STATE OF MICHIGAN

COURT OF APPEALS

BEHLUL FJOLLA and LINDITA FJOLLA,

Plaintiffs-Appellants,

v

NACCO MATERIALS HANDLING GROUP, INC., f/k/a YALE MATERIALS HANDLING CORPORATION, ALTA FORK LIFT, and BELL FORK LIFT, INC.,

Defendants-Appellees.

UNPUBLISHED
December 9, 2008

No. 281493
Oakland Circuit Court
LC No. 2006-078921-NP

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

In this product liability action, plaintiffs appeal as of right a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

On January 7, 2005, plaintiff Behlul Fjolla[1] attempted to repair a forklift at his place of employment, PGS, Inc. During plaintiff's repair efforts, the forklift suddenly and unexpectedly traveled in reverse, crushing plaintiff's hand and arm against metal boxes stacked on a nearby wall. As ultimately amended, plaintiffs' complaint alleged that defendant Nacco Materials Handling Group, Inc. designed and manufactured the forklift, that defendant Alta Fork Lift sold it to PGS, and that defendant Bell Fork Lift, Inc. maintained and serviced the forklift. The second amended complaint raised product liability and negligence claims against all three defendants. Against Nacco and Alta, the second amended complaint additionally alleged a breach of warranty count, premised on their placement of the unreasonably defective forklift into the stream of commerce.

[1] Because plaintiff Lindita Fjolla has raised only a derivative loss of consortium claim, this opinion refers to Behlul Fjolla when employing the singular "plaintiff."

Plaintiff recounted at his deposition that near the end of his shift on January 7, 2005, the forklift stopped moving and his coworkers summoned him to attempt a repair. Plaintiff had previously performed small repairs on the four or five PGS forklifts, which included putting water in the batteries, greasing various components, and fixing signal lights, but he conceded that he lacked formal training in forklift repair. None of the other PGS employees ever serviced the forklifts.

When the forklift stopped moving on January 7, 2005, plaintiff attributed the problem to a malfunction of "plates" that controlled the vehicle's movement. Plaintiff commenced his repair efforts by turning off the forklift's ignition and setting the parking brake. He then removed the hood from the rear of the vehicle, and attempted to use a screwdriver to separate two plates that he believed needed cleaning so that they could make contact and conduct power through the vehicle. Plaintiff asserted that he had previously fixed problems involving the plates by using a screwdriver to separate them, and had watched Bell's forklift mechanics employ the same maneuver.

The plates into which plaintiff inserted his screwdriver are known as contactors. The electrical energy powering the subject forklift flows from the battery through a circuit composed of a series of paired contactor plates, or switches, which complete a circuit when closed. Each contactor plate has two small silver alloy tips. When the forklift's operator moves the control to the forward position, two opposing contactor plates, each bearing two tips, move from an open to a closed position, completing an electrical circuit and delivering power to the motor. The forklift is equipped with forward and reverse contactors, and several specialized contactors that control the vehicle's speed. One such switch, the 1-A, regulates the forklift's travel at higher velocities. Occasionally, paired contactor tips may "weld" together and remain in contact when they should remain open. This problem can occur if the forklift is driven with an incompletely charged battery, or through normal wear and tear. If the 1-A contactor fails, a safety sensor prevents engagement of the forward and reverse contactor tips until the 1-A contactor has been repaired.

The parties agree that on the day of plaintiff's injury, the 1-A contactor tips had welded together, disabling that switch. When plaintiff inserted the screwdriver into the reverse contactor he completed an otherwise open circuit, resulting in the forklift's rearward travel. In essence, plaintiff succeeded in defeating a safety sensor, and thereby "hot-wired" the vehicle. Had plaintiff disconnected the forklift's battery before attempting this repair, the vehicle would not have moved.

Plaintiff's expert witness, Donald Blackmore, opined at his deposition that the forklift was defective because its ignition key switch "did not break or open … the power battery cable from the battery to the contactor plates ultimately to the drive motors." According to Blackmore, plaintiff reasonably expected that because he had turned off the forklift's ignition switch, no power could flow to the drive motor, and the vehicle would not move. Blackmore proposed an alternative design involving an additional contactor controlled by the key switch, which he suggested would prevent unexpected movement of the forklift when the ignition was turned to the off position. Blackmore insisted that his proposed alterative design "comports with the universal expectation of when I shut the key off to something, it's off. And if the battery circuit is interrupted by a key switch controlled contactor, that would have prevented this accident." Nacco's expert witness, Raymond McKenzie, estimated that Blackmore's proposed device would add approximately $100 to the cost of each forklift.

Three days before plaintiff's injury, a Bell mechanic serviced the involved forklift. The mechanic determined that the forward and reverse contactor tips had corroded, and failed to make contact. He rebuilt the contactors and installed new tips. Blackmore averred that the mechanic also should have inspected and rebuilt the 1-A contactor tips. Plaintiffs theorized that if the 1-A contactor had been replaced on January 4, 2005, the forklift would not have needed repair on January 7, 2005. As Blackmore further explained,

> Contactor plates on an electric forklift are much like brake pads on cars in that they are expendable wear items. And the condition of the contactor plate that was on the machine at the time of the accident was well beyond any condition it should have been in.
>
> In other words, it should have been replaced sometime before this accident happened. And had it not been in that condition, it wouldn't have made the weld connection that stuck it in a closed position.

Defendants sought summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff failed to produce adequate evidence supporting his product liability and negligence claims. The circuit court issued a "Revised opinion and order" that recited the following findings:

> The Court finds that Plaintiff's attempt to service the truck was grossly negligent and was not reasonably foreseeable. Plaintiff attempted to repair an electrical device by sticking a screwdriver into an electrical contact *despite* (1) his lack of training with respect to lift trucks, (2) his failure to read Service Manuals, Operator's Manuals or guidebooks, (3) his employer's directive not to repair or adjust machinery unless authorized to do so, and (4) his only knowledge being his observation of trained mechanics employing a similar tactic. [Emphasis in original.]

On the basis of these findings, the circuit court dismissed plaintiff's failure to warn and negligence claims.

Regarding plaintiff's defective design allegation, the circuit court determined that plaintiffs failed to establish that the forklift's design qualified as unreasonably dangerous, or that a safer alternative design was available. The circuit court reasoned,

> Plaintiffs' expert Mr. Blackmore acknowledged that he will provide no testimony regarding the magnitude of the risk imposed by the allegedly defective design. Mr. Blackmore did concede, however, that if Plaintiff's incident were the only such incident of which the manufacturer was aware, he would conclude that the design was "reasonably safe." In this regard, Defendants attach the affidavit of Marvin Welch … attesting that NACCO has no reports of any such claims. Further, although Plaintiffs and Blackmore maintain that the injury could have been prevented with an alternative design, they fail to demonstrate that the suggested alternative would either be safer than the original design or that it would not significantly impair the usefulness or desirability of the product to its users. In any case, the alleged design defect was not the cause of Plaintiff's

> injury. Rather, in view of Plaintiff's lack of training or permission and the multiple warnings, Plaintiff's misuse of the product caused his injury. . . .

II. Standard of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We also review de novo the interpretation and application of statutes as questions of law. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh, supra* at 621.

III. Summary Disposition Analysis

A. Defective Design

Plaintiffs first challenge the circuit court's finding that plaintiff's misuse of the forklift did not qualify as reasonably foreseeable. Manufacturers have a duty to design their products "so as to eliminate any unreasonable risk of foreseeable injury." *Prentis v Yale Mfg Co*, 421 Mich 670, 692-693; 365 NW2d 176 (1984). The statute governing claims alleging a "production defect"[2] provides that a manufacturer has no liability for harm caused by a production defect

> unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. [MCL 600.2946(2).]

Thus, § 2946(2) requires a plaintiff to prove that (1) the product was not reasonably safe when it left the control of the manufacturer or seller, and (2) "a practical and technically feasible alternative" design "would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others."

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[2] The term "production" includes "design" MCL 600.2945(i).

A separate statute addresses potential product misuse. "A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court." MCL 600.2947(2).

A manufacturer "is liable for negligence in the manufacture or sale of any product which may reasonably be expected to be capable of substantial harm if it is defective." *Ghrist v Chrysler Corp*, 451 Mich 242, 248; 547 NW2d 272 (1996), quoting Prosser & Keeton, *Torts* (5th ed), § 96, p 683. "A product is defective if it is not reasonably safe for its foreseeable uses." *Fredericks v General Motors Corp*, 411 Mich 712, 720; 311 NW2d 725 (1981). While a design defect claim tests the conduct of the manufacturer, "[a] breach of warranty claim tests the fitness of the product and requires that the plaintiff 'prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains.'" *Gregory v Cincinnati, Inc*, 450 Mich 1, 12; 538 NW2d 325 (1995), quoting *Piercefield v Remington Arms Co*, 375 Mich 85, 98-99; 133 NW2d 129 (1965).

Before our Legislature enacted product liability reform legislation in 1995, the common law generally required the finder of fact to determine whether a product's danger qualified as unreasonable and foreseeable. In *Casey v Gifford Wood Co*, 61 Mich App 208, 217; 232 NW2d 360 (1975), this Court explained that the test for product liability was "whether the danger from which the plaintiff suffered injury was unreasonable and foreseeable. This usually is a jury question." However, MCL 600.2947(2) now mandates that whether "there was misuse of a product" and whether the product's misuse "was reasonably foreseeable" constitute "legal issues to be resolved by the court." The term "misuse" includes "uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training *regarding the use or maintenance* of the product . . . ." MCL 600.2945(e) (emphasis supplied). Unforeseeable misuse of a product bars a product liability action.[3] "Foreseeability of misuse may be inherent in the product or may be based on evidence that the manufacturer had knowledge of a particular type of misuse." *Portelli v I R Constr Products Co*, 218 Mich App 591, 599; 554 NW2d 591 (1996).

Plaintiff does not contest that he was using or maintaining the forklift at the time of the accident. Nor does plaintiff challenge defendants' assertion that his use of the screwdriver amounts to misuse of the forklift. Instead, plaintiff argues on appeal that his misuse of the product was reasonably foreseeable. Plaintiff insists that his observation of Bell mechanics using a screwdriver to separate the contactors, and the presence of "scratches and scrapes" on the "back cover of the contactors," demonstrated the reasonable foreseeability of his repair technique. Additionally, plaintiff invokes Blackmore's testimony that, "[W]hen you look at the back cover of the contactors, forward and reverse, there's some distress to the hole where the solenoid plunger sits which would appear that it's been beat on before."

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[3] A "product liability action" "means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL 600.2945(h).

Viewing this evidence in the light most favorable to plaintiffs, we conclude that plaintiff's misuse of the forklift was not reasonably foreseeable. Plaintiffs have offered no evidence that the trained mechanics plaintiff observed repairing the contactors failed to disconnect the battery cable before using a screwdriver to separate the tips. The existence of "scratches and scrapes" near the access area for the contactor plates may tend to prove that others used screwdrivers in that vicinity, but the presence of these marks does not reasonably evidence that any service occurred without first disconnecting the battery. Plaintiffs have also failed to demonstrate the existence of any other reported injuries caused by an unexpected movement of the forklift, and Blackmore opined that he would consider the forklift "reasonably safe" if plaintiff's injury constituted the only similar "failure."

Although a forklift user might reasonably conclude that turning off the ignition would prevent movement of the truck, we detect no genuine issue of material fact that either Nacco or Alta reasonably should have foreseen that anyone would have attempted to repair an electrical system by employing a screwdriver to separate electrical components, without previously disconnecting the vehicle's battery. The circuit court thus correctly concluded as a matter of law that plaintiff's misuse of the forklift was not reasonably foreseeable. Given these findings, MCL 600.2947(2) compels us to conclude that the circuit court properly dismissed plaintiff's product liability claims. In light of our determination that the circuit court did not err in dismissing plaintiff's claims for design defect and breach of warranty, we need not address the additional appellate arguments of Nacco and Alta.

Plaintiffs next contend that the circuit court incorrectly granted Bell summary disposition because Blackmore's testimony established that during the January 4, 2005 service call, the Bell mechanic "should have recognized that the problem was with the 1A contact and fixed the problem." Plaintiffs assert that the following evidence supports Blackmore's opinion: (1) the forklift worked only eight hours between January 4, 2005 and January 7, 2005, (2) the service manual instructs to "always install new contacts in sets," and (3) plaintiff's supervisor at PGS denied that the forklifts had been "undercharged." James Gird, plaintiff's supervisor, testified to his knowledge that the contactor plates could "burn out" if the forklifts were operated on an incompletely charged battery. Gird admitted that "on a few occasions," PGS employees had used the forklifts before the batteries were fully recharged. In response, Bell argues that its mechanic bore no legal duty to inspect for problems other than the obvious cause of the forklift malfunction, and that plaintiffs produced insufficient evidence that the 1-A contactor required repair or replacement on January 4, 2005.

Causation requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Cause in fact "generally requires a showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). The plaintiff must introduce evidence affording "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." *Id*. at 165 (internal quotation omitted). Although a plaintiff may establish causation circumstantially, "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner*, *supra* at 163-164. When a motion for summary disposition challenges causation pursuant to MCR 2.116(C)(10), "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact

exists to warrant a trial." *Id*. at 161. In *Skinner*, *supra* at 164, the Supreme Court distinguished between a reasonable inference and conjecture or speculation by quoting from *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956):

> As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Viewed in the light most favorable to plaintiffs, the evidence fails to establish a reasonable inference that the 1-A contactor required repair on January 4, 2005. Plaintiffs do not dispute that when Bell's mechanic completed his repair of the subject forklift, it functioned appropriately for several days. Blackmore admitted that he could not know the condition of the 1-A contactor tips on January 4, 2005. Although the 1-A contactor tips may have exhibited some wear on January 4, 2005, plaintiffs have produced no evidence tending to establish that the tips required replacement that day. "[T]here must be facts in evidence to support the opinion testimony of an expert." *Skinner*, *supra* at 173 (internal quotation omitted). Blackmore's testimony regarding a need to replace the A-1 contactor tips on January 4, 2005 amounts to pure conjecture because it is equally likely that the contactor tips lacked obvious signs of wear. Because plaintiffs failed to present competent evidence tending to prove that the Bell mechanic's failure to replace the 1-A contactor tips on January 4, 2005 caused plaintiff's injury on January 7, 2005, the circuit court properly granted Bell summary disposition pursuant to subrule (C)(10).

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher