COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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Nos. 98-2647 & 98-3617

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

FRED CARLSON,

PLAINTIFF-APPELLANT,

V.

TRAILER EQUIPMENT AND SUPPLY, INC. AND COMMERCIAL UNION INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

VALLEY TRUCK SALVAGE, INC., ABC INSURANCE COMPANY AND WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. Fred Carlson appeals a summary judgment that dismissed his claims against Trailer Equipment & Supply, Inc., and an order denying his motion to rehear the summary judgment motion. Carlson sought to hold Trailer Equipment liable for injuries he sustained in a fall when a grab handle on a semi-tractor cab gave way. Trailer Equipment had recently attached the used cab to the semi-tractor chassis. Carlson contends the circuit court erred by: (1) determining that Trailer Equipment was not subject to strict liability; (2) granting summary judgment because material issues of fact existed; (3) concluding that res ipsa loquitur does not apply; and (4) failing to grant his motion to rehear Trailer Equipment's summary judgment motion based upon his newly-discovered evidence that created a fact issue.

We hold that Trailer Equipment is not subject to strict liability because the reasons underlying strict liability do not apply. Second, because our review of the record discloses no disputed facts and because of Carlson's agreement that no additional discovery was needed, the case was ripe for summary judgment. Third, res ipsa is not appropriate because the cab and its grab handles were not in the exclusive control of Trailer Equipment. Finally, the circuit court properly exercised discretion in refusing to accept Carlson's claimed newly-discovered evidence because Carlson failed to exercise due diligence in obtaining the evidence. We therefore affirm the judgment and order.

Carlson sustained serious injuries when the driver's grab handle on a semi-tractor cab pulled out as he was descending from the cab, causing him to fall. The semi-tractor belonged to his employer, Bay Motor Transport. Trailer Equipment had recently replaced the tractor's cab. Trailer Equipment is in the business of performing general trailer repair on semi-tractors and tractors. Generally, it does only the work the customer requests. It does not sell tractors,

cabs or trailers. Bay Motor had purchased the replacement cab from Valley Truck Salvage, Inc., and had Trailer Equipment replace the old cab from Bay Motor's semi-tractor with the one just purchased. Trailer Equipment performed other work as requested by Bay Motor.

In June 1997, Carlson sued Trailer Equipment on theories of strict liability and negligence. Depositions were taken of Carlson, various employees of Trailer Equipment, and David Rihm, Bay Motor's maintenance manager. All of the evidence indicated that the cab had grab handles on it when provided to Trailer Equipment. Carlson knew this at least by the end of 1997.

In January 1998, Trailer Equipment moved for summary judgment. The circuit court heard the motion in May 1998. At the summary judgment motion hearing, the court inquired whether the parties had completed discovery. Carlson's counsel responded that "I believe that the motion for summary judgment is ripe for determination at least at this point in time with respect to the issues of negligence and strict liability." The circuit court ruled from the bench that there was no issue of fact concerning strict liability and that strict liability did not apply to Trailer Equipment. In a subsequent written decision, the court granted summary judgment to Trailer Equipment in connection with Carlson's remaining negligence claim. It concluded that there were no facts indicating Trailer Equipment had a duty to do anything with the grab handle, and as a result the claim of negligence was not viable. Judgment was entered, and Carlson appealed the judgment.

After the summary judgment hearing, but before the court's written decision, Carlson filed a second amended complaint that added Valley Truck as a defendant. A default judgment was obtained against Valley Truck in September

1998. In discussions between Carlson and Valley Truck, Carlson was informed that the cab had no grab handles on it when sold by Valley Truck to Bay Motor. Carlson obtained an affidavit and, in October 1998, requested the court to grant it a new hearing on Trailer Equipment's summary judgment motion. The court held a hearing and denied the motion for a new hearing on the summary judgment motion. It determined that Carlson's failure to discover who put the grab handles on arose from a lack of diligence in seeking to discover that information. Carlson appealed that order. Subsequently, both appeals were consolidated.

Standard of Review

We review two separate matters in this appeal. First, whether the circuit courts grant of summary judgment was appropriate. Section 802.08, STATS., governs summary judgment methodology. That methodology has been set forth in many of our prior cases, *see, e.g.*, ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. We review the circuit court's decision on summary judgment de novo. *See* ***id***.

Second, we review the denial of Carlson's motion for a new hearing on Trailer Equipment's summary judgment motion. It was in the nature of a motion for relief under § 806.07, STATS.[1] Whether to grant such a motion is

[1] Section 806.07, STATS., provides in pertinent part:

> (1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> ….
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3)[.]

within the circuit court's discretion. *See* ***Kovalic v. DEC Int'l***, 186 Wis.2d 162, 166, 519 N.W.2d 351, 353 (Ct. App. 1994). We will reverse the circuit court's exercise of discretion only if erroneous. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Under this standard, the circuit court's determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record. ***Id***. at 66, 306 N.W.2d at 20.

ANALYSIS

Strict Liability

Carlson does not identify any disputed facts in connection with the circuit court's decision on strict liability. The application of strict liability to an undisputed set of facts is a question of law. ***Mulhern v. Outboard Marine Corp.***, 146 Wis.2d 604, 611, 432 N.W.2d 130, 133 (Ct. App. 1988). Therefore, whether Trailer Equipment was entitled to judgment on Carlson's strict liability claim turns on whether Trailer Equipment was entitled to judgment as a matter of law.

Carlson contends that Trailer Equipment is strictly liable because it put the defective tractor cab into the stream of commerce. He claims that one who refits a vehicle in the manner directed by an owner who then puts the item into the stream of commerce is strictly liable for defects in the refitted machine. For support, Carlson relies on the New Jersey case ***Michalko v. Cooke Color & Chem. Corp.***, 451 A.2d 179 (N.J. 1982), holding that a rebuilder of machinery has a duty to incorporate safety devices in the equipment it rebuilds when feasible to do so. He also attempts to distinguish ***Rolph v. EBI Cos.***, 159 Wis.2d 518, 464 N.W.2d 667 (1991), which held that strict liability does not apply to a reconditioner who

does not manufacture, distribute or sell the products it reconditions. We decline to impose strict liability here.

Wisconsin first adopted the rule of strict products tort liability in 1967, specifically adopting the RESTATEMENT (SECOND) TORTS § 402A. ***Dippel v. Sciano***, 37 Wis.2d 443, 459, 155 N.W.2d 55, 63 (1967). ***Dippel*** held that one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. ***Id***. To date, Wisconsin courts have imposed strict products liability in two categories of cases despite the lack of a technical sale. ***Kemp v. Miller***, 154 Wis.2d 538, 558, 453 N.W.2d 872, 879 (1990) (a commercial lessor may be held strictly liable in tort for damages resulting from the lease of a defective and unreasonably dangerous product); ***Mulhern***, 146 Wis.2d at 612-14, 432 N.W.2d at 133-34 (a defendant may be strictly liable even though it did not sell the product in question if the defendant is in the business of selling that type of product and places the product in the stream of commerce by supplying it to a consumer). The ***Kemp*** court indicated that the inquiry when examining whether to apply strict products liability in the absence of a technical sale is whether imposing liability would serve the purposes underlying strict liability. ***Kemp***, 154 Wis.2d at 556-57, 453 N.W.2d at 879. We conclude that those policies would not be served in this case.

The Wisconsin case most similar to this case is ***Rolph***, in which our supreme court declined to impose strict liability on a refurbisher.[2] In ***Rolph***, the

[2] Although the parties use the terms, we are hesitant to denominate Trailer Equipment a "refurbisher" or "reconditioner." The terms imply a broader purpose and range of activities and discretion to meet that purpose. They suggest that it was Trailer Equipment's intention or responsibility to restore the hybrid vehicle to nearly "original" condition. Trailer Equipment's assignment was, however, limited to joining the used cab with Bay Motor's semi-trailer.

manufacturer of a machine sued in strict liability sought contribution and indemnification from the J.C. Busch Company, which had reconditioned the machinery at the owner's request. ***Id***. at 525, 464 N.W.2d at 669. ***Rolph*** held that "a reconditioner who does not manufacture, distribute, or sell the products it reconditions is not liable in strict products liability for the defects in machines it reconditions." ***Id***. at 524, 464 N.W.2d at 669. The court noted that the objective of strict products liability is to impose

> the risk of loss associated with the use of defective products on the party that created and assumed the risk, reaped the profit by placing it in the stream of commerce, impliedly represented that the product was safe and fit for use by placing it in the stream of commerce, and had the ability to implement procedures to avoid the distribution of defective products in the future.

Id. at 529, 464 N.W.2d at 671. It found these policy reasons inapplicable to the reconditioner. ***Id***. at 530, 464 N.W.2d at 671.

Factually, this case is similar to ***Rolph***. Trailer Equipment, like Busch, is not in the business of manufacturing, distributing or selling machines. *See* ***id***. at 528, 464 N.W.2d at 670. Nor did Trailer Equipment sell the item allegedly responsible for Carlson's injuries. *See* ***id***. Finally, like Busch, Trailer Equipment merely performed such services as were directed by the owner and then returned the cab to the owner. *See* ***id***.

Public policy considerations do not support imposing strict liability on Trailer Equipment. Like Busch, Trailer Equipment did not create the risk by manufacturing the allegedly defective and unreasonably dangerous cab. *See* ***id***. at 530, 464 N.W.2d at 671. Any profit Trailer Equipment reaps was from performing the work requested by Bay Motor, not from putting the cab into the

stream of commerce. *See* ***id***. at 529, 464 N.W.2d at 671. Here, Valley Truck realized the profit from putting the used cab into the stream of commerce. Nor did Trailer Equipment impliedly represent that the cab was safe and fit for use by placing it into the stream of commerce. *See* ***id***. Trailer Equipment's work was performed only after the cab was in the stream of commerce.

We reject Carlson's attempts to distinguish ***Rolph***. He claims a significant distinction is that in ***Rolph***, the machine's owner sold it after the reconditioning, while here, Bay Motor used the cab after Trailer Equipment's work. The ***Rolph*** decision nowhere states that the owner sold the machine and therefore never attached significance to any such fact. ***Rolph*** also distinguished ***Michalko***, noting that the reconditioner in ***Michalko*** had also manufactured the machine that caused the injuries. ***Rolph***, 159 Wis.2d at 530, 464 N.W.2d at 671. We hold that ***Rolph*** applies and decline to impose strict liability upon a business that performs rebuild and repair work at an owner's request and direction, and does not manufacture, distribute or sell items it rebuilds or repairs.

Factual Disputes

Carlson asserts disputed facts exist in connection with his negligence claim, and summary judgment was inappropriately granted. Therefore, we must examine the summary judgment proofs to determine whether factual disputes exist. If material facts are disputed, summary judgment was inappropriate. ***Grams***, 97 Wis.2d at 338, 294 N.W.2d at 476-77.

The facts that Carlson contends are in dispute arise from inferences he would have us draw. Carlson asserts that Trailer Equipment did nothing to check out or inspect the grab handles and because a short time later the grab handle pulled out, he is entitled to an inference that Trailer Equipment was

negligent. Similarly, he claims Trailer Equipment had a duty to provide a road-worthy, safe vehicle and the fact the handle came off creates an inference of negligence. Carlson's unarticulated and undeveloped premise for these inferences is that Trailer Equipment had a duty to perform safety checks on the cab's equipment.

Under summary judgment methodology, the inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. ***Id***. at 338-39, 294 N.W.2d at 477. We decline to draw Carlson's inferences for two reasons.

First, Carlson never raised these issues before the circuit court. In fact, he conceded before the circuit court that the case was ripe for summary judgment. Issues first raised on appeal are waived. *See* ***State v. Rogers***, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995). Carlson waived this issue.

We nevertheless examine his contentions. We conclude that the facts available to the court at the time of the summary judgment are contrary to the inferences Carlson would have us draw. It is undisputed that Bay Motor did not retain Trailer Equipment to perform a safety check of the cab, nor did anyone notice anything wrong with the grab handles. Rihm, of Bay Motor's maintenance manager, had viewed and used the grab handles and noticed nothing wrong. In addition, Trailer Equipment's personnel noticed nothing wrong with the handles. To inspect the grab handle attachments, Trailer Equipment would have had to rip out the inside molding. Carlson did not dispute these facts.

We agree with the circuit court that "[t]here is a lack of evidence which would suggest that Defendant's duty to use ordinary care involved a duty to

inspect the attachment of a grab bar that showed no signs of being loose or unsafe."[3] We conclude that there were no genuine issues of material fact that would preclude summary judgment. The circuit court correctly held that Carlson failed to show that Trailer Equipment breached a duty owed to him.

Res Ipsa Loquitur

In the same vein, Carlson complains that the circuit court failed to apply the doctrine of res ipsa loquitur to allow an inference of Trailer Equipment's negligence. Res ipsa loquitur has three elements:

> (a) either a layman is able to determine as matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

See ***Peplinski v. Fobe's Roofing***, 193 Wis.2d 6, 17, 531 N.W.2d 597, 601 (1995).

Carlson does not meet res ipsa loquitur's second requirement. He offered no evidence showing that Trailer Equipment had exclusive control of the cab or grab handle. Indeed, the undisputed facts establish that at the time of the accident, Bay Motor had possession and control of the cab. Thus, Carlson has failed to satisfy an element of res ipsa loquitur and, consequently, cannot avail himself of the doctrine's evidentiary advantage.

[3] We also believe that the court's analysis in ***Rolph*** regarding duty is similarly applicable here, *see* ***id***. at 533-37, 464 N.W.2d at 672-73, although we do not so hold because Carlson did not develop the issue. *See* ***State v. Flynn***, 190 Wis.2d 31, 58, 527 N.W.2d 343, 354 (Ct. App. 1994).

Order Denying Motion

Carlson claims the circuit court erred by denying its motion to reopen the summary judgment based on Carlson's newly discovered evidence that the cab had no grab handles on it when Valley Truck sold it to Bay Motor. He insists that, because all the earlier evidence indicated Trailer Equipment had nothing to do with the grab handles, he can not be faulted for neglecting to pursue the issue. We disagree.

The circuit court treated Carlson's motion as a motion for relief of the judgment under § 806.07(1)(b), STATS.[4] Subsection (1)(b) in turn directs us to § 805.15(3), STATS., which provides four factors to examine in determining whether to grant relief:

> (3) NEWLY-DISCOVERED EVIDENCE. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:
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> (a) The evidence has come to the moving party's notice after trial; and
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> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
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> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

The circuit court concluded that Carlson failed to exercise due diligence. We limit our review to that factor and conclude that the circuit court did not erroneously exercise discretion. A critical issue in this case was who installed the grab handle on the replacement cab. By the end of 1997, Carlson was aware that Trailer Equipment's and Bay Motor's personnel were testifying that the

[4] *See* note 1.

grab handles were on the cab when purchased by Bay Motor and that Trailer Equipment had done nothing to the grab handles. At that point Carlson could have deposed someone from Valley Truck, or alternatively brought it into the litigation. Yet, it was not until seven months later, after the court dismissed its strict liability claim against Trailer Equipment, that Carlson brought Valley Truck into the litigation. This is not due diligence. Because the court relied upon facts of record and applied he appropriate law, we will not disturb its discretionary decision.

In conclusion, summary judgment was appropriate because no factual disputes existed at the time the motion was heard. ***Rolph*** controls and, using its analysis, we decline to impose strict products tort liability upon Trailer Equipment. We concur with the circuit court's dismissal of Carlson's negligence claims and rejection of res ipsa loquitur because Carlson declined to show that Trailer Equipment breached a duty or was in exclusive control of the grab handle when the injury occurred. Finally, we conclude the circuit court appropriately exercised discretion in determining that Carlson failed to exercise due diligence in obtaining his newly discovered evidence. Accordingly, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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