STATE OF MICHIGAN

COURT OF APPEALS

BURTON SANBORN,

Plaintiff-Appellant,

and

CLARA SANBORN,

Plaintiff,

v

HOWARD EUGENE JESTER and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants-Appellees,

and

WILLIAM EUGENE CRYDERMAN,

Defendant.

UNPUBLISHED
November 16, 2006

No. 270427
Jackson Circuit Court
LC No. 04-002249-NI

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). This case arose out of plaintiff's head-on automobile collision with defendant Jester's vehicle when Jester failed to stop at an intersection. Defendant Citizens Insurance Company became involved because Jester was uninsured at the time. We affirm, although on slightly different grounds than those relied on by the trial court.

There is no dispute that plaintiff sustained a broken rib and burns from the deployment of his vehicle's air bag. Plaintiff, aged eighty at the time, apparently recovered and returned to his job. Plaintiff was employed part-time as a mail transporter, which required him to push carts full of mail and sometimes pick up packages weighing in excess of fifty pounds. He explained that he was planning "to work as long as [he] could." Several months later, plaintiff's seventeen-year-old artificial hip joint failed and required complete replacement. Plaintiff was placed by his

doctor on several activity restrictions, and plaintiff ultimately did not thereafter return to work. Plaintiff alleges other long-term consequences of his injuries.

Plaintiff's treating physician, Dr. Riccardo Giovannone, explained that the artificial hip plaintiff had been given consisted of a metal cup with a polyethylene plastic liner, and those two components were molded together. The particular failure was that the plastic and metal separated, eventually permitting the plastic liner to move and cause the pain plaintiff experienced. Dr. Giovannone explained that artificial hips commonly last anywhere from five to twenty five years, depending on a wide variety of factors, including the patient's activity level. His analysis of the failed hip prosthesis after it was removed was that it was not worn out. He therefore opined that the prosthesis failed because it had sustained some kind of trauma, which could be explained by the automobile accident. However, Dr. Giovannone repeatedly conceded that he had no way to know what actually happened to the prosthesis, and his explanation that it failed because of the accident was speculative. He stated that there was no medical evidence that the accident damaged the polyethylene liner, and although trauma from the accident made sense, there was no way to determine the cause of the failure with "a degree of medical certainty" or even "more likely than not."

Defendants moved for summary disposition on the grounds that there was no credible evidence that plaintiff's artificial hip failed because of the accident, and in any event plaintiff's post-accident life had not been sufficiently affected to meet the threshold requirements set forth by our Supreme Court in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). The trial court agreed, and plaintiff now appeals.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but any preliminary legal questions, such as interpretation of a statute or a rule of evidence, on which the decision is based are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). A grant or denial of summary disposition is in any event reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120.

Plaintiff first argues that the trial court erred in concluding that Dr. Giovannone's testimony did not meet the third requirement of MRE 702, and in any event the trial court was required to hold conduct a *Davis-Frye*[1] evidentiary hearing before it could make that determination. We conclude that MRE 702 is not implicated because the relevant portion of Dr. Giovannone's testimony was not admissible under MRE 403 in any event.

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923).

Under MRE 702, the admissibility of expert testimony requires: "(1) the expert must be qualified, (2) the testimony is relevant to assist the trier of fact to understand the evidence or to determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge." *Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 602; 705 NW2d 703 (2005). Defendants do not challenge Dr. Giovannone's qualifications or the relevancy of how plaintiff's artificial hip came to be damaged. It does not appear that defendants ever contended that performing surgery and visually inspecting a damaged piece of medical equipment are not generally recognized scientific or technical procedures for making medical determinations, in an appropriate case.

As the trial court correctly noted, Dr. Giovannone could only say that the automobile accident *could have* caused the damage the doctor observed in the artificial hip. It does not appear that defendants dispute that the accident is a *possible* cause of plaintiff's injuries. Furthermore, it is axiomatic that a head-on automobile accident resulting in air bag burns and a broken rib is likely to be, at a minimum, a stressful event for one's entire body. Dr. Giovannone repeatedly stated that, although he believed the accident caused the failure, he was merely speculating, he had no medical basis for that conclusion, and he had no way to conclude with any reasonable degree of certainty either that the failure *was* related to the accident or even more generally what actually caused it to fail. At best, Dr. Giovannone's testimony was "[a]n explanation that is consistent with known facts but not deducible from them," which this Court has explained "is impermissible conjecture." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003).

Whether Dr. Giovannone's testimony was admissible under MRE 702 is not truly pertinent under the circumstances. Presuming it is, "[c]ause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences, not mere speculation." *Wiley*, *supra* at 496. Testimony that might be admissible under MRE 702 should be excluded or stricken pursuant to MRE 403 where the trial court finds it purely speculative. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 412; 516 NW2d 502 (1994), abrogated on other grounds, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 56 n 8; 684 NW2d 320 (2004). Because Dr. Giovannone could do little more than hazard an educated guess at what caused plaintiff's artificial hip to fail, the trial court properly excluded it.

Plaintiff's other issue on appeal is that the trial court erred in finding that he did not meet the "serious impairment of body function" threshold requirements of *Kreiner*, *supra*. Based on our review of the record, we agree that the trial court erred in finding that plaintiff did not meet the threshold. However, because plaintiff cannot establish causation, this issue is moot.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis