STATE OF MICHIGAN

COURT OF APPEALS

LYNETTE WITBECK, Personal Representative of the Estate of JAMIE R. WITBECK,

Plaintiff-Appellant,

v

CHECKMATE BOATS, INC., BRUNSWICK CORPORATION, d/b/a MERCURY MARINE GROUP, and PREMIER MOTORSPORTS, INC.,

Defendants-Appellees,

and

COOK MANUFACTURING CORPORATION,

Defendant.

UNPUBLISHED
July 17, 2008

No. 275934
Newaygo Circuit Court
LC No. 05-018876-NP

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendant Checkmate Boats, Inc.'s (Checkmate) motion for summary disposition under MCR 2.116(C)(10) in this wrongful death, products liability/design defect action. Plaintiff challenges that order and the order granting defendant Brunswick Corporation's, d/b/a Mercury Marine Group (Mercury Marine), motion to exclude plaintiff's expert witness and motion for summary disposition under MCR 2.116(C)(10) along with the order granting defendant Premier Motorsports, Inc.'s (Premier) motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. FACTS

This action arose out of the unfortunate drowning death of the decedent following a boating accident where it was noted that his boat, a 2002 Checkmate with a Mercury 225 V-6 EFI outboard engine, veered off suddenly at a 90-degree angle, causing him to hit his head on the windshield's frame and ejecting him into the water while not wearing a life preserver. Mercury Marine and Premier acknowledged that the accident probably occurred after the steering link rod disconnected from the dual steering cable coupler (the dogbone) because the nylon insert locknut (NIL) that was supposed to be on the threaded end of the steering link rod was missing or had

not been properly installed. About a year before the accident, plaintiff purchased the used boat from Premier. Premier accepted the boat as a trade in about ten months before that sale.

Plaintiff brought this action against defendants[1] under the wrongful death act, MCL 600.2922, asserting that steering components were improperly designed, installed, and manufactured and were inadequately inspected to correct the defects and that there was a failure to warn of those defects along with a breach of implied warranties. Following discovery, Mercury Marine moved to strike testimony from plaintiff's proposed expert witness, Troy Bowman, as unreliable under MRE 702 and MCL 600.2955(1). The trial court granted the motion and ultimately dismissed the claims against defendants. This appeal followed.

II. GRANT OF SUMMARY DISPOSITION TO MERCURY MARINE

Plaintiff first argues that the trial court erroneously granted summary disposition for Mercury Marine when it abused its discretion by excluding the opinion testimony of Bowman. We disagree.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Further, we review the trial court's determination as to whether the proposed expert witness was qualified to serve as an expert witness for an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

B. Analysis

For purposes of MRE 702, if the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify to the knowledge, by opinion or otherwise, if the testimony is based on sufficient facts and is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. MRE 702; *In re Noecker*, 472 Mich 1, 11; 691 NW2d 440 (2005). The testimony must be reliable, including the data underlying the expert's theories and the methodology by which the expert draws his conclusions. *Gilbert v DaimlerChrysler Corp*, 470

[1] "Defendants" refers to Checkmate, Mercury Marine, and Premier because Cook Manufacturing Corporation was dismissed with prejudice and is not involved in this appeal.

Mich 749, 779; 685 NW2d 391 (2004). A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403; 443 NW2d 340 (1989). In actions involving the death of an individual, MCL 600.2955(1) also governs the admissibility of testimony from an expert witness. The party proffering the expert bears the burden of persuading the trial court that the expert is qualified to testify. *Siirila v Barrios*, 398 Mich 576, 591; 248 NW2d 171 (1976).

After reviewing the evidence, we conclude that the trial court did not abuse its discretion in excluding Bowman as an expert witness regarding the allegedly defective design and the alternative design theories. Plaintiff does not directly challenge any particular factor with regard to MRE 702 or MCL 600.2955 but rather challenges some of the trial court's factual findings. In particular, plaintiff argues that the trial court failed to recognize the commonality between aerospace and marine fasteners. Regardless of whether the industries use common fasteners, the most pertinent issue is whether Bowman was qualified to testify about the allegedly defective design in issue and the two alternative designs.

As to the former, i.e., his opinion that a NIL would eventually lose its self-locking ability and come off over time from vibrations and from constant adjusting, Bowman acknowledged that his opinion was not tested and was not subjected to any peer review. His conclusion was purportedly based on an apparent aviation standard with regard to NILs, but that standard only provides that NILs should not be reused if the NIL cannot meet minimum prevailing torque values. Coinciding with that directive, Mercury Marine's owners' manual requires an owner to ensure that the NILs are torqued to correct specifications. Plaintiff relies on the apparent aviation standard and a portion of Mercury Marine's outboard shop manual, providing general information on various fasteners, as evidence that the trial court was mistaken that Bowman did not rely on publications to bolster his opinion that the steering connection was improperly designed. However, those documents do not even indirectly support his opinion regarding the effectiveness of an NIL used on an outboard motor steering connection.

Plaintiff also challenges the trial court's focus on the lack of statistical data presented to support Bowman's expert opinion of a defective design, suggesting that Bowman would be deemed qualified to testify concerning a defective fastener in the aviation industry if that was the first incident to date. In other words, she suggests that the lack of statistical data of problems with NILs in outboard motors should not be weighted negatively as to whether his opinion is reliable. However, plaintiff fails to acknowledge that the allegedly defective design has been used by the marine industry for nearly 50 years and expressly complies with the ABYC (American Boat and Yacht Council) standards.[2] Seemingly, there would be some objective, reviewable data to support Bowman's opinion that the design was defective, but there was none provided by plaintiff in this action.

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[2] We disagree with plaintiff's assertion that ABYC standard 17.4.3 and 17.4.3.2 coupled with the note make section 17.4 ambiguous because the note clarifies that self-locking nuts, like the NIL in issue, satisfy the section. Cf. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

As to the alternative designs, Bowman was to testify regarding (1) a cotter pin and (2) a patented alternative design. For the cotter pin, Bowman baldly stated that he analyzed the design using reliable engineering principles and methods and found it to be a practical, technical, and economically feasible, available alternative that would have prevented the harm to the decedent. However, Bowman did not explain what reliable engineering principles and methods he used, and plaintiff has provided no supporting evidence to suggest that they were actually used in creating his opinion. In fact, the only apparent evidence to support his opinion was testimony from Bowman that he discovered an online company using a cotter pin along with a castle nut, which may have had self-locking features like the NIL, but he acknowledged that he had not talked with anyone in the company and was unsure whether that steering system was the same on the boat in issue. However, Richard Snyder, Mercury Marine's former engineer who had intimate knowledge as to steering connection fasteners, testified that the cotter pin had been rejected by the entire industry of engine manufacturers given its very limited life of how many times it could be bended and because it was less durable and reliable than the NIL. Thus, Snyder, who has established expertise in the area, plainly contradicts the unsupported opinion of Bowman with regard to the cotter pin as an effective alternative design.

As for the patent, the purpose of the alternative fastener was to provide a more foolproof connection and retaining assembly that could be assembled and disassembled without the use of tools and to preclude the use of improper substitute fasteners. The patent noted,

> [B]oat owners and operators may not appreciate the locking function provided by the fastening assembly furnished with the original construction. Thus, as a result of subsequent disassembly, the reassembly of the connection may be made improperly. For example, the original self-locking nut may be replaced by a simple non-locking nut or other threaded fastener, or a cotter pin may be left out in the reassembly. In any event, vibration of the improperly reassembled connection can cause the simple threaded fastener to come off and subject the steering linkage to inadvertent disconnection.

While the alternative fastener was patented, it was expressly rejected by the ABYC as an alternative to the NIL and had never been used by any company in the marine industry. Nevertheless, Bowman baldly asserted that he analyzed the design using reliable engineering principles and methods and found it to be a practical, technical, and economically feasible, available alternative that would have prevented the harm to the decedent. Yet again, Bowman did not explain what reliable engineering principles and methods he used, and plaintiff has provided no supporting evidence to suggest that they were actually used in creating his opinion.

Finally, as to both designs, plaintiff asserts that testing had been done within the aerospace industry concerning their efficacy as alternative designs, as evidenced by the aviation standard manual and Mercury Marine's outboard shop manual. However, that assertion is not supported by fact because there is nothing in those documents to comfortably suggest that such testing has occurred or that the results demonstrated that the alternative designs were a better alternative.

In sum, while there may be an occasion where an individual with comparable knowledge and experience should be allowed to testify as an expert concerning a product given the lack of

development in a particular industry, those circumstances do not present themselves here. Cf. *Farr v Wheeler Mfg Corp*, 24 Mich App 379, 384; 180 NW2d 311 (1970). Ultimately, given Bowman's relevant knowledge, experience, and training in the aviation industry coupled with the lack of objective, supportive evidence to bolster his opinions, the trial court did not abuse its discretion by excluding his proposed expert testimony as unreliable. Plaintiff acknowledged that she could not support her claim against Mercury Marine without his opinions at trial; therefore, the court properly granted Mercury Marine's motion for summary disposition.

III. GRANT OF SUMMARY DISPOSITION TO PREMIER & CHECKMATE

Plaintiff next argues that the trial court erred by concluding that the basis for the negligence claim against Premier under MCL 600.2947(6) was too remote to support a finding of proximate cause. We disagree.

A. Standard of Review

Again, we review de novo a trial court's decision on a motion for summary disposition. *Collins*, *supra* at 631. Likewise, we review issues of statutory interpretation de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

B. Analysis

Based on the owners' manual that requires periodic inspections and maintenance, plaintiff argued that Premier violated MCL 600.2947(6)(a), which provides a product liability action against a seller, in part, when "[t]he seller failed to exercise reasonable care . . . with respect to the product and that failure was a proximate cause of the person's injuries." For plaintiff to have prevailed here, she was required to show (1) that Premier failed to exercise reasonable care and (2) that the breach was a proximate cause of the death.[3]

The relied upon manual requires an owner to perform an inspection and maintenance every 50 hours of operation or 60 days, whichever came first, by carefully checking the steering system components for wear, replacing worn parts, and checking the steering system fasteners to ensure that they were torqued to specifications. Premier had the boat in its possession for just over ten months after it was traded in, and plaintiff relies on the manual as evidence that Premier acted unreasonably by failing to continuously check the boat when it was in its possession as required by the manual. See *Hartford Fire Ins Co v Walter Kidde & Co, Inc*, 120 Mich App 283, 291; 328 NW2d 29 (1982) (indicating that the failure to comply with safety instructional manual was evidence of negligence). We agree with the trial court that Premier was not a proximate cause of the accident given the time period between the sale and the accident, just over one year, and the decedent's extensive use of the boat in 2003, the year before the accident.

As explained in *Poe v Detroit*, 179 Mich App 564, 576-577; 446 NW2d 523 (1989),

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[3] While plaintiff originally pursued a breach of warranty claim, plaintiff does not challenge the trial court's decision to dismiss the claim under MCR 2.116(C)(10).

> When a number of factors contribute to producing injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in bringing about the injury. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547-548; 418 NW2d 650 (1988), citing 2 Restatement Torts, 2d, § 431, p 428. Factors to be considered in determining whether the negligence is a substantial factor are:
>
> > (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
> >
> > (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
> >
> > (c) the lapse of time. [2 Restatement Torts, 2d, § 433, p 432.]

Proximate cause has been succinctly defined as "that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, without which such injury would not have occurred." *Weissert v City of Escanaba*, 298 Mich 443, 452; 299 NW 139 (1941). An intervening cause, which results in producing harm to another after the negligence of the defendant, may relieve a defendant from liability. *Poe*, *supra* at 577. "An intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.'" *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). In particular, when a defendant's negligence consisted of enhancing the likelihood that the intervening cause would occur or consisted of a failure to protect the plaintiff against the risk that did occur, the intervening cause is considered to be reasonably foreseeable. *Id.* at 586.

Based on plaintiff's theory of negligence here, as the subsequent owner, the decedent would also have been required to check the steering connection, including the NIL, at least every 60 days after purchase as required under the owners' manual. Therefore, the decedent would have been required to check the connection at least five times before the accident date. While there is no evidence to suggest whether he performed the proper maintenance, had he done so, it would have likely eliminated any chance that the accident would have ever occurred. Premier's alleged negligence did not enhance the likelihood that the accident would occur and did not consist of a failure to protect the decedent from the accident because, under plaintiff's own theory, the decedent would have had to check the NIL at least five times before the date of the accident. That continuing requirement effectively intervened and cut off Premier from any potential liability. Accordingly, no error occurred with regard to the claim against Premier and

the similar claim against Checkmate.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette