STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HERSHEY,

Plaintiff-Appellant,

and

JACQUELINE HERSHEY,

Plaintiff,

v

BLACK & DECKER (U.S.), INC., d/b/a DEWALT INDUSTRIAL TOOL COMPANY,

Defendant-Appellee,

and

HOME DEPOT, U.S.A., INC., and JAMES LUMBER COMPANY,

Defendants.

UNPUBLISHED
September 30, 2008

No. 276572
Wayne Circuit Court
LC No. 04-416541-NP

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

In this product liability action, plaintiff Michael Hershey appeals as of right from the trial court's order granting a directed verdict in favor of defendant Black & Decker, Inc., d/b/a DeWalt Industrial Tool Company. We affirm.

Plaintiff argues that the trial court erred in granting defendant's motion for a directed verdict. Our review of this issue is de novo. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). We must review the evidence presented up to the time the motion was made in a light most favorable to plaintiff to determine whether a question of fact existed for the jury. *Livonia Bldg Material Co v Harrison Constr Co*, 276 Mich App 514, 522-523; 742 NW2d 140 (2007). If reasonable minds could honestly reach different conclusions, the question is one for the jury to decide. *Diamond v Witherspoon*, 265 Mich App 673, 682; 696 NW2d 770 (2005).

In Michigan, a manufacturer's liability for a design defect in a product liability action is essentially viewed as a matter of negligence, albeit there is a distinction between elements of negligence and breach of an implied warranty. *Prentis v Yale Mfg Co,* 421 Mich 670, 692-693; 365 NW2d 176 (1984). A negligence theory focuses on the defendant's conduct, while implied warranty generally focuses on the fitness of the product. *Id.* at 692. Although the theories are often seen as closely related, "[s]ale of a defective product can breach an implied warranty, but it would not reflect negligence in the design . . . if the producer had acted reasonably at every stage." *Lagalo v Allied Corp,* 457 Mich 278, 287 n 11; 577 NW2d 462 (1998).

Traditionally, the means of proving a negligent design in Michigan questioned whether a risk-utility analysis favored an available safer alternative. *Gregory v Cincinnati, Inc,* 450 Mich 1, 11; 538 NW2d 325 (1995). The focus of any duty began with "whether the product was defective when it left the manufacturer's control." *Id.* at 11-12. MCL 600.2946(2), adopted in 1995, now governs product liability actions predicated on a "production" defect.[1] Cf. *Greene v A P Products, Ltd,* 475 Mich 502, 507-508; 717 NW2d 855 (2006) (tort reform legislation enacted as part of 1995 PA 249 displaced the common law as it relates to the duty to warn of an obvious danger in a product liability action); see also *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 13; 658 NW2d 127 (2003).

Under MCL 600.2946(2), plaintiff was required to establish that "the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer." The focus of this element is on the product itself. Thus, it is consistent with a claim predicated on implied warranty, which requires proof that the product is not reasonably safe for uses that are intended, anticipated, or reasonably foreseeable. *Prentis, supra* at 693. Regardless, the manufacturer's duty is to eliminate any unreasonable risks of foreseeable injury. *Id.* Because we find no clear legislative intent to alter the common law that the product be reasonably safe, we shall interpret the statutory "reasonably safe" requirement in accordance with the common law. *Ford Motor Co v City of Woodhaven,* 475 Mich 425, 439-440; 716 NW2d 247 (2006).

Plaintiff alleged that defendant's DW997 model cordless drill was defectively designed because it lacked a second handle that a user could grasp when using the drill. The alleged risk associated with the product's design was that a person would suffer lateral epicondylitis, or what is commonly referred to as tennis elbow, when using the drill. Viewed in a light most favorable to plaintiff, the deposition testimony of Dr. Siatczynski[2] indicates that lateral epicondylitis results in pain at the elbow, but is actually attributed to overuse of the wrist. Plaintiff also established that it was foreseeable that a user would hold the drill firmly with one hand and use it repeatedly. Plaintiff's biomechanics witness, Louis Draganich, testified that even a single use of the drill places stress on the lateral epicondyle.[3] He could not form an opinion with regard to how much

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[1] The word "production" is defined as including "design." MCL 600.2945(i).

[2] The record indicates that the trial court struck a portion of Dr. Siatczynski's deposition testimony regarding the one-handed use of the drill with torque. Plaintiff does not challenge this evidentiary ruling.

[3] According to Draganich's testimony, biomechanics involves the application of mechanical
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drill activity leads to lateral epicondylitis, but testified that some combination of load, or what could be thought of as force or torque, and repetition, can lead to lateral epicondylitis. Draganich opined that a second handle would reduce the potential for this type of injury, but did not analyze the magnitude of the risk posed by the DW997 model drill.

Where it is claimed that a manufacturer omitted a safety device, the magnitude of the foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable, require consideration. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001); *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187; 439 NW2d 326 (1989). Because Draganich's testimony, considered in light of other trial proofs, was insufficient to allow the jury to evaluate the magnitude of the alleged risk posed by the DW997 model drill, the trial court properly granted a directed verdict in favor of defendant with respect to the statutory requirement that a product be reasonably safe when it leaves the manufacturer's control.

We likewise agree with the trial court's conclusion (it did not explain its decision in any detail) that plaintiff failed to prove other elements of the claim. For instance, defendant was also entitled to a directed verdict with respect to the requirement that a plaintiff prove that "a practical and technically feasible alternative production practice was available that *would have prevented the harm* without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others." MCL 600.2946(2). Contrary to plaintiff's argument on appeal, it is not sufficient that a plaintiff merely show that an alternative design would have reduced the risk of harm.

When construing a statute, our primary goal is determine the legislative intent. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). We begin with the statutory language. *Id.* "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplasage or made nugatory." *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). If the statutory language is unambiguous, the words are given their plain meaning and applied as written. *Rowland, supra* at 202.

The phrase "would have prevented the harm" is unambiguous. Although the word "prevent" is not statutorily defined, it is appropriate to consider a lay dictionary to determine its common meaning. *Greene, supra* at 510. The word "prevent" is defined in *Random House Webster's College Dictionary* (1997), in pertinent part, as "to keep from occurring; stop." The word "harm" means "injury or damage." *Id.* The definite article "the" is also generally construed according to its common meaning. *Paige v City of Sterling Hts*, 476 Mich 495, 508; 720 NW2d 219 (2006). "The" has a specifying or particularizing effect. *Id.* Examined as a whole, it is apparent that the Legislature intended that a plaintiff prove that his or her particular injury would have been prevented by the alternative design.

Viewed in a light most favorable to plaintiff, the evidence in this case was insufficient to permit a reasonable jury to find that plaintiff would not have suffered lateral epicondylitis if the

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engineering to biological systems. The use of a power tool, such as a drill, relates to the biomechanics field because certain muscle forces are activated when using a drill.

DW997 model drill had been designed with a second handle. Although it was reasonable to infer that a second handle would have reduced the risk of harm by distributing the load between both arms, the jury would still have been required to evaluate how the torque distribution would have combined with plaintiff's repetitive use of the DW997 model drill. Based on the evidence at trial, it would be mere conjecture to conclude that a second handle would have prevented plaintiff's injury, even if one assumes that a reasonable jury could have found that plaintiff's one-handed use of the drill was the source of his lateral epicondylitis. "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), reh den 445 Mich 1233 (1994), quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). Conjecture is insufficient to create a question of fact for a jury. *Id.* Therefore, defendant was entitled to a directed verdict with respect to this statutory requirement.

The trial court relied on M Civ JI 25.32 in evaluating the element of proximate cause. Plaintiff has not demonstrated that MCL 600.2946(2) was intended to change the common-law requirement of proximate cause in cases involving a manufacturer's alleged production defect. Proximate cause entails proof of both cause in fact and legal or "proximate" cause. *Skinner, supra* at 162-163. The cause in fact element, which generally requires proof that the plaintiff's injury would not have occurred but for the defendant's action, may be established by circumstantial evidence, but mere conjecture is inadequate. *Id.* at 163-164. The alleged product defect in this case is the absence of a second handle on the DW997 model drill. Because the evidence, viewed in a light most favorable to plaintiff, does not support a reasonable inference that plaintiff's injury would not have occurred but for defendant's failure to install a second handle, the trial court properly directed a verdict in favor of defendant with regard to this element.

Plaintiff next argues that the trial court erred by precluding Draganich from giving an opinion that plaintiff's injury would not have occurred if the DW997 model drill had a second handle. In general, we review a decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Under the trial court's gatekeeping function under MRE 702, the court must ensure that every aspect of an expert witness's proffered testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004).

Here, the trial court made a pretrial ruling that it would not conduct a *Daubert*[4] hearing regarding Draganich's testimony based on its determination that Draganich's proposed opinions were based on common sense, and not science, and that it would entertain appropriate objections to his testimony at trial. The purpose of a *Daubert* hearing is to filter out unreliable expert

[4] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

evidence. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008); *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007). Here, however, plaintiff has not challenged the trial court's decision not to hold a *Daubert* hearing. We are left instead with the task of reviewing whether the trial court abused its discretion in ruling on specific defense objections to Draganich's testimony at trial.

Having considered the challenged evidentiary rulings at trial, as well as plaintiff's opportunity to make a separate record of Draganich's proposed opinion, we find no basis for disturbing the trial court's decision that Draganich was not qualified to give an opinion regarding whether a second handle would have prevented plaintiff's injury. Examining the trial court's evidentiary rulings in the context in which they were made, they do not support plaintiff's argument that the trial court relied on Draganich's lack of experience in designing drills to exclude the proffered testimony. Further, it is clear from the record that the trial court permitted Draganich to answer biomechanical questions and provide testimony on the general biomechanical effects of a second handle. But rendering an opinion regarding the precise cause of a specific injury or, as in this case, the consequences of a proposed alternative product design on a particular person, present distinct reliability concerns. See *Smelser v Norfork S R Co,* 105 F3d 299, 305 (CA 6, 1997), abrogated on other grounds by *Morales v American Honda Motor Co, Inc*, 151 F3d 500 (CA 6, 1998). We are not persuaded that plaintiff established a sufficient foundation for Draganich to give a reliable opinion regarding whether the second handle would have prevented plaintiff's injury. Accordingly, we conclude that the trial court did not abuse its discretion in excluding the proposed opinion testimony.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood