COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 8, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-3411

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

VALGENE E. LOERTSCHER AND JUDITH A. LOERTSCHER,

PLAINTIFFS-RESPONDENTS,

V.

THE UNIROYAL GOODRICH TIRE COMPANY AND THE UNIROYAL GOODRICH TIRE COMPANY, INC.,

DEFENDANTS-APPELLANTS,

UNIROYAL GOODRICH CANADA, INC.

DEFENDANT.

APPEAL from an order of the circuit court for Vilas County: ROBERT A. KENNEDY, SR., Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. The Uniroyal Goodrich Tire Company and Uniroyal Goodrich Tire Company, Inc. (Uniroyal) appeal the order denying their summary judgment motion.[1] Uniroyal argues that summary judgment was appropriate because it did not design, manufacture or distribute the tire that caused harm to Valgene Loertscher. Uniroyal also asserts it had no control over defendant Uniroyal Goodrich Canada, Inc. (UGCI), the company that designed, manufactured, and distributed the tire. The Loertschers assert the trial court properly denied summary judgment because the facts supported the inferences of estoppel and a relationship between the similarly named defendant companies. We conclude that Uniroyal is not estopped from asserting its nonparticipation in the design, manufacture and distribution of the tire, and summary judgment was appropriate. We therefore reverse the order and remand for further proceedings.

On March 23, 1992, Valgene Loertscher was injured when a tire he was inflating on a tire rim exploded. The tire was a Uniroyal Laredo LTL S/R LT235/85R16 M&S Tubeless Tire, bearing serial number AUORUR150.

On June 17, 1993, the Loertschers sent a letter to Uniroyal, demanding compensation. Uniroyal responded by requesting an examination of the tire and informing the Loertschers that they would be advised of the findings from the examination. The tire was sent to Uniroyal, and Uniroyal held the tire for several months for testing. On January 12, 1995, Uniroyal informed the Loertschers of its decision to deny the claim, concluding that the tire was not defective, but instead exploded because Loertscher mounted it improperly, and that "the manufacturer is in no way responsible for any damages you may have

[1] Petition for leave to appeal was granted December 17, 1996.

incurred and must respectfully deny your claim." The Loertschers assumed Uniroyal had manufactured the tire, and Uniroyal did not inform the Loertschers to the contrary.

On March 21, 1995, the Loertschers filed a complaint against Uniroyal for the injuries and damages sustained, premised on strict liability and negligence. On March 22, the Loertschers filed an amended complaint in which they named Kelsey-Hayes Co., the manufacturer of the tire rim, as an additional defendant.[2] In its answer filed June 6, Uniroyal denied involvement in the manufacture or sale of the tire. In its responses to the Loertschers' first set of interrogatories, Uniroyal informed the Loertschers that Uniroyal Canada manufactured the tire.

By motion dated October 11, 1995, the Loertschers amended their amended complaint to include UGCI as a party defendant. On December 15, 1995, the Loertschers filed their second amended complaint, asserting negligence and strict liability claims against Uniroyal and UGCI. On April 3, 1996, the Loertschers filed a third amended complaint, reiterating their negligence and strict liability claims and asserting that Uniroyal acted as an agent for UGCI when it took possession of the tire after the accident and denied the claim.[3]

On July 24, 1996, Uniroyal filed a motion for summary judgment, asserting that it did not design, manufacture or distribute the tire, and that it was

[2] The Loertschers subsequently reached a settlement agreement with Kelsey-Hayes Co., and dismissed it from the lawsuit.

[3] In its brief, Uniroyal notes that the Loertschers failed to obtain leave of the court to file the third amended complaint. Because we conclude that Uniroyal's summary judgment should have been granted, dismissing them from the lawsuit, we do not address this issue.

not responsible for the alleged acts and omissions of UGCI. The trial court denied the motion, deciding Uniroyal was estopped from asserting it was not the manufacturer because it accepted and inspected the tire, and reported its finding that the manufacturer was not liable, without specifically denying it was the manufacturer. Uniroyal now appeals the order.

We review summary judgments de novo, in accordance with the standards set forth in § 802.08(2), STATS. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits … show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

In their complaint and amended complaints, the Loertschers asserted claims of strict liability and negligence against Uniroyal. Pursuant to the theory of strict liability,

> a manufacturer of a product who sells (places on the market) a defective product which is unreasonably dangerous to the user or consumer, or to his or her property, and which is expected to and does reach the user or consumer without substantial change in the condition in which it was sold, is regarded by law as negligent even though he or she has exercised all possible care in the preparation and sale of the product, provided the product was being used for the purpose for which it was designed and intended to be used.

WIS J I--CIVIL 3260. Similarly, in a products liability negligence action,

> The duty of a manufacturer or supplier of a product is to exercise ordinary care to insure that the product will not

> create an unreasonable risk of injury or damage to the user or owner when used in its intended or foreseeable manner. This duty must be "approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the shoes of the defendant manufacturer or supplier."

WIS J I--CIVIL 3200 (footnotes omitted; citation omitted). Both claims require the defendant to be the manufacturer or seller of the product. It is undisputed Uniroyal was not involved in the design, manufacture, distribution or marketing of the tire, that Uniroyal and UGCI operated as separate corporate entities, and that Uniroyal was not even in existence as a tire manufacturer, designer or distributor when the subject tire was manufactured by UGCI. Therefore we conclude, as a matter of law, that Uniroyal cannot be held negligent or strictly liable for the injuries sustained by Loertscher when the tire manufactured by UGCI exploded.

We reject the Loertschers' argument that the principles of estoppel preclude Uniroyal from asserting it did not manufacture the tire. "Estoppel may be applied where action or nonaction on the part of the one against whom the estoppel is asserted induced reliance by another, either in the form of action or nonaction, to his detriment." ***Gonzalez v. Teskey,*** 160 Wis.2d 1, 12, 465 N.W.2d 525, 530 (Ct. App. 1990). A party's reliance on another's conduct must be reasonable. ***Hester v. Williams***, 117 Wis.2d 634, 645, 345 N.W.2d 426, 431 (1984).

Estoppel must be proved by clear, satisfactory, and convincing evidence, and mere inference and conjecture are not sufficient to prove an estoppel claim. ***Gonzalez,*** 160 Wis.2d at 13, 465 N.W.2d at 530**.** Although proof of actual fraud is not required, the party against whom estoppel is asserted must have engaged in fraudulent or inequitable conduct. ***Id.*** Additionally, "[t]o give rise to

an estoppel by silence or inaction, there must be a right and an opportunity to speak and an obligation or duty to do so." ***Mortgage Assocs., Inc. v. Monona Shores, Inc.***, 47 Wis.2d 171, 185, 177 N.W.2d 340, 349 (1970).

The general rule is that a party asserting estoppel must plead estoppel when it has the opportunity, unless the facts constituting estoppel appear in the complaint. ***Schneck v. Mutual Serv. Cas. Ins. Co.***, 18 Wis.2d 566, 571, 119 N.W.2d 342, 345 (1963); ***Beane v. City of Sturgeon Bay***, 112 Wis.2d 609, 622, 334 N.W.2d 235, 241 (1983). We recognize that the Loertschers did not plead estoppel. However, even if we assume estoppel was pleaded, we conclude that estoppel is inapplicable to the facts of this case.

In a letter dated June 17, 1993, the Loertschers demanded compensation for the injuries sustained in the explosion of the tire. Uniroyal responded promptly with a June 30 letter to the Loertschers, requesting the subject tire and rim, among other things, be sent to Uniroyal's testing facilities for a non-destructive examination. The letter concluded with the following paragraph: "This correspondence is not to be construed as an admission of liability on our part. We will, upon receipt of the above requested information and artifacts, conduct a thorough review of the facts and advise you of our findings." The trial court decided that Uniroyal's June 30 letter imposed a duty on Uniroyal to advise the Loertschers that it was not the manufacturer of the subject tire:

> Was there a duty to speak? Well, it's so abnormal that these defendants didn't speak that I think there's probably cases that would indicate that they should speak. So [there] maybe (sic) some misrepresentation by silence or estoppel or maybe even deceit and the court does not believe that summary judgment is warranted because of these inferences that could be brought from these facts. So the motion is denied.

Neither the court nor the Loertschers have cited legal authority to support the trial court's conclusion. The context of the letter was that Uniroyal would accept the tire for the limited purpose of an examination to determine whether a defect in the tire had resulted in the explosion of the tire. We conclude the only reasonable inference from the letter is that Uniroyal promised to examine the tire and advise the Loertschers of its findings regarding the alleged defects in the tire. Uniroyal made no representation regarding who had manufactured the tire, and expressly did not admit liability. Absent a query from the Loertschers, Uniroyal had no affirmative obligation or duty to inform them prior to litigation that it had not manufactured the tire in question, especially when the Loertschers could have readily obtained that information from other sources.

Instead, it was the Loertschers' duty, before filing suit, to conduct an adequate investigation to identify the company that had manufactured the tire. "[T]he right to assert equitable estoppel does not arise unless the party asserting it has acted with due diligence. A lack of diligence on the part of the party claiming estoppel is fatal." ***Rascar, Inc. v. Bank of Oregon***, 87 Wis.2d 446, 453-54, 275 N.W.2d 108, 112 (Ct. App. 1978) (citations omitted). Uniroyal's letter did not interfere with the Loertschers' ability to initiate a lawsuit against UGCI, and it was not reasonable for the Loertschers to rely exclusively on Uniroyal's pre-litigation letter, in which Uniroyal made no representation regarding the manufacturer of the tire, to determine that its lawsuit was properly commenced against the correct manufacturer. *See* ***Hester***, 117 Wis.2d at 643-44, 345 N.W.2d at 431. The fact that the statute of limitations may have run on the Loertschers' claim against UGCI is irrelevant to Uniroyal's summary judgment motion.

We also reject the Loertschers' argument that the facts support the existence of an agency relationship between Uniroyal and UGCI. In order to prove apparent agency, the Loertschers must demonstrate three elements: (1) an act by the principal or the agent justifying belief in the agency; (2) knowledge of these acts by the party sought to be charged; and (3) reasonable reliance by a third party. *See* ***McDonald v. Century 21 Real Estate Corp.***, 111 Wis.2d 600, 604, 331 N.W.2d 606, 608 (Ct. App. 1983). The Loertschers contend these elements were established by Uniroyal's acceptance of the tire for examination and denial of their claim, the fact that Uniroyal often examined tires manufactured by UGCI, and their reasonable reliance on the inference that the tire was manufactured by Uniroyal.

We disagree. The Loertschers have not proved the first element. To establish the first element, there must be evidence that the third party knew it was dealing with an agent. ***Carlson v. Taylor***, 41 Wis.2d 685, 694, 165 N.W.2d 178, 183 (1969). "Since apparent authority is the power which results from acts which appear to the third person to be authorized by the principal, if such person does not know of the existence of a principal there can be no apparent authority." ***Id.*** (quoting RESTATEMENT (SECOND) OF AGENCY § 194 cmt. a at 430). At the time the Loertschers sent the tire to Uniroyal for an examination, they believed they were dealing with the manufacturer of the tire. Because they did not, at that time, even realize that UGCI manufactured the tire, they could not have believed that they were dealing with Uniroyal as an agent for UGCI.

By the Court.—Order reversed and cause remanded with directions to grant summary judgment in favor of Uniroyal.

Not recommended for publication in the official reports.