STATE OF MICHIGAN

COURT OF APPEALS

JODI WEISS and RONALD WEISS, Plaintiffs-Appellants, v CHAMPION POOLS, L.L.C., Defendant-Appellee.	UNPUBLISHED July 20, 2010 No. 289429 Oakland Circuit Court LC No. 2007-084095-NO

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Plaintiffs Jodi and Ronald Weiss commenced this negligence action after Jodi Weiss slipped on a coping stone adjacent to a pool under construction by defendant Champion Pools, L.L.C., fell into the unfinished pool, and suffered injury. Plaintiffs appeal as of right a judgment of no cause of action entered pursuant to a unanimous jury verdict. The jury found that defendant had not engaged in any negligent conduct. We affirm.

Plaintiffs assert on appeal their entitlement to a new trial on the basis that the trial court improperly admitted into evidence at trial the deposition of defendant's expert witness in the field of toxicology, Dr. Alfred E. Staubus. "We review a trial court's admission of evidence for an abuse of discretion. However, we review de novo preliminary questions of law pertinent to the admission of evidence." *Campbell v Dep't of Human Services*, 286 Mich App 230, 235; ___ NW2d ___ (2009). An abuse of discretion exists when a court selects an outcome falling outside the principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

According to MCR 2.308(A), "[d]epositions or parts thereof shall be admissible at trial . . . only as provided in the Michigan Rules of Evidence." The Michigan Rules of Evidence in turn exclude from the general prohibition against hearsay the deposition testimony of an expert witness, so long as the parties took the expert's deposition "in compliance with law in the course of the same proceeding . . . [and] the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding." MRE 803(18).

Plaintiffs rely for their inadmissibility contention on an opinion of this Court which held that a deposition taken solely for discovery purposes is not admissible at a trial. *Petto v Raymond Corp*, 171 Mich App 688, 691-692; 431 NW2d 44 (1988). In *Petto*, the defendant sought to depose the plaintiff's expert witness "with the understanding that [the deposition] was

to be taken for discovery purposes only." *Id*. at 690. The defendant's deposition of the plaintiff's expert "clearly noticed that it was being taken for discovery only," and both parties apparently understood this to be the case.[1] *Id*. at 691-692. At trial, the plaintiff moved unsuccessfully to admit the expert's deposition, and plaintiff on appeal urged the admissibility of the expert's deposition on the grounds that the defendant "failed to either file a formal notice with the court stating that [the expert's] deposition was for 'discovery purposes only' or to obtain either a written stipulation or protective order to that effect . . . ." *Id.* at 690, 692. This Court held that "a request for a protective order under MCR 2.302(C) would only have been required had plaintiff noticed [the expert's] deposition to be used at trial and defendant wanted the deposition to be used only for the purpose of discovery." *Id*. at 692. Because the defendant had plainly noticed the deposition of the plaintiff's expert as for discovery purposes only, the Court concluded that the trial court had not abused its discretion by ruling the deposition inadmissible at trial. *Id*. at 692-693.

In this case, unlike *Petto*, the notice plaintiffs supplied for taking Dr. Staubus's deposition contained no language purporting to limit it for discovery purposes only. And at the outset of Dr. Staubus's deposition, plaintiffs' counsel emphasized the unlimited nature of the deposition by announcing, "Let the record reflect that this is the deposition of Alfred Staubus taken pursuant to notice under the Michigan [C]ourt [R]ules and for all purposes permitted therein." The record thus lacks any suggestion that the parties envisioned a discovery only limitation governing Dr. Staubus's deposition. With respect to the other method mentioned in *Petto*, *id*. at 691, as possibly precluding a deposition's admission at trial, securing a protective order under MCR 2.302(C)(7),[2] plaintiffs undisputedly did not move for a protective order. Because plaintiffs did not seek, by agreement, notice or motion for a protective order, to limit the deposition of Dr. Staubus for solely discovery purposes, we conclude that the use of the

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[1] Plaintiffs here urge that the notice in *Petto* did not explicitly designate the plaintiff's expert's deposition as for discovery only. We reject plaintiff's suggestion as contrary to the only reasonable interpretations of this Court's employment of the phrases, "it was clearly noticed," "[the] deposition had been noticed for the purpose of discovery," and "defendant . . . set up the deposition . . . for discovery purposes only." *Petto*, 171 Mich App at 691-692.

[2] The protective order court rule provision reads as follows:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
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> * * *
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> (7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment . . . .

deposition was not limited. We accept plaintiffs' contention that they deposed Dr. Staubus in the interest of discovery, but the record simply does not show that the parties intended discovery would be the only permissible purpose for the doctor's deposition.

Given that the parties placed no external limitations on the use of Dr. Staubus's deposition, the rules of evidence govern the deposition's admissibility, as dictated in MCR 2.308(A). To qualify for the hearsay exception in MRE 803(18), an expert's deposition must have been taken in compliance with the law, in the course of the same proceeding, and the deponent must not be a party to the proceeding. *Winn v Winn*, 234 Mich App 255, 270 n 9; 593 NW2d 662, vac'd in part on other grounds 459 Mich 1002 (1999). Here, all of these criteria exist. The parties did not dispute that Dr. Staubus had expertise in the field of toxicology or that his deposition was taken in compliance with the law, plaintiffs took Dr. Staubus's deposition in course of the same proceeding as the trial, and Dr. Staubus was not a party to the action. Therefore, the trial court properly exercised its discretion when it admitted Dr. Staubus's deposition at trial pursuant to MCR 2.308(A) and MRE 808(18).[3] We deem disingenuous and reject plaintiffs' suggestion that the introduction of Dr. Staubus's deposition at trial precluded them from cross-examining him; the deposition reflects that plaintiffs' counsel had the opportunity to examine Dr. Staubus at length over the course of more than 80 deposition pages, delving into Dr. Staubus's qualifications, theories, and opinions on the evidence of Jodi Weiss's blood alcohol level.

Lastly, even assuming arguendo that the trial court erred in allowing Dr. Staubus's deposition testimony into evidence, any error had no effect on the verdict. "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment . . . unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). The jury returned a special verdict that defendant was not negligent. The verdict form instructed the jury that if it answered the question of defendant's negligence negatively, it should not "answer any further questions," and the jury did not proceed to the issue of any comparative negligence by Jodi Weiss, special verdict question six. See also *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 541 (concurring opinion by Cavanagh, J.); 629 NW2d 384 (2001) ("[C]omparative negligence is used only as a tool for apportioning damages *after* a breach of duty on the part of the defendant is found.") (emphasis added). Because the jury in one question ended the special verdict inquiry by determining that defendant had not engaged in any negligent actions or inactions, and the testimony of Dr. Staubus only related to Jodi Weiss's comparative negligence, any error in the

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[3] Plaintiffs raise no argument on appeal that Dr. Staubus's deposition testimony lacked relevance to the proceedings, MRE 401, MRE 402, or any other evidentiary basis for excluding the deposition. With respect to plaintiffs' theory that a court may only admit an expert witness's deposition if the party associated with the expert deposes the expert, as contemplated under MCR 2.302(B)(4)(d), this subrule does not apply to the circumstances of this case, in which plaintiffs arranged to depose defense expert Dr. Staubus. Moreover, even if MCR 2.302(B)(4)(d) had some relationship to this case, the subrule plainly envisions that a party may offer the expert's deposition "as evidence at trial as provided in MCR 2.308(A)," the rule hinging admissibility on the rules of evidence. *Winn*, 234 Mich App at 270 n 9.

admission of Dr. Staubus's deposition testimony did not affect plaintiffs' right to substantial justice.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher