STATE OF MICHIGAN

COURT OF APPEALS

NESHIA FREEMAN, Conservator and Guardian of the Person and Estate of WILVARD L. FREEMAN, Incompetent,

Plaintiff-Appellant,

and

UNISYS CORPORATION,

Intervening Plaintiff,

v

FMC CORPORATION,

Defendant-Appellee,

and

MANUS DISTRIBUTORS, INC., d/b/a MANUS POWER MOWERS, INC.,

Defendant.

UNPUBLISHED
February 3, 1998

No. 183386
Wayne Circuit Court
LC No. 89-908868-NP

NESHIA FREEMAN, Conservator and Guardian of the Person and Estate of WILVARD L. FREEMAN, Incompetent,

Plaintiff-Appellees,

and

UNISYS CORPORATION,

Intervening Plaintiff,

v

No. 197873
Wayne Circuit Court
LC No. 89-908868-NP

FMC CORPORATION,

Defendant-Appellant,

and

MANUS DISTRIBUTORS, INC., d/b/a MANUS POWER MOWERS, INC.,

Defendant.

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

In Case No. 183386, a products liability case, plaintiff appeals as of right from the jury's verdict in favor of defendant FMC. In Case No. 197873, defendant FMC appeals by delayed leave granted from the trial court's denial of its motion for mediation sanctions and taxable costs in the same case. We affirm in both cases.

Plaintiff was severely injured when the tractor mower he was using, as an employee of Unisys, went backwards over a retaining wall and into the street below and then rolled over him. The mower was designed, manufactured and sold by FMC. Plaintiff passed away following the trial but before defendant filed its motion for mediation sanctions.

Plaintiff first argues that the trial court abused its discretion in allowing defendant FMC to endorse a witness mid-trial, and in allowing the witness to testify on rebuttal and surrebuttal. We disagree. Plaintiff's expert (Dr. Crimp) testified that a gear handle on the tractor had been cracked when it was shaped during manufacture and that, according to the engineering drawing of the handle, such cracking was expected and tolerated. The crack would become worse with wear, weakening the handle, and could cause it to fail, especially since the particular transmission was difficult to engage. If the tractor was operated while the transmission was only partially engaged, it could spontaneously come out of gear. While out of gear, that is, in neutral, it would have no brakes and would travel backwards faster than in gear, which would tend to explain how it cleared the sidewalk and landed in the street when it went off the retaining wall.

On the first day of defendant's case, counsel moved for permission to endorse a new witness (Dr. Packer) to meet plaintiff's evidence that the transmission had been operated while only partially engaged. The trial court found that plaintiff's expert had presented a "new field of inquiry" and, in the interest of helping the jury, allowed defendants to endorse a new expert. Defense counsel was ordered to make him available to plaintiff's counsel for a deposition that afternoon, which in fact occurred. Further, the court adjourned early and told plaintiff's counsel that it was giving him "the night to consider your cross-exam, to forestall the series of arguments that you had that this kind of testimony is a total surprise."

The decision whether to allow the late endorsement of an expert witness is reviewed for abuse of discretion. *Herrera v Levine*, 176 Mich App 350, 355; 439 NW2d 378 (1989); *Pastrick v General Tel Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987). "Trial courts should not be reluctant to allow an unlisted witness to testify where justice so requires, particularly with regard to rebuttal witnesses." *Pastrick, supra*, at 245. There is no list of conditions which must be met before the late endorsement is proper. *Id*. A trial court should set appropriate conditions to prevent prejudice and to enable the opposing party to meet the testimony of the new witness. *Id*. at 246 (relying on *Pollum v Borman's, Inc*, 149 Mich App 57, 62-63; 385 NW2d 724 [1986]). "[J]ustice is best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected" because doing so affords the jury "a fuller development of the facts surrounding the case." *Pastrick, supra*, at 246.

The trial court did not abuse its discretion in allowing the late endorsement of the witness, subject to conditions. Plaintiff did not request more time to prepare and plaintiff did depose the witness before he testified. "The trial court's conditions of permitting [plaintiffs] an opportunity to interview the undisclosed witness and to secure their own expert were reasonable." *Pastrick, supra*, at 246. Particularly given that plaintiff's principal objection is that the rebuttal testimony was cumulative, it is difficult to understand how the expert's testimony could be so prejudicial as to merit reversal. MRE 103(a).

As to the allegedly improper surrebuttal, plaintiff claims that Dr. Packer should not have been allowed to modify his prior testimony after having heard testimony from Dr. Crimp, out of the presence of the jury, which asserted that the gear used by Dr. Packer in his initial testimony was not really a used gear as he claimed. The expert testimony in this case was based on an examination of the transmission gear of the tractor involved in the accident (the "subject" gear), of two identical unused "new" gears, and of a used gear from an identical tractor (the "exemplar" gear). Dr. Packer testified about an exhibit which he thought was the exemplar gear but which, in fact, turned out to be one of the new gears. He testified on the basis of his own pictures of the actual exemplar gear rather than the exhibit itself. This mistake was discovered when Dr. Crimp took his own high magnification photographs of the exhibit in controversy and saw no signs of wear on the gear's teeth. Because the parties initially thought that this was a mere difference of opinion, and court did not wish to have a battle of the experts in front of the jury, Dr. Crimp was not allowed to testify that the exhibit could not be the exemplar gear because it showed no signs of wear at all.

Later in the trial, the court allowed Dr. Crimp to testify that the exhibit was not the same as the exemplar gear photographed and relied upon by Dr. Packer. In response, defense counsel not surprisingly indicated that he wanted to bring Dr. Packer back in light of this evidence. The court indicated that it would allow defendants to present Dr. Packer as a surrebuttal witness to Dr. Crimp's new testimony.[1] Further, it would accord considerable leeway to plaintiff on cross-examination and consider the possibility of allowing Dr. Crimp to make new photographs of the real exemplar gear to supplement his previous testimony

As expected, Dr. Packer testified that the original exhibit was a new unused gear, not the exemplar gear, and that therefore, as previously testified by Dr. Crimp, the photographs of that gear did not show any signs of wear. The genuine, used, exemplar gear was introduced as a new exhibit. Dr. Packer maintained that, although the wrong gear was originally brought into the courtroom and placed in evidence as an exhibit, his opinions remained the same because they were based on his examination and photographs of the real exemplar gear. After Dr. Packer's surrebuttal testimony, the judge asked plaintiff's counsel whether he wanted more time to have the real exemplar gear examined by the expert, suggesting that it might be willing to award plaintiff some costs "because of defendant's admitted error." Plaintiff declined and indicated that she was ready for closing argument. Under these circumstances, the trial court did not abuse its discretion in allowing Dr. Packer to testify rather than allowing the jury to proceed to a verdict under an admitted mistake of fact.

Plaintiff also argues that the trial court abused its discretion in allowing another expert (Dr. Guenther) to testify because his opinion was allegedly unsupported by the evidence. Again we disagree. The expert was merely asked to reconstruct the accident based upon the differing testimony of various witnesses. *Triple-E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995); MRE 703.

Plaintiff's premise-- that an expert's opinion must always be based upon facts in evidence-- is mistaken. Rather, the rules of evidence provide that "[t]he facts or data in a 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." MRE 703. "The court *may* require that underlying facts or data essential to an opinion or inference be in evidence," MRE 703 (emphasis added), but did not do so in this case. Thus, "an expert witness may base an opinion on hearsay or the findings and opinions of other experts." *Id*. at 175.

Dr. Guenther, an accident reconstructionist, testified that, if one assumed that the decedent weighed between 175 and 200 pounds; that he received only one blow to the head (above and slightly behind the ear); and that the tractor went backwards off a four-foot high wall, cleared a ten-foot sidewalk, and landed eight to ten feet into the street (as testified by the only eyewitness to the actual fall), then the tractor must have been traveling at about sixteen miles per hour. He testified further that, if one assumed instead that the tractor made initial contact at a sixty degree angle to the ground and landed upside down about two or three feet into the street (as testified to by another witness), then the tractor would have only been traveling at about five or six miles an hour, which is within the range for the tractor in reverse gear, and must have bounced once before coming to rest on the street. Lastly, he was

asked to assume that the tractor had landed four or five feet into the street (as testified to by still another witness) and he replied that the tractor must have been traveling at about six miles per hour or a bit faster. He indicated that, based on his examination of the damage to the tractor, it was his opinion that it left the wall going about five or six miles an hour, hit the ground at about a sixty degree angle, bounced, and landed somewhere between two and five feet into the street. Given the size of the tires, and the momentum and rotation of the vehicle as it fell, the expert specifically discredited other testimony that the tractor did *not* bounce. Dr. Guenther also specifically stated that the various eyewitness testimonies were inconsistent and that he could not provide an explanation that accommodated all of them. In our judgment, the trial court did not abuse its discretion in finding that Dr. Guenther's opinion was admissible.

Next, plaintiff argues that the trial court erred in refusing to give both a negligence instruction and a breach of implied warranty instruction. We disagree. Where the claim is negligence in the design of a product, the two theories merge and giving both instructions would have been erroneous. *Gregory v Cincinnati Inc*, 450 Mich 1, 12-13; 538 NW2d 325 (1995); *Prentis v Yale Manufacturing Co*, 421 Mich 670, 691-692, 694-695; 365 NW2d 176 (1984). Indeed, separate breach of warranty and negligence "instructions could have created jury confusion and prejudicial error." *Id*. "Such an instruction would have been repetitive and unnecessary and could have misled the jury into believing that plaintiff could recover on the warranty count even if it found [that] there was no 'defect' in the design of the product." *Id*. Therefore, "in a products liability action against a manufacturer, based upon defective design, the jury need only be instructed on a single unified theory of negligent design." *Id*. at 695.

Finally, defendant FMC claims that the trial court erred in refusing to award mediation sanctions against plaintiff. We disagree. The record shows that defendant clearly waived its right to collect sanctions from plaintiff. *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). While FMC did not waive its right to obtain an order awarding costs and sanctions against plaintiff, it did repeatedly promise not to collect on it. Counsel at all times led the trial court to believe that her client had already agreed not to collect on such an order. It would be a waste of time and judicial resources to remand this case for an evidentiary hearing concerning the reasonableness of attorney fees which defendant has already vowed not to collect. Reversal is therefore unwarranted. The trial court did not err in refusing to enter an order which defendant had already promised not to enforce.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] The trial court expressly indicated its belief that Dr. Packer's initial testimony was the product of a mistake on his part rather than a product of any intent to mislead or deceive the jury.