NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5103-14T4

SATEC, INC. and SATEC, LLC,

Plaintiffs-Appellants,

v.

THE HANOVER INSURANCE GROUP, INC., CITIZENS INSURANCE COMPANY OF AMERICA, GRINSPEC INSURANCE AGENCY, INC. D/B/A CENTRIC INSURANCE AGENCY AND LEE NESTEL,

Defendants-Respondents,

and

THE HANOVER INSURANCE GROUP, INC., CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants/Third-Party Plaintiffs-Respondents,

v.

PATRICK SPINA,

Third-Party Defendant.

APPROVED FOR PUBLICATION

June 7, 2017

APPELLATE DIVISION

Argued December 7, 2016 – Decided June 7, 2017

Before Judges Alvarez, Accurso and Manahan.[1]

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[1] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017, and the matter (continued)

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-0799-12.

David Jaroslawicz (Jaroslawicz & Jaros) of the New York bar, admitted pro hac vice, argued the cause for appellant (Jaroslawicz & Jaros, PCCL, attorneys; Elizabeth Eilender, on the briefs).

Jason S. Feinstein argued the cause for respondents Grinspec Insurance Agency, Inc. d/b/a Centric Insurance Agency and Lee Nestel (Eckert Seamans Cherin & Mellot, LLC, attorneys; Mr. Feinstein, of counsel and on the brief; Jill R. Cohen, on the brief).

Craig M. Terkowitz argued the cause for respondents The Hanover Insurance Group, Inc. and Citizens Insurance Company of America (Law Offices of Terkowitz & Hermesmann, attorneys; Mr. Terkowitz, on the brief).

The opinion of the court was delivered by

MANAHAN, J.A.D.

Satec, Inc. and Satec, LLC (collectively, Satec), appeal from the July 1, 2015 order granting summary judgment in favor of defendants Grinspec Insurance Agency, Inc. d/b/a Centric Insurance Agency and Lee Nestel (collectively, Centric) and The Hanover Insurance Group, Inc. and Citizens Insurance Company of

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(continued)
proceeded as a two-judge panel pursuant to Rule 2:13-2(b). Prior to making its determination, the panel elected to call a third judge to participate in the decision, in accordance with Rule 2:13-2(b). The parties have consented to the addition of Hon. Carmen H. Alvarez to the panel, and have waived reargument.

America (collectively, Hanover). The negligence and professional malpractice action arose from damage sustained to Satec's real and personal property as a result of Hurricane Irene. After our review of the record and applicable law, we affirm.

We discern the following facts from the motion record, viewed in a light most favorable to plaintiffs as the non-moving parties. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Satec is a distributor of electricity measurement meters. In 2003, Satec acquired a warehouse and business offices in Union County, New Jersey (the property). In 2007, Satec sought the counsel and advice of Centric, an independent insurance brokerage agency, relative to its desire to insure the property. Satec's office manager, Lourdes Gordillo, met with Nestel, President of Centric. As part of Nestel's presentation to Satec, he provided Gordillo with a letter dated April 20, 2007, which contained an insurance proposal from Hanover, the underwriter of the insurance policy. In the letter, Nestel noted that Satec should review the proposal regarding coverage limits and exclusions:

> Please review the entire proposal carefully with particular attention to the property limits on the proposal and advise me if you would like to increase coverage. Please also review the [r]ecommendations section following this letter. The

> [r]ecommendations section lists insurance coverage NOT included in this proposal. Please advise if you would like us to pursue a quotation for insurance coverage not included in this proposal.

The "recommendations section" was enclosed in a separate document titled, in bold lettering, "Recommendations & Important Insurance Information[.]" That document stated in bold lettering, "Note: The insurance coverage outlined below is not included in your present insurance program. Please contact [Centric] to receive additional information regarding these coverage items and to obtain pricing information[.]" (emphasis in original). Under the portion of the letter labeled "list of insurance coverage not included in your present insurance program," was "Flood & Earthquake Coverage[.]" Those coverages were described as "coverage for flood (including surface water accumulation) and earthquake." The letter specifically advised that "these two perils are excluded under a standard property policy."[2]

Satec ultimately purchased several policies from Centric, including the Business Owners Policy (BOP), which was underwritten by Citizens, a subsidiary of Hanover. The BOP was issued for the period from May 1, 2007 to May 1, 2008, and included in a separate section the following "Exclusions":

[2] Hanover did not write flood insurance.

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

. . . .

(g) Water

(1) Flood, surface water, . . . overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

. . . .

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

(5) Waterborne material carried or otherwise moved by any of the water referred to in paragraph 1., 3. or 4., or material carried or otherwise moved by mudslide or mudflow.

On May 3, 2007, Centric sent a letter to Satec regarding its newly implemented BOP. In the cover letter, Centric stated,

in bold and underlined font, "[p]lease review the attached Recommendations and Important Information flyer for insurance coverage not included in your present insurance program and other factors affecting your insurance," which was enclosed with the letter. The cover letter also noted in the opening paragraphs, "[a]lthough your policy is a broad contract, there are limitations, conditions and exclusions that may affect your recovery in the event of a claim. There are other coverage restrictions outlined in your policy as well."

Thereafter, Satec renewed the policy annually through May 1, 2012. Prior to each renewal, Centric sent Satec written correspondence advising about the upcoming renewal and/or new policy options. Included in each of the letters was the same "Recommendations & Important Insurance Information" document.

On August 28, 2011, the property was flooded due to Hurricane Irene, which resulted in property damage to the building in an alleged amount of $2.3 million. Satec filed a claim seeking coverage from Hanover. Upon receipt of the claim, Hanover conducted an investigation, wherein it determined that the flooding and consequential damage was occasioned by an overflow from the Rahway River, an incident not covered, as specifically excluded, by the BOP.

Sometime prior to the loss, Hanover became aware that the property was located in a flood hazard zone after it conducted a loss control inspection. Hanover did not disclose this information to Satec or Centric. As well, when Satec purchased the property in October 2003, its counsel (a third-party defendant not participating in this appeal) undertook steps to determine if the property was in a flood zone prior to the title closing, which revealed the property was designated a flood hazard area.[3]

Satec filed a complaint on February 28, 2012, and an amended complaint on March 22, 2012, against Centric, Nestel, Hanover and Citizens. In its amended complaint, Satec alleged breach of contract, negligence and professional malpractice, among other claims. Centric, also on behalf of Nestel, filed its answer on May 4, 2012. Hanover, also on behalf of Citizens, filed its answer on September 11, 2013. Following discovery, defendants moved for summary judgment. The trial court held oral argument on June 22, 2015. On July 1, 2015, after finding Satec's expert provided an inadmissible net opinion, the court

[3] It is disputed whether its counsel informed Satec. Counsel was named as a defendant in the third-party complaint. The complaint was later dismissed without prejudice. We have not considered in our determination whether Satec had knowledge of the flood area designation.

granted summary judgment in favor of defendants in an eleven-page written decision. This appeal followed.

Satec raises the following points on appeal:

POINT I

UNDER ESTABLISHED NEW JERSEY LAW, AN INSURANCE PRODUCER/BROKER OWES A FIDUCIARY DUTY TO ADVISE THE INSURED.

A. No Expert is Needed to Establish that the Defendants Breached Their Duty.

B. Defendants' Expert Concedes that a Broker Has a Duty to Advise.

C. If Plaintiff Had Moved for Summary Judgment, the Court Would Have Had to Grant its Motion.

POINT II

STANLEY HLADIK'S EXPERT OPINION IS VALID.

A. Experience and Credentials.

B. Mr. Hladik's Expert Opinion is Based on Experience, Knowledge, Standard Forms, and the Facts.

POINT III

HANOVER IS VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF ITS AGENTS, CENTRIC AND NESTEL.

Satec raises these additional points in its reply brief:

POINT I

THE ISSUE OF WHETHER A BROKER'S DUTY MAY BE ESTABLISHED WITHOUT AN EXPERT WAS RAISED IN THE LAW DIVISION.

POINT II

MR. HLADIK'S OPINION WAS NOT PERSONAL ONLY TO HIMSELF.

POINT III

MATERIAL ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT.

POINT IV

THE COURT SHOULD NOT CONSIDER ARGUMENTS NOT REACHED BY THE COURT BELOW.

We review a grant of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates there is "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill, supra, 142 N.J. at 540). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court

correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008)).

In this matter, Satec claims that there were matters in dispute and sufficient evidence in the discovery record to demonstrate Centric was professionally negligent in breaching its duty to procure adequate insurance to meet its needs, namely flood insurance. We disagree.

We commence our discussion with a review of the duty of care insurance brokers and agents owe to insureds. "[A]n insurance broker owes a duty to his principal to exercise diligence in obtaining coverage in the area his principal seeks to be protected." Werrmann v. Aratusa, Ltd., 266 N.J. Super. 471, 474 (App. Div. 1993) (citing Rider v. Lynch, 42 N.J. 465, 476 (1964)). An insurance broker's liability for negligent acts affecting an insured has been addressed by our Supreme Court:

> Insurance intermediaries in this State must act in a fiduciary capacity to the client "[b]ecause of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies." Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 260 (App. Div. 1987) (quoting Sobotor v. Prudential Prop. & Cas. Ins. Co., 200 N.J. Super. 333, 341 (App. Div. 1984)); see also

> N.J.A.C. 11:17A-4:10 ("An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business."). The fiduciary relationship gives rise to a duty owed by the broker to the client "to exercise good faith and reasonable skill in advising insureds." Weinisch v. Sawyer, 123 N.J. 333, 340 (1991).
>
> [Aden v. Fortsh, 169 N.J. 64, 78-79 (2001) (alteration in original).]

Moreover, the Court delineated that the scope of an insurance broker's obligations to a prospective insured requires insurance brokers: "(1) to procure the insurance; (2) to secure a policy that is neither void nor materially deficient; and (3) to provide the coverage he or she undertook to supply." President v. Jenkins, 180 N.J. 550, 569 (2004) (citing Rider, supra, 42 N.J. at 476). However, "[t]he duty of a broker or agent . . . is not unlimited." Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Group, Inc., 135 N.J. 182, 190 (1994).

I.

In support of its claim of malpractice, Satec retained Stanley Hladik as its expert. In furtherance of his retention, Hladik produced a written report in which he opined that, based upon deviation from accepted standards, Centric negligently failed to procure flood insurance on behalf of Satec. In his deposition testimony, Hladik testified consistently with his report. Centric sought to bar Hladik's testimony by motion,

which was granted. The judge held that Satec's liability expert should be excluded as having produced a "net opinion" and that, in the absence of expert testimony, Satec could not prove as a matter of law its negligence and malpractice claims.

The decision to admit or exclude expert testimony is left to the sound discretion of the trial court. Townsend, supra, 221 N.J. at 52 (citing State v. Berry, 140 N.J. 280, 293 (1995)). It will be reversed only upon a showing that that discretion was abused. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). We review a summary judgment motion premised on an evidentiary ruling in the same sequence as the trial court, "with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Townsend, supra, 221 N.J. at 53 (citing Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010)).

It is well-established that the trial court "must ensure that [a] proffered expert does not offer a mere net opinion." Pomerantz, supra, 207 N.J. at 372. Such an opinion is inadmissible and "insufficient to satisfy a plaintiff's burden on a motion for summary judgment." Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 244 (App. Div. 2013) (citing Polzo v.

Cty. of Essex, 196 N.J. 569, 583-84 (2008); Smith v. Estate of Kelly, 343 N.J. Super. 480, 497-98 (App. Div. 2001)).

"[O]pinion testimony 'must relate to generally accepted . . . standards, not merely standards personal to the witness.'" Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999) (quoting Fernandez v. Baruch, 52 N.J. 127, 131 (1968)). Stated in other words, expert testimony must be based upon a consensus of the involved profession's recognition of the standard defined by the expert. Ibid. There must be some evidential support offered by the expert to establish the existence of the standard. Buckelew v. Grossbard, 87 N.J. 512, 528-29 (1981).

"[I]f an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is personal, it fails because it is a mere net opinion." Pomerantz, supra, 207 N.J. at 373 (citation and internal quotation marks omitted). Indeed, we have stressed that because of "the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." Townsend, supra, 221 N.J. at 55.

In reaching the determination to bar Hladik's report, the judge held:

> In the present matter, the expert opinion of Stanley Hladik testifies as to

> his personal opinion only, and his report and testimony shall be barred as net opinion. Hladik states that his opinion is based upon his [twenty-five] years of personal experience in the insurance industry, as well as a review of the document discovery and deposition testimony that has taken place in this litigation. Not once in his report, however, does Hladik cite to a single objective industry standard or authoritative treatise.
>
> . . . Throughout his report, Hladik states what he believes to be the standard of care for insurance brokers in New Jersey. The statements, however, are conclusory, and do not state how Hladik determined what the standard of care for an insurance broker in New Jersey is. Instead, Hladik merely states, "[i]n New Jersey, the standard of care for a broker includes making sure that the client (insured) understands exactly what types of insurance they need and is available;" that, "[i]t is the standard of care in the industry for brokers to, at the very least, make a physical loop of the premises either before or after meeting with the client;" and that, "[i]t is my opinion that [Nestel] had a duty to advise Satec that the property was located in a flood zone, discuss what flood coverages were available and if Satec declined coverage, to have Satec decline any flood coverage in writing at the time of the initial placement of their risk in May 2007." . . . These statements were made without any qualifying explanations, nor were they supported by any written document, supporting case law, or other objective custom accepted by the insurance producer community. Instead, Hladik's report offers opinions that are personal to him.

The crux of Hladik's report and testimony was that Centric deviated from the accepted standards by failing to make a

physical loop of the premises to determine the potential risks, to assure that Satec understood exactly what types of insurance it needed, to explain in writing the gaps in coverage, and to ascertain the property's flood zone status and advise Satec accordingly.

Although Hladik testified that, in his experience, the referenced standard of care in his report is applicable to insurance brokers, his personal experience is not a substitute for an industry standard or practice. "[A]n expert offers an inadmissible net opinion if he or she cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is personal." Davis, supra, 219 N.J. at 410 (internal quotation marks omitted) (quoting Pomerantz, supra, 207 N.J. at 373).

During his deposition, Hladik testified relative to the issue of a standard:

> Q: Is there a treatise or any other written authority that you view as being one that sets forth the standard of care as it relates to flood insurance for an insurance producer?
>
> . . . .
>
> A: I don't know a specific book that someone has come out and written. I know what my experiences in the field are.
>
> . . . .

Q: Other than your personal experience . . . can you point me to any written materials that you're aware of that talk about an insurance producer's duties or obligations to an insured as it relates to the subject of flood insurance?

A: I don't think one written just based on flood insurance, but there's lots of materials that circulate based on standard of care of all coverages.

Q: Okay. And what written materials do you consider authoritative as it relates to standard of care?

A: I would read many insurance trade journals. There's magazines and other things that come out all the time and people who have experience in the field write articles, and they opine on the subject, and I've gathered all this knowledge over [twenty-four-and-a-half years] and I form my own opinion as to that care.

. . . .

Q: [] Do you consider publications from Big I[, an insurance trade journal,] as to the standard of care of an insurance producer to be authoritative?

. . . .

A: [] My experience is what I've dealt with, with peers in the business and clients in the business and going through these transactions thousands of times, so that's what develops my standard of care. So the written material is what it is. It's part of that whole process.

. . . .

Q: [] And other than your personal experience, can you point me to any other source of authority that says that the standard of care requires a writing?

A: My source of authority is my experience. I do this every day. My peers do it every day. It's what we do. It's how we do it. And it's what the clients deserve for their money. That's the standard. That's the best practices. That's what you are supposed to do.

. . . .

Q: [] In your business, are there certain treatises, publications that are considered the bible, you know, considered really authoritative?

. . . .

A: What's really considered in my business, and it's funny because I asked almost every person in the [nineteen] years I've been at Hanson & Ryan . . . this question is what you learn in school and in getting your license is probably ten percent of what you need to know. The other [ninety] percent is doing it, learning from mentors and realizing what you have to do to do your job.

Q: Okay.

A: So that is where you learn it.

Q: So the answer would be no?

A: Through experience. The answer is no.

Q: There is no one authoritative text for your business?

> A: I'm sure there's probably [twenty] out there, but nobody I know corresponds to them. You learn on the job, and you're trained, and that's how you get experience.

Evidential support for an expert opinion may include what the expert has learned from personal experience and training; however such experience, in turn, must be informed and given content and context by generally accepted standards, practices, or customs of the insurance industry. See N.J.R.E. 702. Here, Hladik presented no authority supporting his opinion. There was no reference made to any document, any written or unwritten custom, or established practice that the broker/agent community recognized as a duty it owes insureds.[4] Nowhere in Hladik's report or testimony does he identify the source of the standard of care enunciated, including decisional law, by which to measure plaintiff's claimed deficiencies or to determine whether there was a breach of duty owed defendant. Notwithstanding Hladik's extensive experience in the insurance industry, boiled down to its essence, Hladik's opinion is infirm as comprised of conclusory determinations that defendants departed from the

[4] Experts may base their opinions upon unwritten industry standards without violating the net opinion doctrine. See, e.g., Davis, supra, 219 N.J. at 413 (quoting Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001)) (recognizing that the expert's conclusions might not have been inadmissible net opinion if he had referenced an "unwritten custom" of the industry).

standard of practice among New Jersey insurance brokers based on his personal view of that standard. See Pomerantz, supra, 207 N.J. at 373.

II.

Satec further contends the court erred in finding that, without an expert, it could not demonstrate Nestel breached his duty to advise Satec as to the need for flood insurance. We review de novo the legal consequences of the exclusion of the expert opinion as it effects Satec's ability to establish liability. Townsend, supra, 221 N.J. at 59 (citing Davis, supra, 219 N.J. at 405). Contrary to Satec's assertions, given the discrete factual scenario presented herein, we hold that it is not "common knowledge" whether Centric's actions constituted a deviation from the accepted standard of care of a New Jersey insurance producer. See Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 702 (2017) ("[A] jury should not be allowed to speculate without the aid of expert testimony in an area where laypersons could not be expected to have sufficient knowledge or experience.").

Our court has instructed that the common knowledge doctrine is to be construed narrowly. Hubbard v. Reed, 168 N.J. 387, 395-96 (2001). It applies where "jurors' common knowledge as lay persons is sufficient to enable them, using ordinary

understanding and experience, to determine a defendant's negligence without the benefit of specialized knowledge of experts." Id. at 394 (citation and internal quotation marks omitted). Ordinarily, insurance brokerage is a field beyond the ken of the average juror. Thus, in the insurance coverage context, the common knowledge doctrine is limited to "obvious" cases of negligence where a broker's conduct does not comport with Rider, supra, 42 N.J. at 476. See, e.g., Bates v. Gambino, 72 N.J. 219, 226 (1977) (per se negligence established where broker lacked knowledge required by law); Dimarino v. Wishkin, 195 N.J. Super. 390, 393 (App. Div. 1984) (per se negligence established where broker failed to procure coverage and notify the client once the coverage could not be obtained).

Here, unlike in Bates and Dimarino, the issue of breach of duty does not rest upon "obvious" conduct such as a lack of knowledge by Centric or its failure to procure requested coverage or notify Satec that the requested coverage could not be obtained. See Bates, supra, 72 N.J. at 225-26. Accordingly, expert testimony was required to assist the jury relative to the intricacies of the fiduciary relationship between Centric and Satec, and any breach of duty that may have occurred. See Triarsi v. BSC Group Servs., LLC, 422 N.J. Super. 104, 115-16 (App. Div. 2011).

III.

Finally, Satec argues Hanover is vicariously liable for the negligence of Centric based on the existence of an agency relationship between the two parties, whereby Hanover, the principal, was at all times vicariously liable for the negligent acts of its agent. In the alternative, Satec further argues Centric is Hanover's agent under a theory of apparent authority. Satec also notes that the judge failed to address this issue while deciding summary judgment in favor of defendants. We hold that the first argument finds no support in the law and the second argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

This court has held that "[a]s a matter of elementary agency law, the negligence of an employee-agent is imputable to the employer-principal, who must answer for it." Johnson v. Mac Millan, 233 N.J. Super. 56, 61 (App. Div.), remanded on other grounds, 118 N.J. 199 (1989). "It has long been recognized[,]" however, that imputation will not apply where "in the case of an independent broker placing insurance for a client with an insurance company." Id. at 62. For example, we have held that when a broker "undertook to evaluate a client's insurance needs and to make recommendations[,] it was acting not as the agent for any one of the several insurers it represented but only for

[his or her] own client." Id. at 63; see also Mazur v. Selected Risks Ins. Co., 233 N.J. Super. 219, 226 (App. Div. 1989); Avery v. Arthur E. Armitage Agency, 242 N.J. Super. 293, 300-01 (App. Div. 1990). Therefore, the actions of the broker were not, by application of respondent superior, negligence of the insurer it represented. Johnson, supra, 233 N.J. at 62.

Applying these governing principles, we are unpersuaded by Satec's argument that Hanover should be held vicariously liable for the alleged negligent actions of Centric. As we held in Johnson, in the case of an independent insurance broker, like Centric, imputation will not apply when the broker is evaluating a client's needs and making recommendations accordingly. Satec's arguments are directed at Centric's failure to advise it regarding its need for flood insurance for the property. As such, we hold the actions of Centric may not be imputed to Hanover.

Affirmed.