

STATE OF MICHIGAN
COURT OF APPEALS

RAY DONALD KETTERMAN, Personal
Representative of the Estate of RAYMOND LEE
KETTERMAN, Deceased,

UNPUBLISHED
May 16, 2006

Plaintiff-Appellant,

v

CITY OF DETROIT and DENNIS DAVID
MALCOLM,

No. 258323
Wayne Circuit Court
LC No. 03-310417-NI

Defendants-Appellees.

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

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause of action in this wrongful death suit. We vacate the judgment and remand for a new trial.

Plaintiff's decedent, Raymond Lee Ketterman (decedent), was a pedestrian who was struck by a bus near the intersection of Grand River and Woodward Avenues in Detroit and died four days later from the injuries incurred in the accident. Plaintiff filed a wrongful death suit against the City of Detroit and the driver of the bus. Both defendants claimed governmental immunity from tort liability under MCL 691.1401 *et seq.* The jury found that the driver had been negligent but not grossly negligent,¹ and that decedent had been 60 percent at fault² in the accident, thus precluding any recovery by plaintiff. Plaintiff appeals.

Plaintiff raises two issues on appeal, both related to the trial court's inclusion of the testimony of William Larkin, District Superintendent of Road Management and Safety for the City of Detroit Department of Transportation ("DOT"). Larkin is also the primary accident

¹ MCL § 691.1407(2)(c) protects a government employee whose "conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

² Per MCL § 600.2959, a party more than 50 percent at fault may not recover; per MCR 500.3515(2)(b), noneconomic loss "damages shall not be assessed in favor of a party who is more than 50% at fault."

investigator for the DOT. Before trial, plaintiff's counsel brought a motion in limine to exclude Larkin's testimony where defense counsel intended to introduce it as expert testimony as to the point of impact of the accident and as to the victim's posture at the time of impact, arguing that Larkin was not qualified as an expert to address accident reconstruction or to draw conclusions as to the victim's posture based on the victim's injuries. The trial court heard oral arguments and denied the motion. As to the first issue, the trial court stated: "I think he's got a lot of experience and should be allowed to testify." As to the second, the court said "I'm going to allow the opinion as," and was at that point cut off by defense counsel, who said "Thank you, your honor." The hearing went on to address other matters not relevant to this appeal. Plaintiff argues on appeal that the inclusion of this testimony was error rising to the level of abuse of discretion resulting in substantial unfair prejudice to plaintiff.

Appellate courts review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Specifically, this Court reviews decisions "regarding the qualification of an expert witness for an abuse of discretion." *Clerc v Chippewa War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005). Notwithstanding the deferential standard of appellate review, a trial court may neither abandon its role as a gatekeeper under MRE 702 to ensure that expert testimony is reliable, nor perform that function inadequately. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). An abuse of discretion exists when "an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999) (citation omitted). But an error in the admission of evidence will not warrant appellate relief unless refusal to take this action appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Craig, supra*, p 76 (quotation marks and citation omitted). The proponent of the evidence bears the burden of establishing its admissibility. *Gilbert, supra*, p 781.

Effective January 1, 2004, MRE 702 was amended "to particularize" the trial court's gatekeeper duty. *Gilbert, supra*, p 780 n 44. As amended, MRE 702 provides:

If the court determines that 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 by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is *based on sufficient facts* or data, (2) the testimony is the product of *reliable principles and methods*, and (3) the witness has *applied the principles and methods reliably* to the facts of the case. [MRE 702 (emphases added).]

A trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable. *Gilbert, supra*, p 781. "MRE 702 requires a trial court to insure that each aspect of an expert opinion's proffered testimony – *including the data underlying the expert's theories and the methodologies by which the expert draws conclusions from that data* – is reliable." *Id.*, p 779 (emphasis added). "Reference in MRE 702 to 'scientific' evidence implies a grounding in the methods and procedures of science, and its reference to 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.*, p 781 (citations omitted).

Similarly, MCL 600.2955 provides criteria for expert testimony in actions for death and other injuries. MCL 600.2955 provides that "a scientific opinion rendered by an otherwise

qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact.” MCL 600.2955(1). “In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert . . .” MCL 600.2955(1). Providing further guidance, the statute adds that the court “shall consider” a list of factors similar to the *Daubert* indicia of reliability. See *Gilbert, supra*, p 781. (“MRE 702 has since been amended explicitly to incorporate *Daubert’s* standards of reliability.”)

We find that here the trial court did not fulfill its gatekeeper function in the hearing on the motion in limine to exclude the testimony. The trial court heard defense counsel’s listing of Larkin’s on-the-job training and catalog of attended courses in accident investigation, and seemed essentially to end the inquiry there. While Larkin’s background may well qualify him as an expert in the area of accident investigation as a general matter, we find that this inquiry was insufficient to establish that Larkin was qualified to testify as an expert on the specific facts of this accident. An expert may be qualified “by knowledge, skill, experience, training, or education,” but still must have applied a reliable method to sufficient facts of the case at hand to be qualified to testify. MRE 702.

Plaintiff first argues that Larkin was not qualified to testify as an expert witness on the point of impact³ in the accident. At the hearing on the motion to exclude the witness, Defendant explained that Larkin used a method known as “coning,” where any items held by a victim of an impact with a vehicle will fly from the victim’s hand and land in a particular pattern. The pattern is the result of the kinetic energy transferred from the vehicle to the victim to the items. An expert applying the coning method may determine the point of impact by viewing the pattern and estimating the speed of the vehicle. The trial court did not inquire into or examine whether coning has been subjected to scientific replication or peer review publication, or any of the other criteria required by MCL 600.2955(1). Neither defendant during the motion hearing nor Larkin during the trial ever explained precisely how coning is used to calculate point of impact; i.e., the location of the collision. Defendant merely argued: “You might think of it as a shotgun pattern. If you observe where it lands, you can draw lines back to where [the person] was hit and . . . every accident reconstructionist will tell you that.” But Larkin is not an accident reconstructionist.

Even if coning had been adequately vetted as a method, the court did not fairly assess Larkin’s application of the method to the facts in this case. During the hearing on the motion, plaintiff reviewed Larkin’s deposition testimony that he had supervised the work of the accident investigators and officers at the scene, rather than taking photos or measurements himself, or preparing field sketches of relevant evidence such as the pattern of the victim’s personal items on

³ Point of impact in this context specifically means the precise location in the street where the vehicle made contact with the victim. It is noteworthy that at trial Larkin repeatedly confused the phrase “point of impact” as it relates to the location of the collision on the street and as it relates to the point on the front of the bus that struck the victim (i.e., whether the windshield, the lower part of the grille, etc.).

the ground.⁴ Plaintiff noted that Larkin had in fact stated that he “didn’t do an actual accident investigation” himself. During Larkin’s deposition and at trial, plaintiff questioned Larkin as to when he had arrived at the scene of the accident, and Larkin estimated it was ten or fifteen minutes after the accident occurred. Larkin admitted that he had no way of knowing whether EMS technicians or others had moved any of the items that were the basis of the coning pattern used to determine point of impact. Larkin admitted he had no way of knowing how fast the bus was moving, but stated he was not concerned about it because he felt that speed was not an issue in this accident. He admitted the bus had been moved (backed up) when the EMS technicians arrived on the scene so that they could provide medical assistance to the victim, but since this happened before Larkin arrived on the scene, he could not know the exact placement of the bus when the driver stopped. All of these are relevant factors in establishing whether Larkin was in possession of sufficient facts to reliably apply a reliable method of assessing the scene to determine point of impact.⁵

During the hearing on the motion in limine to exclude Larkin’s testimony as to point of impact, the trial court did not address these factual and methodological concerns validly raised by plaintiff; we therefore find Larkin’s trial testimony on this point was somewhat speculative and its reliability unproven. The testimony directly affected plaintiff’s substantial rights because fault in this case turned largely on where plaintiff’s decedent had entered the street: if in the bounds of the crosswalk,⁶ less negligence could be attributed to decedent. Defendant asserts on appeal that because Larkin’s testimony established the same point of impact as that of another expert witness, Mr. Wing,⁷ any error in admitting the testimony was harmless. However in this case the jury’s finding that decedent had been 60% at fault suggests a nearly even balancing of the contradictory testimony of the eyewitness as against the expert witnesses, and implies that the one legitimate expert witness’s testimony was unfairly bolstered by Larkin’s testimony. Essentially, because it was such a close call, the inclusion of Larkin’s testimony likely did deprive plaintiff of substantial rights. Failure to exclude the testimony therefore rises to the level of abuse of discretion.

⁴ Measurements and photos or field sketches are critical reference material here because coning establishes point of impact by the measure of the placement of the victim’s personal items in relation to the location of the victim and the vehicle, with the speed of the vehicle at the time of the accident also being a factor.

⁵ Larkin testified that he based the decision in part on the lack of other physical evidence that one would expect to find if the point of impact had been further south than he estimated, here meaning inside the crosswalk rather than some 40 feet north of it as Larkin alleged. This evidence or the lack of it is not relevant to the issue of whether Larkin was properly qualified as an expert on the coning effect of this particular accident and what it means as to point of impact.

⁶ The crosswalk at this intersection is not plainly marked with painted lines, but is apparently identified by a brick pathway embedded in the street.

⁷ This witness was an accident reconstructionist, qualified apparently by a master’s degree in mechanical engineering, a week of training at Northwestern University, and by serving as an expert witness at many trials.

Plaintiff also argues that the trial court abused its discretion in allowing Larkin to opine, based on injury biomechanics, that decedent was bent down at the time of the collision. We hold that Larkin lacked expertise sufficient to opine about decedent's posture at the point of impact. Larkin is not a medical doctor. Larkin admitted that aside from the medical examiner's report, he did not review any of decedent's medical records or any depositions. The trial court never examined what methodology Larkin used to arrive at the conclusion that the injury to decedent's leg indicated that he was bending over. The trial court made no statement at the time of its ruling on the motion in limine regarding why Larkin's injury biomechanics opinion would be allowed. The trial court provided no analysis of Larkin's qualifications to offer an injury-biomechanical opinion, the factual basis for the opinion, or the methodology for forming the opinion.

In his deposition, when asked what training allowed him to offer his injury biomechanics opinion, Larkin replied: "I believe in the intermediate class there is a course that is taught specifically about pedestrian accidents and pedestrian injuries" Larkin did not provide specifics about what his training in injury biomechanics involved. Larkin admitted that, aside from the one intermediate course about pedestrian accidents, he did not have any medical training that would allow him to offer this opinion. A single course in pedestrian accidents does not seem to us to be a substantial qualification to offer a key opinion in this case. As with the point of impact testimony, this testimony directly affected plaintiff's substantial rights because fault in this case turned largely on the care plaintiff's decedent had exercised in crossing the street: had he walked straight across without stopping or bending down, less negligence would likely be attributable to the victim.

Larkin's opinion directly contradicted the testimony of an eyewitness to the accident. At trial plaintiff asked Larkin about the testimony of witness Jackson, who plaintiff alleged had testified that the victim was not bent over, but had "put his hands up on the front windshield of the bus."⁸ Larkin's response was "[e]yewitness testimony is suspect." Larkin added that no physical evidence supported the eyewitness testimony, such as finger or hand prints on the windshield. "This Court has held that an expert's opinion is objectionable . . . where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by

⁸ Ms. Jackson did not testify live at trial, but her video deposition was shown to the jury with some segments redacted. In Ms. Jackson's deposition, plaintiff's counsel asked "[b]ased on what you observed at that intersection, was Mr. Ketterman somehow hidden, or obstructed, or difficult to view?" Ms. Jackson responded "I don't think so. The man was tall. You couldn't help but see him." In describing the accident, Ms. Jackson stated that "Mr. Ketterman put his hands up like this, and the bus just went over him." When asked whether the victim had at any time bent over, the witness said he had not. Ms. Jackson also stated that the victim was in the cross-walk, not 40 feet north of it as suggested by Mr. Larkin. Although the witness told plaintiff's counsel that the victim had not bent down at any time in the cross-walk, later in the deposition, when asked by defense counsel if the victim had dropped anything in the street, the witness stated "[h]e bent down to pick up something . . . and got right back up." She repeated several times though that he was definitely standing up when the bus hit him.

disparaging the witness' power of observation.” *Badalamenti v William Beaumont Hosp.*, 237 Mich App 278, 286; 602 NW2d 854 (1999).

Although Larkin mentioned the lack of physical evidence as supporting his conclusion, he admitted that the conclusion was based on his assessment of the twisting injury to the victim’s knee, which he opined could happen only if the victim had been bent over with his weight primarily on his left leg. When plaintiff put this scenario to defendant’s expert pathologist as a hypothetical, the doctor replied that it is more likely for the left knee to have been injured as it was if it had been bearing more weight than the right at the time of impact, but specifically stated this is not a certain conclusion. The doctor stated “[t]here is no determinant there to state so,” and “I cannot draw a conclusion on the basis of that.”

We find that the trial court at the hearing on the motion in limine to exclude his testimony did not properly qualify Larkin as an expert to testify as to the victim’s posture (i.e., standing up or bent over), and we note that because the testimony significantly affected the trial’s outcome, the error rises to the level of abuse of discretion. Defendant again asserts that because this testimony is corroborated by that of expert witness Wing, any error was harmless. Again, given the closeness of the case, we must disagree. While the jury weighed the eyewitness testimony against the contradictory expert witness testimony, a second expert corroborating the first might well serve as the tipping point.

Our Supreme Court in *Gilbert* spoke of “analytical gap[s]” between data and opinions given by experts, warning that insufficient inquiry into an expert’s qualification to testify based on reliable application of reliable methods to the specific facts of a case might let in testimony that could “serve as a Trojan horse that facilitates the surreptitious advance of . . . spurious, unreliable opinions.” *Gilbert, supra*, p. 783. The trial court must vigilantly play the gatekeeper role to prevent just this from happening, and here the trial court did not do so.

We vacate the trial court’s judgment and remand for a new trial. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper