STATE OF MICHIGAN

COURT OF APPEALS

SAFECO INSURANCE COMPANY OF AMERICA, Plaintiff-Appellant,	UNPUBLISHED February 21, 2003
v CARRIER CORPORATION, Defendant-Appellee.	No. 235567 Grand Traverse Circuit Court LC No. 99-019270-NZ

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this products liability action, plaintiff appeals by right from the trial court's decision granting defendant's motion for a directed verdict. We affirm.

A home that was under construction started on fire on December 4, 1997. Plaintiff insured the house. Plaintiff, as a subrogee of the homeowners, sued defendant on two theories: design defect and breach of implied warranty. Plaintiff's theory was that the fire started in the furnace that defendant designed.

Plaintiff argues that the trial court abused its discretion in ruling that the opinion of plaintiff's expert, Dr. Anderson, with regard to a design defect, was not based on reliable, scientific evidence. We disagree. "The decision to admit or exclude expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion." *Berryman v K Mart Corp,* 193 Mich App 88, 98; 483 NW2d 642 (1992).

In the case at hand, Dr. Anderson was received as an expert witness in electrical engineering. However, the trial court took under advisement whether Dr. Anderson could offer opinions with regard to the design defect. Dr. Anderson testified that the circuit board in the furnace, which was designed by defendant, caused the fire. Dr. Anderson also testified that the 009 and 016 circuit boards, which were different boards from the one in the furnace, were alternate designs.

At the close of plaintiff's proofs, defendant moved for and was granted a directed verdict. The trial court stated that it could not find one of the key elements established -- an alternate design that was economically and technically feasible. The trial court further stated that Dr.

Anderson's opinions regarding an alternate design and the defective condition of the furnace were not supported by reliable, scientific evidence as required by *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and MRE 702. We review a trial court's grant or denial of a directed verdict de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002).

In *Daubert*, *supra* at 582, the question before the Court was what the standard is for admitting expert scientific testimony in a federal trial. The Court found that the *Frye*[1] test, i.e., the "general acceptance test," was superseded by the adoption of the FRE 702. *Id.* at 587-588.

The Michigan Legislature enacted MCL 600.2955(1) "in an apparent effort to codify the United States Supreme Court's holding in *Daubert,* [*supra*.]" *Greathouse v Rhodes,* 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd on other grounds 465 Mich 885 (2001). MCL 600.2955 states in part:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
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> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
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> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

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[1] *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

"The plain language of the statute establishes the Legislature's intent to assign the *trial court* the role of determining, pursuant to the *Daubert* criteria, whether proposed scientific opinion is sufficiently reliable for jury consideration." *Greathouse, supra* at 238 (emphasis in original).

The trial court listed a number of reasons why Dr. Anderson's opinions with regard to a design defect were not reliable, including that Dr. Anderson had not disassembled the 011 circuit board (the same board that was in the furnace); that Dr. Anderson did not test an 011 board; and that Dr. Anderson made no effort to recreate the failure of the 011 board. The trial court noted that Dr. Anderson concluded that the 011 board did not have to be tested separately because except for the board materials, it was for all other relevant purposes, identical to the 008 boards. However, the trial court noted that Dr. Anderson could not state from what the board materials were made, whether one board was stiffer than the other, or whether their thermal properties differed.

The trial court also stated that Dr. Anderson testified that the 009 and the 016 boards were alternative designs. But then the trial court noted that Dr. Anderson would not agree that the 009 was a safe alternative design that he would "sign off on" and that Dr. Anderson could not say that the 016 board was better than the 011 board with regard to any specific design changes.

"In evidentiary rulings, an abuse of discretion will be found 'only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made.'" *Berryman, supra* at 98, quoting *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991) (citation omitted). After reviewing Dr. Anderson's testimony, we conclude that his opinion testimony with regard to a design defect was not supported by appropriate validation or indication of reliability, as required by *Daubert,* MRE 702, and MCL 600.2955(1). Therefore, the trial court did not abuse its discretion in finding that Dr. Anderson's opinion testimony was not reliable.

Plaintiff also argues that the trial court erred in granting defendant's motion for a directed verdict. We disagree. In order to prove breach of an implied warranty, the plaintiff must show that the product left the manufacturer in a defective condition and that the defect caused the plaintiff's injuries. *Jodway v Kennametal, Inc,* 207 Mich App 622, 629; 525 NW2d 883 (1994). A product is defective if it is not "reasonably fit for its intended, anticipated or reasonably foreseeable use." *Gregory v Cincinnati Inc,* 450 Mich 1, 34; 538 NW2d 325 (1995) (citations omitted).

As discussed above, the trial court did not abuse its discretion in finding that Dr. Anderson's opinion regarding the design defect was not reliable. Plaintiff presented no other evidence to establish that the furnace was defective. Because the evidence was insufficient to establish a prima facie case for breach of implied warranty, the trial court properly granted defendant's motion for a directed verdict. *Reisman v Regents of Wayne State University,* 188 Mich App 526, 538; 470 NW2d 678 (1991).

Plaintiff also brought a claim against defendant for design defect. "A plaintiff who claims that a product was defectively designed has the burden of producing evidence of the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of the risk of a particular design." *Lawrenchuk v Riverside Arena, Inc,* 214 Mich App 431, 435; 542 NW2d 612 (1995) (citations omitted). Again, because the trial court

did not abuse its discretion in finding that Dr. Anderson's opinion with regard to alternate designs was not reliable, we find that the evidence presented was insufficient to establish a prima facie case. Therefore, the trial court did not err in granting defendant's motion for a directed verdict with regard to plaintiff's design defect claim.

We affirm.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter