STATE OF MICHIGAN

COURT OF APPEALS

In re TUNNEY ESTATE.

GERALDINE TUNNEY MURPHY, Personal Representative of the Estate of JOHN B. TUNNEY, JR., Deceased,

Plaintiff-Appellant/
Cross-Appellee,

v

FORJAS TAURUS, TAURUS INTERNATINAL MANUFACTURING, INC., and CHARLES MCDONALD, d/b/a CHARLIE'S GUNS,

Defendant-Appellees/
Cross-Appellants.

UNPUBLISHED

No. 152590
LC No. 87-330100-NP

Before: Corrigan, P.J., and Markey and J.R. Ernst,*JJ.

MARKEY, J. (dissenting).

After a very thorough review of the entire record in this matter, I am convinced that the trial court erred in granting a directed verdict in favor of defendant; consequently, I would reverse on that issue. Both the trial court and the majority fail to recognize that at times the evidence in product liability cases can be analyzed more from a standpoint of common sense than from extremely technical expert opinion testimony.

Directed verdicts in negligence cases are viewed with disfavor. *Berryman v K mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). In reviewing a trial court's grant of directed verdict, we examine the testimony and all legitimate inferences that may be drawn from the evidence in a light

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

most favorable to the plaintiff in determining whether a prima facie case was established, *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986), or whether there was a material issue of fact, *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991). "If, on the other hand, the evidence is insufficient to establish a prima facie case, then the motion should be granted, since reasonable persons would agree that there is an essential failure of proof." *Reisman, supra*. Plaintiff asserts that the trial court erred in granting defendants a directed verdict because, viewing the evidence in a light most favorable to plaintiff, reasonable minds could conclude that she had established a genuine issue of material fact regarding the defective design and proximate cause portions of her products liability claim. I agree.

To establish a prima facie case of product liability for a design defect, a plaintiff must introduce sufficient evidence to prove that the design of the defendant's product was unreasonably dangerous. *Prentis v Yale Mfg Co*, 421 Mich 670, 693-694; 365 NW2d 176 (1984). To determine if the design was unreasonably dangerous, the plaintiff must show that a design defect created an unreasonable risk of foreseeable injury. *Id*. at 694. The manufacturer's duty to use reasonable care in designing its products in a reasonably safe manner for the product's intended, anticipated, or reasonably foreseeable uses also extends to reasonably anticipated misuses of the product. *Id*.

Here, the trial court concluded that plaintiff had failed to establish a prima facie case of design defect primarily because (1) her expert witness failed to testify that the gun was unreasonably unsafe without the firing pin block, (2) her expert failed to perform similar tests on the gun under conditions mirroring those in this case, and (3) plaintiff failed to provide testimony that it was foreseeable in 1985 that the gun would fire when dropped muzzle up and with the hammer in the resting position. Contrary to the trial court and the majority opinion, I believe that additional expert testimony with respect to these areas was neither critical nor necessary because reasonable minds certainly could have concluded on the basis of the evidence presented at trial that the gun in question is unreasonably unsafe if it fires when dropped and while the hammer is in full rest position, i.e., uncocked. A jury is certainly capable of making these types of conclusions for themselves without the need for extensive expert testimony. We cannot forget that MRE 702 conditions the testimony by experts on whether or not it "will assist the trier of fact to understand the evidence or determine a fact in issue." To conclude as did the trial court and the majority that reasonable minds could not differ regarding why this accident occurred, and that the gun must have been defective if it discharged when it was dropped muzzle up as propounded by plaintiff, simply defies logic, undermines the reason for using expert testimony, ignores the spirit of law, and essentially constitutes impermissible fact-finding.

In addition to the evidence in this case as set forth by the majority opinion on pages 3 and 4, I would also note that plaintiff's expert, Mr. Townshend, did in fact testify that the presence of a firing pin block device would have eliminated the danger of an accidental discharge of this gun if it had been dropped "muzzle up" in the way that the witnesses to the Tunney accident described it. He also opined that the force of the gun striking the floor did in fact exert sufficient energy through the hammer and

against the firing pin to overcome the firing pin's spring thereby driving it into the primer. Plaintiff also called Manuel Costa Da Silva as an adverse witness in order to develop proofs concerning defendant's factual theory of how the accident occurred and in order to address the issues of foreseeability and defendant's design decisions.

Considering the evidence as set forth in a light most favorable to plaintiff, reasonable minds could conclude that an issue of material fact existed regarding whether the PT-92 without the firing pin block created an unreasonable risk of foreseeable injury, particularly when defendant Taurus continued to sell the PT-92 models for two years after it first began manufacturing the PT-92-AF with an inexpensive simple device that was designed to prevent the gun from accidentally discharging.[1] The trial court erred and, now so does the majority by fact-finding and substituting its judgment for that of the jury. See *Reisman, supra*.

The trial court also granted the motion for a directed verdict because it believed that plaintiff's evidence on causation was speculative. As our Supreme Court stated in *Skinner v Square D Co*, 445 Mich 153, 159-160; 516 NW2d 475 (1994),

> It is well settled under Michigan law that a prima facie case for products liability requires proof of a causal connection between an established defect and injury. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 415; 443 NW2d 340 (1989).[2] While the plaintiff bears the burden of proof, the plaintiff is not required to produce evidence that positively eliminates every other potential cause. Rather, the plaintiff's evidence is sufficient if it "establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." Id. [Emphasis added; footnote added.]

Our Supreme Court has repeatedly recognized that a plaintiff may use circumstantial proof to show the requisite causal link between a defect and an injury in products liability cases. *Skinner, supra* at 163. "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164. Rather, a plaintiff must produce substantial evidence from which a jury may conclude that but for the defendant's conduct, it is more likely than not that the plaintiff would have escaped injury. *Id*. at 164-165. Plaintiff's theory, therefore, must have some basis in fact. *Id*.

In the case at bar, plaintiff contends that plaintiff's decedent died when the gun he was carrying fell to the ground and discharged, fatally shooting him, while defendants claim that the decedent caught the trigger and caused the gun to discharge as it fell. Importantly, these are the only two possible explanations for this accident. Again, I believe that circumstantial evidence coupled with the testimony of several eye witnesses supported plaintiff's theory of how the accident occurred so as to preclude directing the verdict.[3] Reviewing this evidence in a light most favorable to plaintiff, I believe that reasonable minds could conclude that the gun discharged when the pistol's butt struck the ground, and that the force of the fall caused the gun's firing pin to move, discharging the gun. As a result, the gun recoiled, slamming the gun's hammer into the floor. This not only lodged material from the floor into the hammer but also

prevented the slide from naturally thrusting backward, thereby leaving the spent shell in the gun's chamber. Notably, defendant’s theory of the

accident fails to explain why the spent shell casing remained in the firing chamber, rather than ejecting from the gun after Tunney allegedly pulled the trigger.

In light of significant objective evidence supporting plaintiff's theory of causation and refuting defendants' theory as implausible, I would find that plaintiff's theory of causation was beyond mere speculation or conjecture. The majority simply erects legal hurdles in this case that are unwarranted legally or factually. In concluding that plaintiff did not meet her burden of establishing foreseeability, they simply indicate that "plaintiff's expert," apparently mistakenly referring to Da Silva, had never heard of an accident happening with the muzzle up; thus, such an accident was not foreseeable. The majority further indicates that plaintiff's experts engaged in no testing of the subject weapon itself to show that the gun might discharge when dropped muzzle up. Again, I do not believe the law requires such testing nor does the law allow that for a manufacturer "ignorance should be bliss." Both of these analyses simply encourage manufacturers to do nothing to determine the safety of their products. (nor do they cite any legal support for this analysis). Accordingly, I believe the trial court erred in granting the motion for directed verdict on this basis at the close of plaintiff's proofs and would reverse and remand for a new trial on this issue.

/s/ Jane E. Markey

[1] As an aside, I do not believe that a plaintiff or a plaintiff's expert in a product liability action is required to perform "destructive" testing on an allegedly defective products in order to prove that the product will malfunction at some particular rate such as one-in-one hundred tests or one-in-one million tests.

[2] The *Mulholland* Court also clarified that "[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id*. at 416-417, n 18, quoting Prosser & Keeton, Torts (5th ed), 41, p 269.

[3]Thomas Kish, Tunney's co-worker, was standing within a few feet of Tunney when the gun discharged. Kish saw a flash "directly on the floor" and heard the gun discharge as Tunney was pushing a filing cabinet. He testified that he did not see Tunney remove his hands from the cabinet or make any other sudden hand movements. Ruthanne Bourlier also saw Tunney moving the cabinet. Although she could only see one of his hands on the cabinet, she testified that she saw Tunney make no sudden movements before the gun discharged. The medical examiner also testified that the graze-like abrasion immediately below the entry wound and the upward trajectory of the bullet into Tunney's body were consistent with the gun having fallen to the floor and discharging. The examiner also stated that the absence of "powder tattooing at the entry wound" supported his opinion that the gun was at least four feet from the entry

wound when it discharged. All of these witnesses successfully challenged defendant's theory that Tunney pulled the trigger himself.