In the Missouri Court of Appeals
Eastern District
DIVISION ONE

JEANNE MOORE and MONTY MOORE,	)	No. ED92770
	)	
Appellants,	)	Appeal from the Circuit Court of
	)	the St. Louis County
v.	)	
	)	Hon. Mark D. Seigel
FORD MOTOR COMPANY,	)	
	)	
Respondent.	)	Filed: December 22, 2009

Before Kathianne Knaup Crane, P.J., Clifford H. Ahrens, J., and Nannette A Baker, J.

Introduction

Jeanne and Monty Moore ("Appellants") appeal from the trial court's grant of a directed verdict in favor of defendants Ford Motor Company ("Ford") on Appellants' failure to warn claims, and the judgment entered in favor of Ford on the remaining claim. Appellants claim five points on appeal: first, that the trial court erred in granting Ford's motion for a directed verdict on their failure to warn claims because Appellants made a submissible case; second, that the trial court erred in admitting Ford's "state of the art" evidence; third, that the trial court erred in admitting testimony from Ford's expert, Catherine Corrigan; fourth, that the trial court erred in limiting Appellants' cross-examination of Ford's expert, Dr. Harry Smith; and fifth, that the trial court erred in denying Appellants' motion for a new trial based on cumulative errors. We find no error and affirm.

Factual and Procedural Background

Viewed in the light most favorable to the plaintiff, the facts are as follows. On November 1, 2005, Jeanne Moore stopped to make a turn in her 2002 Ford Explorer when she was hit from behind by Edward Holthaus in a Ford Expedition. Holthaus's vehicle was traveling about thirty miles per hour when it hit Jeanne's car. The force of the collision was such that her vehicle traveled forward some distance and came to rest after hitting a building.

After the impact, the driver's seat collapsed backward such that Jeanne's head and shoulders hit the back seat, fracturing her T9 vertebra (the ninth thoracic vertebra) and rendering her a paraplegic. At the time of the accident, Jeanne weighed more than 300 pounds.

At trial, Appellants claimed that the seats of the vehicle were not designed for a person of Jeanne's size and that Ford should have provided warnings of such. Appellants claimed they would not have purchased the Explorer had they known that the seats were not tested or designed to perform with occupants of Jeanne's size and weight. Additionally, they claimed that Ford was negligent for not issuing warnings that the seats could collapse in rear impacts, and for not designing and testing the seats for occupants who weighed more than 220 pounds.

The case was tried before a jury. At the close of Appellants' case, the trial court granted Ford's motion for a directed verdict on the failure to warn claims. In response to this, Appellants dismissed their remaining negligence claims, leaving only their claim for strict liability. At the close of trial, both parties moved for a directed verdict on the strict

liability claim. The court denied both motions. The jury returned a verdict in favor of Ford. This appeal follows.

Standard of Review

In reviewing a directed verdict granted in favor of a defendant, the Court of Appeals will view evidence and permissible inferences most favorable to the plaintiff, disregard contrary evidence and inferences, and determine whether, on evidence so viewed, plaintiff made a submissible case. *Friend v. Holman,* 888 S.W.2d 369, 371 (Mo. App. W.D. 1994). In reviewing a trial court's judgment granting a motion for directed verdict, we must determine whether the plaintiff made a submissible case, i.e., whether the plaintiff introduced substantial evidence at trial that tends to prove the essential facts for his or her recovery. *Intertel v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 199 (Mo. App. E.D. 2006). We view all the evidence in the light most favorable to the plaintiff, giving him or her the benefit of all reasonable inferences, and disregarding the defendant's evidence except to the extent that it aids the plaintiff's case. *Id.* A presumption is made in favor of reversing the trial court's grant of a directed verdict unless the facts and any inferences from those facts are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to the result. *Id.* (internal citations omitted).

Directed Verdict Failure to Warn Claim

Appellants claim that the trial court erred in directing a verdict against them on their failure to warn claims. Specifically, they contend that they made a submissible case and presented substantial evidence from which a reasonable jury could conclude that the Ford Explorer’s driver’s seat was unreasonably dangerous when it was used without

knowledge of its characteristics. Consequently, Appellants claim that Ford was negligent in their failure to warn.

Appellants argue that they produced substantial evidence that Jeanne would have altered her behavior *before* buying the vehicle if Ford had provided a warning that the seats in the Explorer would not accommodate a person of her size. Appellants contend that Jeanne would not have purchased the Explorer if she had been supplied a warning about the seats and thus, would not have suffered the serious injury in that vehicle.

In order to make a failure to warn claim, a plaintiff must prove two separate elements: First, the plaintiff's injuries must be caused by the product from which the subject warning is missing. Second, a plaintiff must show that a warning would have altered the behavior of the individuals involved in the accident. *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. banc 1992). In Missouri, there is a rebuttable presumption that a plaintiff would have heeded a warning if it had been available. *Duke v. Gulf & Western Mfg. Co.*, 660 S.W.2d 404, 419 (Mo. App. W.D. 1983).

However, a failure to warn claim must be supported by evidence that the plaintiff would have pursued an alternative course of action in heeding the warning. *Steele v. Evenflo Co., Inc.*, 178 S.W.3d 715, 718 (Mo. App. E.D. 2005). In this case, Appellants provided no evidence of what alternative course of action they would have taken had there been a warning that the Explorer's seats had not been designed or tested for a person of Jeanne's size. In fact, Jeanne testified that she never checked the owner's manual for weight limits on seats before purchasing the car. Jeanne also testified that she did not ask anyone at the Ford dealership about weight limits on seats. She testified that she looked for weight limits in the owner's manual for towing, but not for seats. Further,

she testified that she never looked for weight limits of passengers on the seats of any car she and her husband had ever owned.

Moreover, the Missouri Supreme Court held that a time of purchase theory of causation,[1] is legally unsound, ignoring "any reasonable concept of proximate cause." *Arnold,* 834 S.W.2d at 193. "[A] rational jury could perhaps (imaginatively) find that the lack of information at the time of purchase was a 'but for' cause of the explosion." *Id.* The traditional approach to proximate cause in failure to warn cases focuses on the effect of giving a warning on the actual circumstances surrounding the accident. *Id.*

The trial court, during the proceedings in chambers to discuss the Respondents' motion for directed verdict on the failure to warn claim, noted that there was no evidence that a "specific weight limit would have created an unsafe environment or use of this seat by the plaintiff in this case." It also stated that Appellants could not formulate a suitable warning that Ford should have given and observed that there was no evidence that Appellant would have changed her conduct if there had been a warning. The trial court particularly noted that Appellant testified that she did not "look through the [owner's] manual until after they had already bought the car." Further, the trial court observed that there was no expert testimony that the seat design was defective and the cause of Jeanne's injuries.

Appellants argue that under *Tune v Synergy*, expert testimony is not required in product defect cases to make a submissible case in Missouri. 883 S.W.2d 10, 14 (Mo. banc 1994). But a review of the record shows that Appellants misconstrue the trial court's observation. The trial court was searching for any evidence Appellants produced

[1] A time of purchase theory of causation states that the lack of information at the time of purchase is a proximate cause of the later resulting accident.

that the Explorer's seat was defective for a person of Jeanne's size and weight in order to determine if they made a submissible case. It was not ruling that unless there was expert testimony Appellants could not make a submissible case. The lack of expert testimony was only one factor the trial court considered before granting Ford's motion for a directed verdict solely on the issue of failure to warn. We find that the trial court did not err in sustaining Ford's motion for a directed verdict on Appellants' failure to warn claim. This point is denied.

"State of the Art" Evidence

In their second point relied on, Appellants claim that the trial court erred in admitting Ford's "state of the art" evidence because it was irrelevant, immaterial and unduly prejudicial. Appellants argue that when this evidence was admitted, their case was proceeding only on the strict liability claim and that the evidence tended to lead the jury to decide the case on the "reasonableness" of Ford's conduct, an improper basis.

The trial court's decision to admit or exclude evidence is given substantial deference on appeal. *Aliff v. Cody,* 26 S.W.3d 309, 314 (Mo. App. W.D. 2000). Our review of error alleged in the admission or exclusion of evidence is limited to an abuse of discretion standard. *Id.* The burden of establishing abuse of discretion is on the appellant. *Id.* at 315. A trial court has considerable discretion in deciding whether to admit or exclude evidence at trial. *Williams v. Trans States Airlines, Inc.*,281 S.W.3d 854, 872 (Mo. App. E.D. 2009). When reviewing for an abuse of discretion, we presume the trial court's finding is correct, and reverse when the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable

persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.* (internal citations and quotations omitted). Upon finding an abuse of discretion, this court will reverse only if the prejudice resulting from the improper admission of evidence is outcome-determinative. *Id.*

Appellants contend that they were prejudiced by the trial court's admission of Ford's "state of the art" evidence, which they define as industry practice and custom, because it was admitted after they had voluntarily dismissed their remaining negligence claims against Ford. They argue that since they were proceeding only on a strict liability claim against Ford, the "state of the art" evidence included evidence that was immaterial and irrelevant. The specific evidence to which Appellants objected was the testimony of Roger Burnett, Ford's expert on seat design. Burnett testified on Ford's methods of testing seat design as it related to occupants and force in an accident. Ford offered Burnett's testimony to rebut the testimony of Appellants' expert, Louis D'Aulerio, on Ford's seat design. Appellants objected to Burnett's testimony comparing Ford's testing to that of other car manufacturers, arguing that it was irrelevant, misleading and unfairly prejudicial under the Appellants' strict liability claims. The trial court overruled the objection, stating that it was impossible to separate the Appellants' evidence in their case that pertained to the strict liability claims versus the negligence claims.

Missouri courts have emphasized the distinctions between negligence and strict liability products liability claims. In *Thompson v. Brown & Williamson Tobacco Corp.,* the court held:

> In Missouri, a plaintiff may choose to bring a failure to warn case under a negligence theory pursuant to Section 388 of the Restatement (Second)

> of Torts, or as an action for strict liability pursuant to Section 402A of the Restatement (Second) of Torts. The defendant's standard of care, knowledge and fault are relevant considerations in a negligence claim**,** but under strict tort liability, the defendant may be found liable without regard to his knowledge or conduct.

207 S.W.3d 76, 107 (Mo. App. W.D. 2008) (citations omitted). A similar distinction exists between design defect claims based on strict liability versus negligence. In negligence cases the duty owed is based on the foreseeable or reasonable anticipation that harm or injury is a likely result of acts or omissions. *Blevins v. Cushman Motors,* 551 S.W.2d 602, 608 (Mo. banc 1977). On the other hand, strict liability in tort is based in part on the foreseeable or reasonably anticipated use of the product, rather than on the reasonably anticipated harm the product may cause. *Id.*

In the case at bar, Appellants requested a limiting instruction be given, stating that the "[state of the art] evidence was admissible for one purpose but not admissible for other purposes or issues in this case." Appellants claimed they were entitled to ask for a limiting instruction because the issue of Ford's compliance with Federal Motor Vehicle Standards was relevant to the negligence claims, which were dismissed, but not relevant to the strict liability claims. The trial court agreed to give the requested instruction.

Accordingly, we find that the trial court did not err in admitting Ford's "state of the art" evidence. Appellants were not unduly prejudiced by its admission, particularly in light of the limiting instruction given. This point is denied.

Dr. Corrigan's Testimony

In their third point relied on, Appellants claim that the trial court erred in admitting testimony from Ford's expert witness, Dr. Catherine Corrigan. Appellants contend that Dr. Corrigan was not qualified to offer the opinions she gave about the cause

of Jeanne's injuries and her interpretations of CT scans because she is not a medical doctor. We review this point under the standard in Point II, supra.

To qualify as an expert witness, a person must have specialized knowledge, skill, experience, training, or education within a given profession or calling. *Childs. v. Williams,* 825 S.W.2d 4, 10 (Mo. App. E.D. 1992). Appellants rely on *Childs* to support his point. In *Childs,* this court held that expert *medical* treatment was the exclusive means to prove a claim for intentional infliction of emotional distress where no physical injury has occurred, and the plaintiff needed to show emotional distress or mental injury that must be medically diagnosable and must be of sufficient severity so as to be medically significant. *Id*. (internal citations omitted).

In the case before us, Dr. Corrigan, who holds a Ph.D. in medical engineering and a Master's degree in mechanical engineering, offered her expert testimony on the subject of the direction, magnitude and effect of forces acting on a person's body in an accident. Unlike in *Childs,* Dr. Corrigan did not offer testimony concerning Jeanne's diagnosis or treatment of injuries. She never testified as a medical diagnostician.

In a case more factually analogous to this one, *Koedding v. Kirkwood Contractors, Inc.*, this Court held that the testimony of a defense expert witness, who held a doctorate in orthopedic biomechanics, on the nature of the plaintiff's fracture was admissible. 851 S.W.2d 122 (Mo. App. E.D. 1993). In *Koedding,* the plaintiff dove off a bridge and into a river splitting his skull open. *Id.* at 123. The plaintiff claimed that the company that built the bridge had negligently left debris from the old bridge in the river causing his injury. *Id.* at 124. The defendants' expert, an expert in the field of orthopedic biomechanics, testified that the plaintiff's injuries were not consistent with

striking a “rigid I-beam” because the amount of force that such a dive would have generated would have caused substantially greater and different injuries to his skull and vertebra had the diver's head struck rigid steel. *Id.* at 126. The expert testified that because plaintiff's injuries were limited to a lacerated scalp and a fracture of the third cervical vertebra, he had to have hit something deformable that would bend or give upon impact. *Id.* This court found no error in the admission of the expert’s testimony. *Id.* at 127.

Likewise, Dr. Corrigan’s testimony was limited to her expertise as a biomechanical engineer. A review of the record shows that Dr. Corrigan opined about the direction of the forces that would create a T9-T10 dislocation in the area of the body where Jeanne sustained her injuries. Dr. Corrigan testified about the forces using biomechanical engineering terms such as hyperflexion, hyperextension and compression rather than medical terminology. We find that Dr. Corrigan did not testify as a medical expert about the cause and diagnoses of Jeanne’s injuries. Therefore, there was no error in her testimony. This point is denied.

Cross-Examination

In their fourth point relied on, Appellants claim that the trial court erred in limiting their cross-examination of Ford’s expert, Dr. Harry Smith. Specifically, they contend that the intended cross-examination related to the issue of the potential of head injury as a result of a rear impact in an automobile accident that would have shown that Smith agreed with their expert and disagreed with Ford’s other expert on an important issue of injury causation.

Appellants argue that they would have questioned Dr. Smith about statements contained in an article in he authored with two other people. The statements concerned the potential to ameliorate head and neck injury in rear impact collisions "when the head is perfectly braced." Respondents objected that this was beyond the scope of Dr. Smith's direct examination. The trial court sustained the objection.

We review this point under the standard in Point II, supra. The trial court has discretion to limit cross-examination and the introduction of evidence for the purpose of impeachment. *St. Louis Sw. Ry. Co. v. Fed. Compress and Warehouse Co.*, 803 S.W.2d 40, 43 (Mo. App. E.D. 1990). Although a witness may be cross-examined and impeached with a prior inconsistent statement, there must be a "real inconsistency" between the prior statement and the one made at trial. *Id.* (internal citations omitted).

In this case, our review of the record reveals that Dr. Smith testified as a medical expert, reviewing Jeanne's medical records, assessing her injuries, and offering a medical opinion. Since Jeanne's injuries were to her thoracic area, he did not opine about head and neck injuries or the seat design of the Explorer or biomechanical forces. Thus, we find no error in the trial court's ruling that Appellants' questions to Dr. Smith were beyond the scope of direct examination. This point is denied.

Cumulative Error

Finally, in their fifth point relied on Appellants claim that the trial court erred in denying their motion for a new trial on the grounds of cumulative error. Appellants contend that the cumulative effect of the errors in their first four points was so prejudicial as to justify a new trial even if no single point standing alone so justifies.

Appellants primarily rely on two cases more than fifty years old to support their contention that the cumulative effect of non-prejudicial errors can be sufficient to show overall prejudice. In both *Faught v. Washam*, 329 S.W.2d 588, 604 (Mo. 1959) (overruled on other grounds by *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994)) and *Myers v. Moffett*, 312 S.W.2d 59, 65 (Mo. 1958), the Missouri Supreme Court held that the cumulative prejudicial effect of matters with which they had previously discussed "in combination affected the trial of the case in such a way as to have a substantial prejudicial influence on the verdict rendered by the jury in this case." *Myers*, 312 S.W.2d at 65.

However, recent cases interpreting that proposition have not found the cumulative error argument to be persuasive. In *DeLaporte v. Robey*, this court acknowledged that, "[i]t is true a new trial can be ordered due to cumulative error, even without deciding whether any single point would constitute grounds for reversal." 812 S.W.2d 526, 536 (Mo. App. E.D. 1991). But we found that most of appellant's grievances were either not errors, minor infractions, sufficiently cured, or misstatements of the record, and declined to reverse on this point. *Id.* Likewise in *Crawford v. Shop 'N Save Warehouse Foods, Inc.*, we held that none of the allegations alleged by the appellants were in error, and therefore there were not numerous cumulative errors which would mandate a new trial. 91 S.W.3d 646, 652 (Mo. App. E.D. 2002).

In the case before us, none of Appellants' allegations resulted in errors either singly or in combination with each other. Therefore we find that the trial court was not in error in its denial of Appellants' motion for a new trial based on cumulative errors. This point is denied.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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Nannette A. Baker, Judge

Kathianne Knaup Crane, P.J., and
Clifford H. Ahrens, J., concur.