IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 18, 2003 Session

CHARLES BROWN, ET AL. v. CROWN EQUIPMENT CORPORATION

Direct Appeal from the Circuit Court for Shelby County
No. 97528-9 T.D. Robert L. Childers, Judge

No. W2002-02228-COA-R3-CV - Filed February 25, 2004

Plaintiffs filed suit against Defendant, seeking compensatory and punitive damages based on injuries allegedly caused by the defective nature of Defendant's forklifts. At the conclusion of Plaintiffs' and Defendant's expert testimony, the trial court granted Defendant's motion to exclude Plaintiffs' experts and the Defendant's motion for directed verdict. Plaintiffs appeal these decisions. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Lisa June Cox, Jackson, Tennessee, Gerson H. Smoger, Dallas, Texas and J. Brent Austin, Lexington, Kentucky, for the appellants, Charles Brown, Barbara Sue Reynolds and Howard Reynolds.

Thomas J. Cullen, Jr., Baltimore, Maryland and William W. Dunlap, Jr. and Shannon E. Holbrook, Memphis, Tennessee, for the appellee, Crown Equipment Corporation.

OPINION

In their complaint, Plaintiffs Charles Brown (Brown) and Barbara Sue Reynolds (Mrs. Reynolds) allege that they sustained leg injuries while operating two different models of Defendant's, Crown Equipment Corporation (Crown), forklifts. Both Brown and Mrs. Reynolds brought product liability claims[1] against Crown while Mrs. Reynolds' husband, Plaintiff Howard Reynolds (Mr. Reynolds, or collectively with Brown and Mrs. Reynolds the Plaintiffs), sought

[1]Brown's and Mrs. Reynolds' injuries were not related but their claims have been consolidated.

compensation based on his loss of consortium.[2] Prior to trial, both the Plaintiffs and Crown filed motions *in limine* to exclude the opposing parties' experts from testifying at trial. In a hearing, the trial court analyzed the merit of the motions using the standards for the admissibility of expert testimony as enumerated in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997). After this initial hearing, the trial judge denied the motions which allowed the experts of both parties to testify at trial. In a subsequent order, the trial court orally entered a scheduling order for the trial. In that order, the Plaintiffs were given five days, or thirty-five hours, for their proof while Crown was given four days, or twenty-eight hours, for its proof. In addition, the trial judge stated:

> I've looked at one or two of the rules in the Tennessee Law of Evidence . . . which provide that these rules shall be construed to secure the just, speedy, and inexpensive determination of the proceedings. Based on that rule, I'm going to order that the witnesses be presented one after another. Because as I stated earlier, in order for the jury to understand the conflicting testimony of the various experts in this case and in order for them to reach a fair verdict in the case based on all of that expert testimony, I think they should hear those witnesses one after the other. So I'm going to order that the plaintiff[s] present their expert witnesses at the end of plaintiff's proof and the defendant present their expert witnesses at the beginning of the . . . defendant's proof.

In presenting their case in chief, the Plaintiffs called two experts, a mechanical engineer, Richard Johannson (Johannson), and a biomechanical engineer, Gerald Harris, Ph.D. (Harris). Relying upon statistics prepared by Crown, records documenting real accidents, biomechanical literature, drawings of a rear door, and testing information, Johannson and Harris opined that Mrs. Reynolds' and Brown's injuries would have been prevented had a rear door been installed on the forklift's operator compartment. In the Plaintiffs' brief filed with this court, they assert that had the trial judge not imposed such a strict scheduling order, they would have been able to call an additional expert, John Sevart (Sevart), to testify following the testimony of Harris and Johannson. Additionally, the Plaintiffs assert that they attempted to call Sevart to testify as a rebuttal witness but the trial court denied this request based on the time restrictions of the trial.[3]

At the close of the Plaintiffs' and Crown's expert testimony, Crown renewed its motion to exclude Plaintiffs' experts accompanied by renewing its motion for a directed verdict on all issues of liability. The trial court granted the motion to exclude Plaintiffs' experts finding that neither expert had tested their evidence, subjected it to peer review, determined its potential rate

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[2]The original complaint was also brought against Equipment Engineering Company, Equipment Engineering Corporation, James M. Terrell, and George M. Terrell. These additional defendants filed a motion for summary judgment which was granted by the trial court.

[3]While the Plaintiffs, in their brief, recount the trial court's denial of Plaintiffs' request to call Sevart as a witness, they fail to cite to its occurrence in the trial transcript. After reviewing the rather voluminous trial transcript, this Court similarly fails to find its existence.

of error, or had the scientific community accept their evidence. The court further found that Johannson's drawing of the rear door was prepared solely for purpose of the present litigation and that Harris' opinions and conclusions were similarly prepared for the present litigation. Absent the expert testimony, the court found no evidence to indicate Crown's negligence or that its forklifts "were defective or unreasonably dangerous or that the forklifts were not merchantable or fit for the particular purpose for which they were manufactured" and granted Crown's motion for directed verdict. Plaintiffs subsequently filed a motion to alter or amend the judgment which was denied by the trial court. Plaintiffs timely filed their notice of appeal.

Issues Presented

In considering the issues as presented by both parties, this Court perceives the following issues for our review:

1. Whether the trial court erred in granting Crown's motion to exclude the expert testimony of Gerald Harris, Ph.D., and Richard Johannson.

2. Whether the trial court erred in precluding Plaintiffs from calling John Sevart as a witness in its case in chief or as a rebuttal witness.

3. Whether the trial court erred in granting Crown's motion for directed verdict on all issues of liability.

Standard of Review

"In general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). The trial court's ruling in this regard may be overturned if the discretion is arbitrarily exercised or abused. *Id*." *McDaniel v. CSX Transp.*, 955 S.W.2d 257, 263-64 (Tenn. 1997). To the extent that any other issues involve questions of fact, our review of the trial court's ruling is *de novo* with a presumption of correctness. Tenn. R. App. P. 13 (d); *Sullivan v. Sullivan*, 107 S.W.3d 507, 509 (Tenn. Ct. App. 2002). We may not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. *Sullivan*, 107 S.W.3d at 510. With respect to the court's legal conclusions, however, our review is *de novo* with no presumption of correctness. *Id*.

Admissibility of Expert Testimony

In addressing whether it was error for the trial court to exclude the expert testimony of Harris and Johannson, this Court first turns to the relevant Tennessee Rules of Evidence which provides:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness

qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Rule 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 702, 703. Relying upon these rules, the Tennessee Supreme Court imposed the following standard to be used by trial courts in ruling on the admissibility of expert testimony:

> [A] trial court must determine whether the evidence will substantially assist the trier of fact to determine a fact in issue and whether the facts and data underlying the evidence indicate a lack of trustworthiness. [Rules 702 and 703] together necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.
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> Although we do not expressly adopt *Daubert*, the non-exclusive list of factors to determine reliability are useful in applying our Rules 702 and 703. A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether as formally required by *Frye*, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.
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> . . . The court . . . must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. *See, e.g., Joiner v. Gen. Elec. Co.*, 78 F.3d 524, 530 (11th Cir. 1996).

McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 265 (Tenn. 1997).

In this case, the testimony of both Johannson and Harris was based upon their review of statistics performed by Crown, records documenting real accidents, biomechanical literature, drawings of a rear door, and testing information. After hearing the testimony of both Johannson and Harris, the trial judge entered its findings and holding in a well drafted order granting Crown's motion to exclude Plaintiffs' experts. However, the court erred by stating that

"Tennessee has not adopted the *Daubert* standards, but instead *requires* a consideration of a nonexclusive list of factors to determine an expert witness's reliability." As the prior quoted portion of *McDaniel* indicates, the trial court *may* but is not required to consider the non-exclusive list of factors in that it is useful in determining whether the testimony substantially assists the trier of fact and whether the underlying research indicates a lack of trustworthiness. Tenn. R. Evid. 702, 703; *McDaniel*, 955 S.W.2d at 265.

Nevertheless, the trial court addressed all five of the *McDaniel* factors and found as follows:

> **Testimony of Richard James Johannson**
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> The Court has reviewed the testimony of the Plaintiffs' witness Richard James Johannson in light of the *McDaniel* factors.
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> As to factor one of *McDaniel*, whether the scientific evidence has been tested and the methodology with which it has been tested, the witness offers no evidence except for his bareboned opinion regarding the pretrial testimony of the plaintiffs, various witnesses and the defendant's accident reports. The witness also admits that testing is extremely important to engineers, yet he had done no testing of the door he claims will make forklifts safer. By the witness's own testimony on direct examination, he explains what the protocol would be for individuals charged with addressing a potential safety problem. Paraphrasing the witness's testimony on direct examination[,] he said that the first step is to identify a problem, then define it, then brainstorm the ideas generated, then look for solutions, then evaluate the solutions, then test the solutions, then put the ideas in the field and keep fixing them until they were right. By the witness's own admission, testing is a critical part of design. Therefore, if the witness has done no testing of his proposed safer door, how can his testimony as to its safety be trustworthy? Further, the witness claims to have undertaken a preliminary study regarding the value of adding a door to the Crown forklift, but he admits that this design is not one he would recommend that Crown implement due to the lack of analysis. The witness admits he had never built a door, nor has he done any design of a door except for a sketch or drawing and some preliminary calculations regarding strength and impact.
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> When looking at expert witnesses' theories[,] other courts have held that a mere sketch or a preliminary drawing is not acceptable as an engineering drawing or prototype. Indeed, how can an idea be anything but an idea unless it has been tested? Absent proper testing, the fact finder is not aided. The fact finder is merely asked to accept a naked hypothesis as valid scientific evidence with no supporting data, or information.

As to factor two of *McDaniel*, whether the evidence has been subjected to peer review or publication, the witness's door idea could not be subjected to peer review because by the witness's own admission[,] there was nothing to review but a preliminary drawing.

As to factor number three, whether a potential rate of error is known, since the witness['s] idea has not been tested, the potential rate of error is unknown.

As to factor number four, whether the evidence is generally accepted in the scientific community, the scientific community cannot possibly have any knowledge of the witness's idea since the witness, by his own admission, has nothing to submit to the scientific community except for a sketch or a drawing; therefore, there is nothing for the scientific community to accept or embrace. Moreover, the scientific community has rejected the witness's other proposal of "just add doors and safety follows" on numerous occasions.

As to factor number five, whether the expert's research in the field has been conducted independent of litigation, it is undisputed in this case that the witness's drawing of a door concept was created for litigation.

The Court does not dispute that the witness is an expert in his chosen field of engineering. The Court would not exclude this if he had any testing to back up his opinions; however, he does not. And the fact that he may be able to make a far more educated guess than a layperson, this does not make his opinion trustworthy.

. . . .

Testimony of Gerald F. Harris, Ph. D.

The Court has also reviewed and considered the testimony of the Plaintiffs' witness, Dr. Gerald F. Harris.

As to factor number one, the witness admits he has done no testing on forklifts and has never designed a door. The witness also admits that testing is an important part of evaluation; and while he claims that not all testing has to be physical, the position he takes regarding the addition of a door to a forklift is hardly something about which one can give a naked opinion. The addition of or the failure to add a door is a core issue in this case. The witness makes statements that the presence of a door would have prevented the injuries with no basis for that opinion. Indeed, on direct examination the witness said, "the failure to supply the door was the cause of the injury. Had the door been there, there wouldn't have been an injury." Since the witness makes this bare bones claim, completely lacking any data or testing to support it, his testimony is mere speculation and should not be allowed. The

witness acknowledges that there are tremendous variations in the types of situations and reactions that might occur in a tipover. This acknowledgment indicates a need to create or recreate the various situations to test what would happen. Further, the witness admitted that he had no expertise in human reactions in emergency situations regarding forklifts and had conducted no testing to determine how forklift operators would react in emergency situations.

Factor number two concerns peer review. The Court finds the testimony of Dr. Harris to be rather ironic in this case. The witness, by his own admission, is a peer reviewer. The Court finds it ironic given the fact that he presumably understands the importance of peer review, since he is a peer reviewer for a publication, that Dr. Harris' hypothesis has not been subjected to the scrutiny of his peers.

Factor number three. The rate of error cannot be known on an untested hypothesis.

As to factor number four, whether the evidence is generally accepted in the scientific community, the scientific community does not accept the evidence of Dr. Harris because he has submitted none. The attempts to submit his ideas for any review at all through Mr. Sevart on two occasions were rejected. Again, as with Mr. Johannson, a naked conclusion is not enough.

Factor number five. The witness admits that his opinions and conclusions came about purely through litigation. Dr. Harris has conducted no testing, and he does not purport to rely on any testing which would support any of his conclusions. Dr. Harris has merely relied on his knowledge in the field of biomechanics. And, again, the Court has no reason to question Dr. Harris' expertise in the field of biomechanics, but more is involved in this case than an expertise in the field of biomechanics. In this type of litigation, where the machinery in question is a highly specialized piece of equipment, an expert witness cannot rely on supposition or theories. An expert testifying that he knows what happened and how it could have been prevented may not do so absent any tests of research or verifiable scientific method.

After reviewing the testimony of Johannson and Harris, this Court finds that the trial court did not err in its findings. Beyond its analysis of the five *McDaniel* factors, the court found that "Johannson's opinion is just that, an educated guess with no scientific or technical basis and that it lacks trustworthiness." Further, "Harris' methodology appears to the Court to be little more than a consideration of the facts presented." These further findings emphasize the role of the trial court as enumerated in *McDaniel*. That is the court determined that the expert testimony would not substantially assist the trier of fact to determine a fact in issue and, at least for Johannson, the court further found that the opinion lacked trustworthiness. The trial court did

not abuse its discretion in excluding the testimony of Plaintiffs' experts. Accordingly, we affirm the trial court's grant of Crown's motion to exclude the testimony of Harris and Johannson.

John Sevart

The Plaintiffs next argue that it was error for the trial court, in enforcing a strict ordering of proof, to preclude Plaintiffs from calling John Sevart as an expert witness in their case in chief and subsequently as a rebuttal witness. As previously mentioned, the Plaintiffs recount these events in their brief but fail to cite to their occurrence in the record. After reviewing the rather voluminous record, this Court fails to find their occurrence. This Court has held that it "is not under a duty to minutely search a voluminous record to verify numerous unsupported allegations in [a party's] brief." *Schoen v. J.C. Bradford & Co.*, 642 S.W.2d 420, 427 (Tenn. Ct. App. 1982); *see also* Tenn. R. App. P. 27(6); Ct. App. R. 6(a)(4). Accordingly, Plaintiffs' second issue is without merit.

Directed Verdict

This Court will next address whether it was error for the trial court to enter a directed verdict in favor of Crown. In product liability cases, this Court has held that "[i]f the fact in issue is one within the common knowledge of experts only (as is the case before us), and not within the common knowledge of a layman, it is necessary for plaintiff to introduce expert testimony in order to make out a *prima facie* case." *Kibbler v. Richards Med. Co.*, No. 02A01-9110-CV-00214, 1992 WL 233027, at *2 (Tenn. Ct. App. Sept. 23, 1992) *perm. app. denied* (Tenn. Jan. 5, 1993) (citing M. Stuart Madden, *Products Liability* 532 (2d ed. 1988)). In the case of *Dancy v. Hyster Co.*, 127 F.3d 649 (8th Cir. 1997), the United States Court of Appeals was faced with similar questions as those presented in the present case. *Id*. at 651-55. In that case, the alleged defective product was a lift truck, similar to a forklift, and the alleged defect was the omission of a "guard around the compartment to prevent the operator from being pinned under the lift truck." *Id*. at 651. The plaintiff's expert witness opined that a mesh guard was needed to protect the operator. As to whether expert testimony would be required for this product liability claim, the court stated:

> We cannot expect lay jurors to possess understanding about whether the mesh guard envisioned by [the expert] would be capable of withstanding the force involved in a fall and be effective in protecting Plaintiff from the injury he received. We cannot expect a lay juror to know whether such a device would increase the risk associated with the vision impairment discussed by [the expert]. We cannot expect a lay juror to know whether the mesh guard itself would cause more injuries than it creates by, for instance, breaking and puncturing the lift truck's operator.

Id. at 653. We believe that, like the mesh guard, the effectiveness of a rear door, the risks associated with a rear door, and the potential for greater injury had the rear door been in place are

all facts in issue beyond the common understanding of lay jurors. As a result, expert testimony is required in this case for the Plaintiffs to make out a *prima facie* product liability claim against Crown. Accordingly, we affirm the trial court's grant of Crown's motion for directed verdict. Having held that, absent expert testimony, Plaintiffs could not make out a *prima facie* claim against Crown and that it was not error for the trial court to exclude Plaintiffs' experts, this Court need not address the Plaintiffs' remaining issues.

Conclusion

In light of the foregoing, we affirm the trial court's grant of Crown's motion to exclude Plaintiffs' experts and motion for a directed verdict. Costs of this appeal are taxed to the Appellants, Charles Brown, Barbara Sue Reynolds, and Howard Reynolds, and their surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE