

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA K. GROOM, individually and as next
friend for JOSHUA GROOM, minor,

UNPUBLISHED
September 22, 2005

Plaintiff-Appellee,

v

No. 254797
Ottawa Circuit Court
LC No. 01-041216-CH

KNOLL CONSTRUCTION, INC, and JAMES
KNOLL,

Defendants-Appellants.

and

SHORELINE ROOFING AND CONSTRUCTION,
LLC, and RYCENGA HOMES, INC,

Defendants.

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant Knoll Construction, Inc., appeals as of right from a jury verdict in favor of plaintiff. We affirm.

Plaintiff purchased a newly constructed condominium from defendant in July 2000 and moved into the residence in October 2000. Thereafter, plaintiff discovered that the roof leaked. Plaintiff brought suit against defendant and others alleging negligence, breach of express warranty, breach of implied warranty, and violation of the Michigan Consumer Protection Act, MCL 445.901 et seq., seeking to recover for property damage and for personal injury allegedly caused by mold and fungus growth resulting from the leak.

Defendant first argues that the trial court erred in admitting the testimony of plaintiff's experts. We disagree. The admissibility of expert testimony is in the trial court's discretion, and this Court will not reverse the trial court's decision to admit such testimony on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989); *Hamilton v Kuligowski*, 261 Mich App 608, 610; 684 NW2d 366 (2004). 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. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). "A court necessarily abuses its

discretion if it ‘admits evidence that is inadmissible as a matter of law.’” *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004) (citation omitted).

Plaintiff offered the testimony of David Lutkenhoff, a certified industrial hygienist who conducted an air quality assessment of plaintiff’s residence, and Dr. Frederick DeTorres, the doctor that treated her for allergies and asthma. Defendant asserts that this testimony, which it characterizes as purporting to establish that exposure to mold causes adverse human health effects, was novel scientific evidence for which plaintiff failed to provide sufficient foundation. The record, however, dispels this notion. Lutkenhoff testified as to the amount of mold in plaintiff’s residence, to which defendant affirmatively consented; Lutkenhoff mentioned only in passing that reference materials and literature in the industrial health industry indicated that certain symptoms might be indicative of the presence of mold. Both Lutkenhoff and plaintiff’s counsel expressly disavowed that Lutkenhoff was testifying regarding any causal connection between exposure to mold and adverse health effects, and his testimony was admitted only as to his identification and measurement of mold in plaintiff’s residence. Thus, even if this Court were to accept defendant’s argument that testimony regarding adverse human health effects caused by exposure to mold was novel scientific evidence, there simply was no such testimony offered by Lutkenhoff. Accordingly, defendant’s challenge to the admission of Lutkenhoff’s testimony lacks merit.

DeTorres testified that plaintiff tested positive for allergy to mold and, therefore, that the presence of mold in her residence would exacerbate her symptoms. Defendant did not object to DeTorres’ qualifications or methods and did not challenge the scientific reliability of allergy tests or the science underlying the practice of allergy and immunology. Contrary to defendant’s characterization, DeTorres did not purport to testify regarding any general adverse effect of mold exposure on human health. Rather, he testified as plaintiff’s treating allergist regarding the specific effect of exposure to mold on her. MCL 600.2955(2) requires that a “novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.” The purpose of such a requirement “is to prevent the jury from relying on unproven and ultimately unsound scientific methods.” *People v Gonzales*, 415 Mich 615, 623; 329 NW2d 743 (1982). Thus, it applies only to novel scientific principles or techniques and a party need not show general acceptance of an established test. *Craig, supra* at 80; *People v Haywood*, 209 Mich App 217, 221; 530 NW2d 497 (1995).

Defendant made no effort to challenge DeTorres’ methodology. Nor does defendant assert that the medical practice of allergy and immunology as a science is novel. Indeed, that the practice of allergy and immunology is not novel is evidenced by numerous cases previously before Michigan Court’s involving testimony regarding allergic conditions. See, e.g., *Tate v Botsford General Hosp*, 472 Mich 904; 696 NW2d 684 (2005) (no question of fact as to plaintiff’s competence to refuse treatment following an allergic reaction to a drug in the emergency room); *Bird v Pennfield Agricultural School Dist*, 348 Mich 663, 667-668; 83 NW2d 595 (1957) (upholding an award of compensation for lost wages resulting from an allergic reaction to paint in her workplace); *Moody v Chevron Chemical Co*, 201 Mich App 232; 505 NW2d 900 (1993) (in which the decedent died from an allergic reaction after sustaining a bee sting), *Koski v Automatic Heating Service*, 75 Mich App 180, 184; 254 NW2d 836 (1977) (whether it was reasonably foreseeable that a humidifier could cause a condition where a fungus

would grow that would cause hypersensitivity pneumonitis in an allergic person was a question of fact for the jury), *Howell v Outer Drive Hosp*, 66 Mich App 142, 144; 238 NW2d 553 (1975) (wrongful death action alleging that the plaintiff's decedent died as the result of an allergic reaction to a painkiller administered to him by the defendants). As noted above, defendant does not argue that the practice of allergy and immunology is novel science. Therefore, defendant's argument that the trial court abused its discretion in admitting DeTorres testimony lacks merit.

Defendant also argues that the trial court erred in denying its motion for directed verdict because plaintiff waived all causes of action against defendant for damages or defects in the property at the time of sale by choosing to not have the property inspected. We disagree. This Court reviews a trial court's decision on a motion for a directed verdict de novo, considering all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed for resolution by the jury. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "When the evidence presented could lead reasonable jurors to disagree, the court may not substitute its judgment for that of the jury." *Tobin v Providence Hospital*, 244 Mich App 626, 652; 624 NW2d 548 (2001).

Paragraph 16 of the purchase agreement indicates that plaintiff elected not to have an independent inspection of the residence before purchasing it; that paragraph further provides that:

Buyer agrees that Buyer is not relying on any representation or statement made by Seller or any real estate salesperson (whether intentionally or negligently) regarding any aspect of the premises or this sale transaction, except as may be expressly set forth in this Agreement, a written amendment to this Agreement, or a disclosure statement separately signed by the Seller. Accordingly, if the Buyer chooses no inspections, fails to complete inspections or submits no written proposals, Buyer agrees to accept the premises "as is" and "with all faults", except as otherwise expressly provided in the documents specified in the preceding sentence.

The disclosure statement for the condominium project provides that defendant warranted "the workmanship and materials in the Common Elements [described in the Master Deed], both limited and general, at the Project for one (1) year following the date of the closing of the sale" between plaintiff and defendant. The Master Deed, to which the condominium by-laws are attached, specifically provides that the roof is a common element. Defendant also completed a seller's disclosure statement of the condition of the property, signed by James Knoll, its owner, and dated June 12, 2000, in which it indicated that the roof was new and had not previously leaked. In paragraph 27 of the purchase agreement, defendant certified that the property remained in the same condition as disclosed in that statement and agreed to inform plaintiff in writing of any changes in the condition of the property before closing.

According to the plain language of the purchase agreement, by declining an inspection, plaintiff acknowledged that she was not relying on any representations by defendant other than those contained in the agreement and the disclosure statement – including the representation that the roof had not previously leaked – and that she was accepting the premises "as is" and "with all

faults” – except for the one-year warranty for common elements, including the roof, expressly provided in the Disclosure Statement.

In making its argument that the “as is” clause precludes the instant action, defendant ignores that portion of paragraph 16 of the purchase agreement that provides that plaintiff accepted the property “as is” *except* as otherwise provided in a disclosure statement. Thus, under paragraph 16, plaintiff was entitled to rely on defendant’s representation in the seller’s disclosure statement that the roof did not leak. Plaintiff testified that, after she moved into the residence, Knoll told her that the roof had leaked previously. This testimony was sufficient to create a factual question regarding whether defendant had knowledge of a prior roof leak but represented that there was no such leak in the seller’s disclosure statement in violation of the MCPA. Further, defendant overlooks that it *expressly* warranted the workmanship and materials in the roof for one year following the date of closing, which was expressly excepted from any waiver created by operation of paragraph 16 of the purchase agreement. Therefore, the trial court did not err in denying defendant’s motion for a directed verdict.

Affirmed.

/s/ David H. Sawyer

/s/ Michael J. Talbot

/s/ Stephen L. Borrello