel to [p]laintiffs so as to permit [p]laintiffs to make informed decisions whether to waive the time frames in the [a]ssignment and proceed with the transaction in accordance with its terms.

The communications between [Con Ro] and [JJMR] were through counsel and required the [a]ttorney [d]efendant to timely communicate with his clients so as

to permit them to comply with the deadlines set forth in the [a]greement. This is especially critical in a commercial transaction when the parties do not have the benefit of consumer protection law, but rather are left to their own devices and their representation by counsel and the obligations contained in the written contract. These obligations included compliance with time deadlines and afforded the seller the opportunity to terminate the transaction. The [a]ttorney [d]efendant's failures, as set forth above, proximately resulted in damages incurred by the [p]laintiffs as the result of the lapse of time frames set forth in the written agreement. The sellers exercised their right to terminate the [a]greement. As the result of the [a]ttorney [d]efendant's failure to protect the interests of the [p]laintiffs in the transaction, the [p]laintiffs were required to spend \$200,000.00 and payment of the sellers' counsel fees to reinstate the [a]greement and proceed with the transaction.

At the close of discovery, defendant moved for summary judgment.^[2] Plaintiffs opposed the motion, filing certifications from Ambrosio and Tietjen. Ambrosio's certification noted:

10. I rely upon the Rules of Professional Conduct as a requisite standard of care and the scope of an attorney's duty to the client.

11. My legal analysis is based on the standards of care and duty found in the Rules of Professional Conduct....

Non-adherence to deadlines

15. The Agreement was initially terminated due to the failure to comply with the timely deadlines, which resulted in time-is-of-the-essence to be issued.

16. These delays as Mr. Tietjen testified in his deposition... were due to Mr. Mazawey's delays....

17. As is opined in the report issued by me, dated June 24, 2010, [d]efendant Mazawey violated the applicable professional standard of care to the Plaintiffs.

18. For the reasons set forth herein, the [d]efendant's motion should be denied.

The trial judge concluded Ambrosio's report was a net opinion, after determining the expert merely noted JJMR declared Con Ro in default of the contract and plaintiffs were dissatisfied with defendant's representation without providing factual underpinnings to support a conclusion that malpractice occurred. The motion judge granted summary judgment dismissing plaintiffs' complaint as insufficient to prove defendant deviated from the standard of care. The subsequently filed motion for reconsideration was denied. Plaintiffs appeal arguing the court erroneously determined Ambrosio's report was an inadmissible net opinion.

The admissibility of expert testimony is guided by N.J.R.E. 702 and 703. N.J.R.E. 702 provides that "[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. 703, which provides that "[t]he 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[.]" recognizes that an expert's opinion must be founded on "facts or data[.]" [Hisenaj v. Kuehner, 194 N.J. 6, 24 \(2008\)](#).

Experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." [Landrigan v. Celotex Corp., 127 N.J. 404, 417 \(1992\)](#). They must be able to point to a generally accepted objective standard of practice and "not merely to standards personal to the witness." [Fernandez v. Baruch, 52 N.J. 127, 131 \(1968\)](#). Because an expert's opinion must be founded on facts or data, the "net opinion rule requires an expert witness to give the why and wherefore of his [or her] expert opinion, not just a mere conclusion." [Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 \(App. Div.\), cert. denied, 145 N.J. 374 \(1996\)](#). When an expert opinion is unsupported by factual evidence, it is inadmissible. See *Ibid.* (stating "[a]n opinion lacking foundation is worthless").

A net opinion is one that "present[s] solely a bald conclusion, without specifying the factual bases or the logical or scientific rationale that must undergird that opinion." [Polzo v. Cnty. of Essex, 196 N.J. 569, 583-84 \(2008\)](#) (footnote omitted). See also [Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361 N.J. Super. 22, 43 \(App. Div. 2003\)](#) ("An expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded."). "The net opinion rule has been succinctly defined as 'a prohibition against speculative testimony.'" [Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 525 \(App. Div. 2007\)](#) (quoting [Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 \(App. Div.\), cert. denied, 154 N.J. 607 \(1997\)](#)), cert. denied, 194 N.J. 272 (2008). "Under this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unquantified possibilities." [Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 \(App. Div.\), cert. denied, 122 N.J. 333 \(1990\)](#).

The net opinion rule also "focuses upon '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.'" [Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 \(App. Div. 2001\)](#) (quoting [Buckelew v. Grossbard, 87 N.J. 512, 524 \(1981\)](#)). The doctrine requires an expert's opinion be based on reasonable probabilities. [Buckelew, supra, 87 N.J. at 524](#). "Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience." [Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 \(App. Div. 2002\)](#) (citation omitted).

In [Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 79 \(App. Div. 2007\)](#), we found a proposed expert's report satisfactory when measured against the requirements of the net

proposed expert's report satisfactory when measured against the requirements of the net opinion rule. The report included references to case law, RPCs, cases, and treatises to establish a standard of care and then "identif[ied] the deficiencies he perceived in [defendant]'s preparation of the case and the resulting ill-informed judgments[.]" *Ibid.* The report further explained "[s]uch deviations... constitute[d] a violation" of the legal standards he articulated. *Ibid.* The factual record satisfactorily linked the references to the stated legal standard of care. *Id.* at 80.

Plaintiffs argue the court erred in review of Ambrosio's opinion, which they maintain adequately "analyzed the entire factual record, and further incorporated disputed facts into the analysis and his certification" filed in opposition to summary judgment. They assert the trial judge "imposed an additional standard on the fundamental requirements for an expert's report, one not supported by the case law" and maintain Ambrosio's report recited defendant's failure "to secure time extensions agreed on by Tietjen and [JJMR]," which is the basis of the malpractice claims. We disagree.

Plaintiffs' argument overlooks the critical fact that Ambrosio's report does not draw a proximate cause connection between the alleged negligence and the resultant damages. The contract included specific time frames for compliance and an estimated closing for April 30, 2006. Plaintiffs requested closing be scheduled ten days beyond, on May 8, 2006, and JJMR consented to close on May 19, 2006. While this assent was not incorporated into a written contract extension agreement, no facts show JJMR declined to close on that date or that plaintiffs requested an extension beyond this date.

Unlike the satisfactory report in [Carbis Sales, supra, 397 N.J. Super. at 79](#), Ambrosio's report failed to identify deficiencies in defendant's conduct, why these deficiencies deviated from the standard of care, and how that deviation caused plaintiffs' damages. See [Conklin v. Hannoeh Weisman, 145 N.J. 395, 416 \(1996\)](#) (stating a claim for legal malpractice requires a showing of an attorney-client relationship, a duty of care upon the attorney, a breach of that duty, and proximate causation between the breach and damages incurred). The mere listing of statements of factual history and general principles gleaned from case law and the RPC's without connecting the two will not sustain the conclusion reached.

Ambrosio's report concluded defendant committed malpractice because he failed to comply with time frames set forth in the contract, yet he does not state what deadline defendant missed and ignores that default resulted because plaintiffs did not pay the \$50,000 deposit. Next, the report suggested defendant failed to advise plaintiffs of time frames in the contract, again without mention of what time frame was at issue or the affirmative advice stated in defendant's February 18 and March 1, 2006 letters. Ambrosio's broad assertion that defendant failed to explain the significance of the contract's terms to allow plaintiffs to determine whether to proceed with the contract is belied by defendant's documentary evidence. Finally, defendant's omission to obtain a written extension of the contract is not linked to plaintiffs' suffered loss, as JJMR at all times complied with the stated extension.

Absent the identification of an act or omission that failed to conform to an articulated

Absent the identification of an act or omission that failed to conform to an articulated professional standard resulting in damages, the report lacks the "why and wherefore" amounting to a bare conclusion of professional negligence. [Froom v. Perel, 377 N.J. Super. 298, 313 \(App. Div.\)](#) (holding plaintiffs "must present evidence to support a finding that defendant's negligent conduct was a `substantial factor' in bringing about plaintiff's injury, even though there may be other concurrent causes of the harm"), certif. denied, [187 N.J. 267 \(2005\)](#).

Plaintiffs' second contention is the grant of summary judgment was error because the judge did not consider certifications of contested facts submitted in opposition to summary judgment. Plaintiffs maintain the judge "failed to consider the expert's certification and the certification of... Tietjen[.]" This contention lacks merit.

Ambrosio's statement that the delays mentioned by Tietjen were defendant's delays. The statements by Tietjen cited by Ambrosio neither defined what was delayed nor articulated any result from the claimed delay, making it impossible to discern whether defendant's conduct proximately caused plaintiffs' harm. See [Aldrich v. Hawrylo, 281 N.J. Super. 201, 214 \(App. Div. 1995\)](#) (stating in legal malpractice cases, expert testimony is generally required to discern the skill and ability of ordinary lawyers); [Vort v. Hollander, 257 N.J. Super. 56, 61 \(App. Div.\)](#) (holding "expert testimony was... required to establish that plaintiff's malpractice was the proximate cause of damage to the defendants"), certif. denied, [130 N.J. 599 \(1992\)](#).

We find no basis to disturb the trial judge's conclusion that Ambrosio's report was a net opinion, which was inadmissible. Accordingly, summary judgment was properly granted.

Affirmed.

[\[1\]](#) We are unable to actually review the clause as set forth in the Development Agreement because portions of the copy included in the record have been obstructed.

[\[2\]](#) It is noted that plaintiffs initially missed the deadline to file an expert report and defendant first moved for summary judgment motion. The motion was denied and plaintiffs were given additional time to do so. Defendant unsuccessfully sought leave to appeal. Thereafter, plaintiffs produced Ambrosio's June 24, 2010 report.

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