STATE OF MICHIGAN

COURT OF APPEALS

JACK L. TAYLOR,

Plaintiff-Appellee,

v

FORD MOTOR COMPANY,

Defendant-Appellant.

UNPUBLISHED

No. 187002
Wayne Circuit Court
LC No. 92-230690-NI

Before: Markman, P.J., and Holbrook, Jr. and O'Connell, JJ.

MARKMAN, P.J. (dissenting).

I respectfully dissent. While I agree with the majority that, when viewed in a light most favorable to plaintiff, sufficient evidence existed --albeit barely-- to sustain the jury's finding that the air bag in plaintiff's automobile should have been deployed as a result of the impact of the instant accident, I do not believe that sufficient evidence was presented to establish a causal connection between the manufacturing defect and plaintiff's injury.

We review the trial court's denial of a defendant's motion for judgment notwithstanding the verdict by examining the testimony and all legitimate inferences that may be drawn therefrom in the light most favorable to the plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 681; 385 NW2d 586 (1986). If reasonable minds could differ, the defendant's motion is properly denied. *Id*. at 681-682.

Matras and other decisions of the Michigan Supreme Court indicate that appellate courts are to apply the same test in reviewing decisions on motions for judgment notwithstanding the verdict that the trial court applies. See *Scholz v Montgomery Ward & Co*, 437 Mich 83, 88 n 3; 468 NW2d 845 (1991), citing *Kroll v Katz*, 374 Mich 364, 369; 132 NW2d 27 (1965). In *Meagher v Wayne State University*, __ Mich App __; __ NW2d __ (4/15/97), this Court concluded that we review *de novo* trial court decisions regarding motions for directed verdict. The *Meagher* Court reasoned that the correct standard of review was *de novo* because no Michigan Supreme Court cases have held that the standard was abuse of discretion and because *Matras* indicates that an appellate court is to apply the same test that the trial court applies. This rationale applies to review of decisions regarding motions for

judgment notwithstanding the verdict as well. Cf. *Rice v ISI Manufacturing, Inc*, 207 Mich App 634, 636; 525 NW2d 533 (1994) (indicating that the standard of review is abuse of discretion).

Under Michigan products liability law, a plaintiff must establish that the defendant supplied a product that is defective *and* that there is a causal connection between the defect and the plaintiff's injury. *Snider v Bob Thibodeau Ford*, 42 Mich App 708, 713; 202 NW2d 727 (1972). In *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), the Court stated:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Therefore, plaintiff in the instant case had the burden of establishing that the failure of the air bag system to deploy was causally connected to his injuries.

Trombley testified extensively concerning the purpose of air bag systems. To summarize, the core of his testimony was that air bags are designed to prevent injuries caused by vehicle occupants being hurled against the vehicle's dashboard, steering wheel and windshield. From this testimony, a reasonable jury could have concluded that the failure of the air bag to deploy was a contributing factor with respect to any injuries plaintiff suffered as a result of contact with the dashboard, steering wheel and windshield. However, it was clearly established below that plaintiff's injuries were caused by his contact with *the shoulder harness*. Both of plaintiff's medical witnesses, Dr. Viswanath and Dr. Salamon, testified that plaintiff's injuries to his upper body were distributed along his shoulder harness line, from which an inference could be drawn that the injuries were caused as plaintiff was thrust forward against his shoulder belt during the accident. Specifically, Dr. Viswanath testified that plaintiff's injuries "could be related to the shoulder harness" since his discoloration occurred "along [its] distribution" while Dr. Salamon stated that "my assumption is that that bruise was caused by the seat belt because that's basically where it goes."

Lacking below was evidence establishing that, had the air bag deployed, plaintiff would not have been injured by the shoulder harness. It is conceivable that, had the air bag deployed, it would have cushioned plaintiff's body as it was propelled forward, mitigating the impact of plaintiff's body against the shoulder harness. However, it is equally conceivable that the deployment of the air bag would have had no effect in the context of plaintiff's body being thrown against the shoulder harness. In fact, it is conceivable that, given the relatively low speed at which the accident occurred, the deployment of the air bag could have hurled plaintiff back into his seat with great force, injuring him even more severely.[1] The point is that this is a highly technical area and Trombley offered no testimony from which the jury could conclude that deployment of the air bag would have prevented the injury that occurred.[2] The jury was left to merely speculate concerning the cause of plaintiff's injuries.

In fairness, I note that Trombley did testify that plaintiff's injury "is the sort of injury that an air bag is supposed to prevent." However, this conclusory statement was unsupported. The "uncritical adoption [of conclusory statements] without examination or relation of the facts to the conclusion should be rejected by the appellate courts." *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 138; 274 NW2d 411 (1979). Trombley laid no factual foundation for this assertion. Similarly, Dr. Salamon testified that plaintiff's shoulder injury was caused by the failure of the air bag to deploy. Again, however, there existed no factual predicate for this conclusion. Although on direct examination Salamon stated that plaintiff's injuries were related to the failure of the air bag to deploy in the automobile accident, he admitted on cross examination that he was not aware of the speed of the vehicles before impact, the number of impacts between the vehicles, the force or severity of the impact or the direction or severity of the forces acting on plaintiff. Further, he stated that he had no knowledge about how plaintiff interacted with his seat belt during the accident or what he hit inside the vehicle. Further, there is some question as to whether Salamon, a physician lacking any expertise in the operation of air bag systems, should have offered testimony in this area at all.[3] Therefore, I believe that no reasonable jury could have found for plaintiff given this substantial evidentiary omission. Accordingly, in my judgment, the court erred in denying defendant's motion for judgment notwithstanding the verdict. *Matras*, *supra*. See also *Serinto v Borman Food Stores*, 3 Mich App 183, 189-190; 142 NW2d 32 (1966), aff'd 380 Mich 637; 158 NW2d 485 (1968) (in evaluating directed verdict motions, trial court must consider evidence as a whole).

The combined testimony of plaintiff's experts did not provide substantial evidence from which a jury could reasonably conclude that, more likely than not, but for failure of the air bag to deploy, plaintiff's injuries would not have occurred.[4] Therefore, in my judgment, the trial court erred in finding that plaintiff had established a prima facie case of products liability and denying defendant's motion for judgment notwithstanding the verdict.

/s/ Stephen J. Markman

[1] I realize that this conjecture raises a slightly different issue. However, I mention it only to highlight that the jury was left to grope in the dark on this issue. The jury had no basis at all to determine the extent to which inflation of the air bag might have *caused* injuries to the plaintiff offseting, for purposes of damages, the injuries allegedly caused by the failure of the air bag to deploy.

[2] While I agree with the majority that Trombley was properly qualified as an expert under MRE 702, *Mulholland v DEC Corp*, 432 Mich 395, 402, 406; 443 NW2d 340 (1989), he lacked specific experience pertaining to air bag systems.

[3] Indeed, when queried during cross-examination as to the basis for his deposition opinion that the failure of the air bag to deploy was the cause of plaintiff's injuries, Dr. Salamon acknowledged that he could not remember what his justification for this statement had been in his report two months earlier.

[4] One means by which plaintiff could have demonstrated that his injury was of a nature designed to be prevented by the proper deployment of air bags would have been to introduce evidence from the rules or regulations of the Federal Highway Safety Administration or a similar agency to this effect. No such

evidence was introduced. Nor is it otherwise apparent or obvious that plaintiff's injury was within the sphere of protection of the properly deployed air bag. To the contrary, the Owner's Manual to the car involved in the instant accident states expressly, "The air bag only operates in frontal accidents more severe than hitting a parked car of similar size and weight head-on at about 28 mph. In such a collision, you would be thrown forward against your safety belt."