STATE OF MICHIGAN

COURT OF APPEALS

DELORES ROBINSON, Personal Representative for the Estate of HAROLD L. ROBINSON,

Plaintiff-Appellant,

v

ROYAL OAK FORD, INC., a/k/a MCLAUGHLIN ENTERPRISES,

Defendant-Appellee.

UNPUBLISHED
May 28, 1996

No. 175144
LC No. 89-380323

Before: Reilly, P.J., and Michael J. Kelly and C.L. Bosman,* JJ.

PER CURIAM.

In this products liability case a directed verdict was granted to defendant, Royal Oak Ford, at the close of plaintiff's proofs in the Oakland Circuit Court. Plaintiff appeals as of right.

Plaintiff's decedent, Harold L. Robinson, died of carbon monoxide poisoning on December 10, 1988. At the time of his death, Robinson was in a grocery store parking lot waiting for the store to open. He was the sole occupant of a 1985 Mazda, which had been purchased by his wife as a used car in June of 1988 from defendant Royal Oak Ford, Inc. An AET was performed on the Mazda following his death. The result showed an unacceptably high level of carbon monoxide. When the used Mazda was sold to plaintiff by defendant in June of 1988, it was accompanied by an AET compliance certificate issued in May of 1988. An accurate automotive emissions test (AET) includes an indication of carbon monoxide levels.

A pretrial motion in limine resulted in denying plaintiff the right to present (1) evidence of AET fraud at defendant's premises which may have involved the Robinsons' car; (2) testimony from accident reconstruction and toxicology experts, and (3) photographs taken in 1992 of the exhaust system of the subject vehicle.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff urges that the trial court abused its discretion in preventing plaintiff from presenting evidence that the decedent's car may have been one of those vehicles issued a fraudulent AET certificate.

The decision whether to admit evidence is within the sound discretion of the trial court, and it will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty Inc.*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Prior to trial, defendant moved in limine to exclude any evidence or mention of the fact that it was investigated by the State of Michigan Bureau of Automotive Regulation regarding allegedly fraudulent AET testing and related matters. On-site Automotive, Inc., a mobile AET testing service company which had performed tests for defendant and other dealerships, was found to have issued fraudulent certificates of AET compliance. As a result, On-Site lost its license to conduct AET tests. Four vehicles sold by defendant, not including the Mazda driven by plaintiff's decedent, were determined to have been issued fraudulent certificates. Defendant argued that mention of the AET testing scandal was prejudicial, would invite speculation on the part of the jurors, and was irrelevant unless it could be shown that plaintiff's Mazda was the subject of On-Site's fraud.

In response to defendant's motion, plaintiff offered the deposition testimony of Larry Sirgany, the former president of On-Site Automotive, that the test was not conducted on the subject vehicle. The tests were also not conducted for 95% of the certificates issued. He admitted on cross examination that On-Site retained no records of which tests were genuine and which "phony" and did not know if plaintiff's car "was a faked test." The court ruled that, probabilities aside, the evidence would be barred unless plaintiff could produce testimony that the AET was not performed on the Mazda. Plaintiff asserted that each of the employees of On-Site Automotive was assigned a district. The employee that signed the Mazda's certificate of compliance was not assigned to defendant's district and did not go to defendant's premises. The witness, Sirgany, deduced that that meant that the Mazda's "test" was fabricated on his driveway, where the VIN's of numerous vehicles, presumably including that of the Mazda, were entered into the testing machine, but the actual test was performed on a single car, with emissions within acceptable parameters. If the signer of the Mazda certificate never went to the dealership where the Mazda was located, the certificate could not possibly have accurately represented the condition of the Mazda's emissions. This testimony was tantamount to establishing that the test was not performed on the Mazda. The evidence was improperly excluded on the ground that plaintiff did not have a witness to testify that the AET was fraudulent as to the subject vehicle. The trial court abused its discretion in excluding the evidence. The logical conclusion from the facts presented by Sirgany's testimony is that the AET on the Mazda was fraudulent. Plaintiff should have been allowed to introduce testimony regarding the AET testing fraud involving defendant and On-Site Automotive.

Plaintiff next claims error in the court's exclusion of an accident reconstruction expert and a forensic toxicologist, who were proffered to testify relative to the defective muffler system. She argues that the excluded witnesses would have testified that it was highly probable that the Mazda's exhaust system was defective at the time the car was sold.

The qualification of a witness as an expert and the admissibility of the expert's testimony are consigned to the trial court's discretion and rulings will not be reversed on appeal absent an abuse of that discretion. *Davis v Link Inc.*, 195 Mich App 70, 74; 489 NW2D 103 (1992). Defendant's motion in limine sought to preclude the testimony of a toxicologist and an accident reconstructionist on the ground that its liability was conditioned on the existence of defects in the Mazda's exhaust system while the vehicle was in its possession. Defendant claimed the experts could not ascertain whether the system was defective before it was sold to the wife of plaintiff's decedent. Plaintiff offered the deposition testimony of the accident reconstructionist that he can "confidently testify that the extent of corrosion present within ninety days after [Robinson's] death was so advanced that it clearly existed at the time of the sale, less than six months earlier." Defendant countered with other deposition testimony of the same witness indicating that he could not tell when the hole in the exhaust system came into existence, but that it was there a long time. Plaintiff argued that the toxicologist would testify that Robinson's death occurred within a short time period, indicating an intense presence of carbon monoxide. Such conflicts should have been resolved by the jury. The existence of a substantial defect could be inferred from the large quantity of carbon monoxide generated by the car. The trial court should not have excluded the two expert witnesses.

In *Bercel Garages Inc. v Macomb County Road Comm'n*, 190 Mich App 73, 83-84; 475 NW2d 840 (1991), this Court, citing *Cirner v Tru-Value Credit Union*, 171 Mich App 163, 170; 429 NW2d 820 (1988), stated the requirements for the admission of expert testimony.

> (1) the witness must be an expert; (2) there must be facts in evidence which require or are subject to examination and analysis by a competent expert; and (3) there must be knowledge in a particular area that 'belongs more to an expert than to the common man.' [*id*, 171 Mich App at pp. 168-169; 429 NW2d 820.]
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> The 'critical inquiry' with regard to expert testimony is 'whether such testimony will aid the factfinder in making the ultimate decision in the case.' In determining whether the expert testimony will aid the trier of fact, it is helpful to apply 'the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. *Ladd, Expert Testimony*, 5 Van L R 414, 418 (1952). [*Id*. P 169]

See also, *Davis*, 195 Mich App at 73-74.

Defendant's contention was that Robinson died because he was sitting in the car from six to eight hours with the engine running and the car not moving. Under those conditions, a toxic amount of carbon monoxide could build up from a defect-free exhaust system. The toxicologist's proffered testimony that death occurred within a very short period of time would indicate that defendant's theory was flawed, and that the defective exhaust system caused his death.

The trial court abused its discretion in excluding the experts because it focused only on their ability or lack of ability to testify as to the exact date the exhaust system on the Mazda became defective. If the trial court had determined that they were unqualified to testify as to that fact, and precluded them from doing so, while allowing them to testify as to other relevant aspects of the case within their respective areas of expertise, that ruling would have fit within the framework provided by *Bercel,* supra *at 83-84.* The blanket exclusion of two experts was improperly based on their inability to testify regarding a single fact, which was apparently outside their areas of expertise, and was an abuse of discretion.

Plaintiff next claims the trial court abused its discretion in excluding photographs taken in 1992 of the Mazda's exhaust system, where the purpose of the photographs was to show the condition at that time, in 1992, to be compared with the condition existing near the time of Robinson's death, providing data from which the expert could extrapolate the degree of corrosion at the time the car was sold.

The admission of photographic evidence is reviewed for an abuse of discretion. People v Anderson*, 209 Mich App 527, 536; ___ NW2d ___ (1995); night v Gulf & Western Properties Inc*., 196 Mich App 119, 133-134; 492 NW2d 761 (1992). The trial court abused its discretion in denying admission of photographs of the exhaust system in 1992 for purposes of scientific analysis and comparison based on the court's conclusion that determining the rate of corrosion was too speculative. The trial court's determination that the procedure was too speculative was made without benefit of first hearing from the expert regarding the testing procedures, their parameters, and their reliability. Failure to conduct a hearing was error.undermining the court's conclusion that the procedure was too speculative.

We also find error in the trial court's directing a verdict for defendant at the close of plaintiff's case.

In deciding the motion for a directed verdict, the trial court should have reviewed the record in the light most favorable to the plaintiff, granting it every reasonable inference and resolving any conflict in the evidence in its favor. *DOT v McNabb*, 204 Mich 674, 676; ___NW2D ___ (1994); *Berryman, supra* at 91. The failure of the trial court to consider the favorable inference due plaintiff when all evidence was to be viewed in a light most favorable to it necessitates remand for a new trial.

Reversed and remanded.

/s/ Maureen Pulte Reilly
/s/ Michael J. Kelly
/s/ Calvin L. Bosman