

STATE OF MICHIGAN
COURT OF APPEALS

FELISA MOORE and SHERMAN MOORE,

Plaintiffs-Appellants,

v

GERALDINE CERLING,

Defendant-Appellee.

UNPUBLISHED

January 20, 2004

No. 243017

Iosco Circuit Court

LC No. 00-002731-NI

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff¹ appeals by right from the verdict of no cause of action returned by the jury in her automobile negligence action. We affirm.

Plaintiff first claims the trial court abused its discretion in allowing defendant's expert to testify. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Plaintiff claims the trial court abused its discretion in admitting Dr. John Cavanaugh's testimony because he never personally examined plaintiff, and did not visit the scene of the accident, examine the vehicles or skid marks, or perform an accident reconstruction. Moreover, plaintiff argues, Dr. Cavanaugh's testimony was contradicted by that of plaintiff's medical experts.

These arguments are without merit. Under MRE 703, an expert is entitled to render an opinion based on facts or data "perceived by or made known to the expert at or before the hearing." There is no requirement that an expert actually visit the scene of an accident in order to render a qualified opinion. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 458; 633

¹ The term "plaintiff" in the singular refers to Felisa Moore because the other plaintiff, Sherman Moore, is her husband and his is a derivative loss of consortium claim.

NW2d 418 (2001), citing *Berryman v Kmart Corp*, 193 Mich App 88, 99; 483 NW2d 642 (1992). Any such defect in the expert's testimony goes to its weight, not its admissibility. *Id.* In addition, "an opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001).

Next, plaintiff faults the trial court for failing to conduct an evidentiary inquiry under the *Davis-Frye*² test. "[T]he *Davis-Frye* test limits the admissibility of *novel* scientific evidence by requiring the party offering such evidence to demonstrate its general acceptance in the scientific community." *Craig v Oakwood Hosp*, 249 Mich App 534, 546; 643 NW2d 580 (2002) (Cooper, J, concurring in part and dissenting in part), lv gtd in part on other grounds, 469 Mich 880 (2003) (emphasis in original). However, absent a showing that an expert's testimony is based on *novel* scientific evidence, there is no need to conduct a *Davis-Frye* analysis. *Id.* Neither in this appeal nor in the trial court did plaintiff argue that biomechanics is novel scientific evidence; thus, this issue is without merit.

Next, plaintiff claims Dr. Cavanaugh's testimony was scientifically unreliable under the criteria set forth in MCL 600.2955(1). We note, however, that this statute is not a rule of evidence and does not displace the rules of evidence. *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd in part on other grounds, 465 Mich 885 (2001). We review a trial court's evidentiary decision under the rules of evidence.

Under MRE 702, "[a]s long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible." *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997), citing *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Plaintiff claims the trial court erred in admitting Dr. Cavanaugh's testimony because there was no foundation showing that Dr. Cavanaugh had followed acceptable scientific methods in reaching his conclusions. Plaintiff claims Dr. Cavanaugh's methodology was flawed because he relied on plaintiff's medical records, the police report of the accident, photographs of the vehicles, and plaintiff's deposition testimony.

These arguments are unpersuasive. In *Dudek v Popp*, 373 Mich 300, 306-307; 129 NW2d 393 (1964), our Supreme Court held that "one properly qualified in accident investigative background may testify either from personal observation or from properly authenticated and admitted exhibits." We also held in *Lopez v General Motors Corp*, 224 Mich App 618, 634; 569 NW2d 861 (1997), that videotaped crash tests were admissible to support the testimony of biomechanics and kinematics experts, even though the tests were not reconstructions of the actual accident. We held that defects in the evidence could be attacked on cross-examination and went to the weight, not the admissibility, of the evidence. *Id.* at 632, n 20. Plaintiff in the instant

² *People v Davis*, 343 Mich 348, 72 NW2d 269 (1955); *Frye v United States*, 54 US App DC 46, 293 F 1013 (1923).

case had ample opportunity to attack Dr. Cavanaugh's testimony. Plaintiff questioned Dr. Cavanaugh extensively about the information he used in formulating his opinion, as well as the information he did *not* take into account. We conclude that any defects in the basis of Dr. Cavanaugh's opinion were sufficiently brought to the attention of the jury and are matters of weight, not admissibility.

Moreover, in addition to the properly admitted exhibits, Dr. Cavanaugh's opinion was also based on his own independent research in injury causation, including a study involving twelve cadavers that were impacted on the right and left sides, revealing no opposite-side shoulder injuries. His research was published in several journals directed at automotive engineers, biomechanics, and orthopedic specialists, among others. This research was conducted in conjunction with the Centers for Disease Control, the National Highway Traffic Safety Administration, and automobile companies. Like plaintiff's experts, Dr. Cavanaugh also has a medical degree. He has studied and done research on the physiology of pain and human injury tolerance since 1985. Dr. Cavanaugh teaches physiology courses at Wayne State University and has been a professor there since 1998. The trial court did not abuse its discretion in admitting Dr. Cavanaugh's testimony.

Next, plaintiff claims the jury's verdict was against the great weight of the evidence. This Court will not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990).

Contrary to plaintiff's assertion, the record does not conclusively establish that plaintiff's injuries dated to the time of the accident. Each of the four physicians who testified on behalf of plaintiff first treated her more than a year after the accident. In each case, their knowledge of her history was dependent on information provided by plaintiff herself. The medical records from her regular physician, however, reveal that plaintiff complained of neck pain only once in more than a year – two days after the accident. Thus, the jury could have reasonably concluded that the neck pain reported more than a year later by plaintiff was not caused by the accident.

Second, the testimony of plaintiff's experts does not conclusively show that plaintiff's injuries were caused or aggravated by the accident. Although each testified that plaintiff's symptoms *could* have been caused or aggravated by the car accident, on cross-examination, the experts were much more equivocal. Both Dr. Cilluffo and Dr. Ciullo agreed that plaintiff's condition was consistent with ordinary wear and tear and that a car accident would not have been necessary to create the problems plaintiff experienced. In sum, the jury's verdict was supported by competent evidence presented by both plaintiff's and defendant's experts, and no miscarriage of justice occurred.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper