

Guide to Expert Testimony in Malpractice Cases Against Real Estate Professionals

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While it is true that expert testimony can be a critical tool for a litigator in any type of case, we have noticed a growing trend in New Jersey's trial courts toward the requirement of expert testimony in real estate litigation involving malpractice claims against real estate professionals. In this article, we review different strategies regarding expert testimony that attorneys can use to tilt the balance of the case in their favor.

Generally, expert testimony as to the standard of care owed by a defendant is not a requirement in all cases, with the exception of medical malpractice cases. However, courts will require expert testimony when the issue at bar is so esoteric that it would require a jury to improperly speculate or draw impermissible inferences. *Townsend v. Pierre*, 221 N.J. 36, 53 (2015). The seminal case on the issue of the standard of care owed by a real estate broker is *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426 (1993). In *Hopkins*, the New Jersey Supreme Court found that expert evidence may be necessary to clarify for a jury the standard of care expected from a reasonable real estate broker. Ultimately, however, the court in *Hopkins* held that a jury is capable of determining whether an obscured step was a dangerous condition without the assistance of experts because the hazard was relatively commonplace and ordinary.

In practice, the decision of when to disclose an expert report is critical. Often in professional malpractice suits, the deadline for a party to exchange its expert report is dictated by a case management order, which normally requires the plaintiff to exchange its expert report during the discovery period, before the defendant's report is due. However, these deadlines can serve another purpose as well. For example, when the plaintiff fails to serve its expert by the deadline prescribed in the case management order, the defendant is left with an important decision. On the one hand, the defendant can immediately file a motion to preclude the plaintiff from offering any expert testimony at trial. On the other hand, the defendant could decide to hold off on filing a timely motion for summary judgment until the case is closer to trial.

The benefit to the first course of action is that, if the motion is granted, it can be used as an early attack that can cripple a plaintiff's case where expert testimony is required. In this scenario, the defendant can then quickly move for summary judgment on the basis that the plaintiff cannot sustain its burden of proof without expert testimony. The downside is that by doing so, it can alert the non-compliant adversary of his omission, and the court will likely permit a late filed report, if it is done within the discovery end date. Even if an early motion

to preclude is denied and discovery is, alternatively, extended, the party moving to preclude its opponent's expert report should craft its argument to establish that the "law of the case" requires the opposing party to produce expert testimony to satisfy its burden of proof. That way, there is still an opportunity to file a motion for summary judgment at the close of discovery if the opponent's expert report is a net opinion.

We have recently seen multiple examples of these strategies playing out in the New Jersey trial courts. In our exemplar case, the plaintiffs are the buyers of a home in Bergen County, and they sued the defendant sellers and sellers' agents for claims sounding in fraud, fraudulent concealment, violation of the Consumer Fraud Act and negligent misrepresentation. The plaintiffs' claims arose out of allegations that the defendants made misrepresentations as to the existence of ongoing litigation between the homeowners' association and a nearby Native American reservation. Specifically, the plaintiffs alleged that the defendants made misrepresentations which concealed the fact that the ongoing litigation would increase the homeowners' association dues and fees, and lower the value of the property. The plaintiffs exchanged very limited discovery prior to the discovery end date and, importantly, did not produce an expert report opining as to the liability of the defendants-sellers' agents.

At the close of discovery, the defendants-sellers' agents moved for summary judgment arguing, *inter alia*, that the plaintiffs could not prove the agents breached a duty of care owed to them without expert testimony. The trial court ultimately found that specific fraudulent misrepresentations and concealment to induce the purchase of

the property are within the common knowledge of an average jury. Therefore, those claims could proceed because expert testimony was not required. However, the trial court decided that expert testimony was necessary to clarify for a jury the standard of care expected from a reasonable real estate agent.

When expert testimony is not necessary, the standard of care can be derived from applicable statutes and regulations. For example, N.J.A.C. 11:5-6.4 provides that real estate brokers shall "make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency." The regulation further provides that the broker must at least inquire of the "seller or seller's agent any physical conditions that may affect the property" and conduct "a visual inspection of the property to determine if there are any readily observable physical conditions affecting the property." N.J.A.C. 11:5-6.49(b)(1)(i) and (ii).

However, in the exemplar case, the trial court noted that the standard of conduct found in the above regulations does not explicitly provide what duty a seller's real estate broker may have to a buyer. Furthermore, the regulation focuses on matters regarding physical and potentially observable conditions of the property. Here, issues as to ongoing litigation would clearly not be readily observable through visual inspection or become known through inquiry to the sellers about any physical conditions affecting the property. Therefore, the court decided that the regulations were inapplicable.

The court further held that expert evidence is necessary to demonstrate and clarify for a jury the selling broker's obligation and the standard of care expected. This is because a trier of fact would not be reasonably expected to intuitively grasp the responsibilities and obligations of a third party with no privity of contract with the plaintiff buyers. Accordingly, the plaintiffs' claims for negligent misrepresentation were dismissed because they did not produce an expert report during the discovery period.

Overall, while a litigator in a professional liability matter should constantly evaluate each claim separately and continuously weigh the strengths and weaknesses of his or her cases, that lawyer should always

consider the importance of expert testimony to establish a duty of care and the pitfalls that may exist if an expert report is not produced. Further, the litigator should determine the ability to challenge an expert for the failure to produce an expert opinion and the best time to press those potential motions.



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