STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiff-Appellant/
Cross-Appellee,

v

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

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
July 5, 1996

No. 152590
LC No. 87-330100 NP

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

PER CURIAM.

In this products liability action, Plaintiff appeals by right the order dismissing her claim on defendants' motion for a directed verdict. We affirm.

The trial court did not err in granting defendants' motion for a directed verdict. *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). Plaintiff failed to present sufficient evidence that the design of defendants' gun was unreasonably dangerous because the gun did not have a firing pin block. *Prentis v Yale Mfg Co*, 421 Mich 670, 693-694; 365 NW2d 176 (1984). Plaintiff did not establish that it was foreseeable that the gun would drop-fire under the circumstances of this case. *Id.*

A manufacturer must design a product to eliminate any unreasonable risk of foreseeable injury. *Owens v Allis-Chalmers Corp*, 414 Mich 413; 326 NW2d 372 (1982). To determine whether a defect exists, the trier of fact must balance the risk of harm occasioned by the design against the utility of

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

the design. *Prentis, supra*. To prove a claim of design defect because the manufacturer omitted a safety device, the plaintiff must establish: (1) the magnitude of the foreseeable risk, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injury sustainable from such an accident; and (2) alternative safety devices and whether they would have been reasonably effective in minimizing the foreseeable risk of danger. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995); *Reeves v Cincinnati Inc*, 176 Mich App 181; 439 NW2d 326 (1989). Plaintiff failed to present sufficient evidence to warrant a jury determination that the design of defendants' gun was unreasonably dangerous because the gun did not have a firing pin block. Moreover, plaintiff did not present adequate evidence that the manufacturer could foresee that the gun would drop-fire under the circumstances of this case.

Plaintiff's decedent, John Tunney, was a security guard who delivered and picked up money bags for Meijer's, Incorporated. Tunney was carrying the gun at issue in the waistband of his pants on December 19, 1985. After depositing a bag of money in an automatic teller machine at a Meijer store, Tunney was attempting to move a filing cabinet back into position when the gun apparently fell from his waistband, discharged, and killed him. At the time of the accident, Thomas Kish, who was standing nearby, watched Tunney as he started to push the filing cabinet. Tunney was using both hands and was slightly bent over. As Kish moved closer to assist Tunney, and while Tunney was pushing the cabinet, Kish saw a flash "directly on the floor" and heard the gun discharge. He did not see Tunney remove his hands from the cabinet or make any sudden movements with his hands.

A second witness, Ruthanne Bourlier, also watched Tunney as he was moving the cabinet. Although she could only see one of his hands on the cabinet, she saw Tunney make no sudden movements before the gun discharged.

The gun was recovered after the accident with the spent cartridge still in the chamber and with the hammer in the full rest position. At trial, Oakland County Medical Examiner Bill Brooks testified regarding an autopsy he had performed on Tunney's body. Brooks testified that the graze-like abrasion immediately below the entry wound in Tunney's body was consistent with the gun having fallen to the floor and discharging. Brooks also stated that the absence of "powder tattooing at the entry wound" allowed him to opine that the gun was at least four feet from the entry wound when it discharged. Moreover, Dr. Brooks described the upward trajectory of the bullet into Tunney's body as being consistent with the gun having fallen to the floor and discharging.

Plaintiff's expert David Townshend testified that he believed the gun striking the floor exerted sufficient force or energy through the hammer and against the firing pin to overcome the firing pin's spring and drive the firing pin into the primer, thus allowing the gun to discharge despite the gun's hammer having been in a full rest position. Townshend noted the presence of tile imbedded in the hammer of the gun that was apparently consistent with the tile located on the floor in the area where the accident occurred. Nonetheless, plaintiff's expert Townshend also testified as follows:

"Q: But is it your testimony then that the PT-92 is a reasonably safe gun in a barrel-up drop?"

"A: It's a reasonably safe gun, but as to whether it would be protected as securely or safely as if it contained an automatic firing pin block safety, in my opinion, it does not."

Plaintiff's own expert thus ultimately acknowledged that the PT-92 was reasonably safe as designed.

Dr. John Funkhouser, a forensic chemist, analyzed the tile material found imbedded in the hammer of the gun and compared it with the tile from the Meijer's floor. Because he could find nothing inconsistent between the two tile materials, he concluded that the tile material in the gun could have come from the Meijer's floor.

Plaintiff finally called an adverse witness, Manuel Costa Da Silva, a mechanical engineer and manager of the factory that produced the accident gun, who was employed by defendant Forjas Taurus. Da Silva testified that defendant manufactured the PT-92 gun, which had no firing pin block, from 1981 through 1985; that defendant began manufacturing the PT-92-AF with a firing pin block mechanism in 1983; that the two guns shared many of the same parts; and that although decedent's gun PT-92 had a PT-92-AF slide and holes for the firing pin block mechanism, sixty-five cents ($.65) in modifications would be necessary to fit the firing pin block mechanism into decedent's gun. He could not, however, quantify the dollar amount of changes necessary to retool the gun. Further, Da Silva testified that a PT-92 would not discharge in a muzzle-up three to four foot drop with the hammer in the full rest position.

In granting a directed verdict to defendants, the trial court stated:

THE COURT: This is a motion for directed verdict in a case involving an alleged design negligence on the part of the defendants herein of the Taurus PT-92. As defense counsel notes, plaintiff would have the burden, certainly the burden of proving that the accident happened in the manner claimed and also that there was an unreasonable risk here and such risk was foreseeable that there was harm.

There has been testimony by two of the plaintiff's early witnesses, Mr. Kish and Ruth Bourlier, that they were on the scene at the time.

Mr. Kish, who was a guard with the deceased, said the plaintiff said, "I'm hit," and he grabbed his groin area. He saw no movement, just a flash.

Ms. Bourlier at the scene also said all she saw was the deceased saying, "I've been hit," and no movement, either.

But this necessarily in this Court's opinion does not mean that there was no movement on the part of the deceased.

Now, also, the theory, of course, of the plaintiff is that this gun was negligently designed, it was dropped, the hammer, arguably a closed hammer, stuck on the floor, discharging the gun and ending in a ballistic missile going through the deceased. To further this, he has to have some evidence, and no one actually saw the gun hitting the floor. The fact that these two witnesses on the scene didn't see any movement is not enough to prove that in this Court's opinion.

Now, we have the plaintiff's own expert, Mr. Townshend. In this Court's opinion, again, all we have are conclusionary and speculative theories.

The Court observed the lineup, the way the gun supposedly hit the floor in Mr. Townshend's testimony. It just, in this Court's opinion, did not line up. The angle wasn't proper.

Also, Mr. Townshend would not testify that this gun was unsafe, unreasonably unsafe. The only thing he could compel himself to say was it could have been made safer by this firing pin block. He could not say that the gun was unreasonably unsafe.

Again, the Court notes that there were no tests made of a similar instrument, no similar tests. There was some general testimony about tests being made with the hammer half cocked by defendants, but no tests made of the same gun under similar situations.

Again, there was no testimony brought forward that at the time in 1985, that it was foreseeable that the gun would fire when dropped muzzle up, hammer down, just no testimony whatsoever.

I noticed also that in Dr. Brooks's testimony, he did indicate in this testimony that the gun would have had to have been shot four feet away to cause the wound that it did, but his testimony was inconsistent with either theory, either plaintiff's theory that the gun dropped muzzle up, hammer closed, or the defense theory that the deceased had grabbed the gun either on the way down or bouncing up.

So all in all, this Court finds that plaintiff's theory is only truly speculative, conjectural. The plaintiff has the burden of proof to bring forth testimony before the jury, and this Court finds that he has not proved his theory. The burden has not been met. There is just not sufficient evidence to go to the jury; so I am granting the motion.

An expert's opinion must be supported by the evidence in the case. Plaintiff's expert hypothesized that the accident occurred in a certain way, i.e. muzzle up, hammer closed. He could not explain his theory consistently with the physical evidence regarding the trajectory of the bullet. The trial court did not err in concluding that plaintiff's expert's theory was inconsistent with the physical evidence.

Skinner v Square D Co, 445 Mich 153, 159, 162; 516 NW2d 475 (1994). Plaintiff must in the first instance establish cause in fact; a mere slight basis in fact is not sufficient to satisfy plaintiff's burden:

> The 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. [Mulholland *v DEC Internat'l Corp,* 432 Mich 395, 416-417, n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts, (5th ed), § 41, p 269.]

Moreover, the purpose of the firing pin block in the PT-92-AF Model I is to avoid discharge when the gun is dropped with the muzzle down. It has no function whatsoever in a muzzle up drop, such as allegedly occurred in this case. Witness Da Silva testified that carrying the PT-92 model cocked and loaded, with the safety off, and worn in one's waistband, was extremely dangerous. Witness Da Silva also testified that he had never heard of anyone being injured in a similar accident. Nor had he *ever* heard of a PT-92 discharging when it was dropped with the muzzle up and the hammer in a full rest position, although 53,000 guns had been sold. Because witness Da Silva managed the factory that produces these pistols, he would certainly have heard about muzzle-up accidents, had they occurred. Plaintiff did not meet the burden of establishing forseeability. Plaintiff's expert engaged in no testing whatsoever of the subject weapon. Both the manufacturer and the Brazilian Army, however, had tested this weapon. Their tests did not show that the gun would *ever* discharge in a muzzle up drop from one meter. Plaintiff's expert could not replicate the hypothesized conditions. It was thus not legally foreseeable that the gun would discharge under the circumstances of the instant accident. Plaintiff adduced no evidence that the gun as designed and sold was unreasonably dangerous without a firing pin block.

The jury needed guidance to determine the industry's standard for safety at the time this gun was manufactured. Defendant Forjas Tauras marketed guns that contained the firing pin block and guns that did not. Plaintiff did not adduce sufficient evidence to establish that the PT-92 should have had a firing pin block installed in it to make it reasonably safe; she merely adduced evidence that it would have been safer with the firing pin block. Because there was no evidence whatsoever that defendants knew that the gun would discharge under the circumstances of this accident, it was not foreseeable that the defendants should have designed a gun to prevent discharge under these circumstances.

The testimony of Medical Examiner Bill Brooks was not adequate to remove plaintiff's case from the category of speculation or conjecture. The trial court did not err in holding that Dr. Brooks' theory advanced neither plaintiff's or defendants' case when he testified that the gun was at least four feet away from the entry wound when it discharged.

Finally, the presence of tile material in the gun does not advance plaintiff's case. Even if Meijer's floor material was embedded in the gun, it does not advance the probative inquiry regarding

whether the gun discharged when it struck the floor (plaintiff's theory), or whether Mr. Tunney grazed the gun, allowing the gun to discharge by touching the trigger before the gun hit the floor an tile material thereafter became embedded in it (defendants' theory).

Mr. Tunney died in a tragic accident. A jury cannot fairly ascribe that tragedy to defendants' negligence where plaintiff has failed to meet the required legal standards to establish a design defect.

Plaintiff has also not shown that the trial court abused its discretion in the numerous evidentiary rulings challenged on appeal. *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2s 51 (1992).

In light of the above holdings, we need not address the issues raised in defendants' cross-appeal.

Affirmed.

/s/ Maura D. Corrigan
/s/ J. Richard Ernst