COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2707 **Cir. Ct. No. 2001CV511**

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

HEATH BUCHHOLZ,

PLAINTIFF-RESPONDENT,

V.

FARMERS INC. OF ALLENTON AND MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

HELGESEN INDUSTRIES, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 SNYDER, P.J. Farmers Inc. of Allenton and Michigan Millers Mutual Insurance Company appeal from a judgment in the amount of

$404,683.99. They argue that the jury verdict holding them liable for personal injuries to Heath Buchholz reflects reversible error. Specifically, they argue that Buchholz's own negligence was an intervening force and therefore a superseding cause of his injuries. We disagree and affirm the judgment of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case arises from the sale of a piece of used farm machinery. Buchholz purchased an Owatona grinder/mixer from Farmers on February 7, 1998. While looking over the grinder/mixer at Farmers' lot, Buchholz noticed that a power take off (PTO) guard was damaged and there was no guard on the beveled gears of the discharge auger. Farmers' salesperson, Peter Hafemeister, testified that when Farmers takes used machinery in trade its policy is that "when we sell it we are going to put the guards on it." Buchholz testified that the damaged PTO guard was replaced, but there was still no guard on the beveled gears when the machinery was delivered by Farmers.

¶3 On the day of the accident, Buchholz was grinding cob corn to feed his cattle. He testified that he knew the guard was missing but determined that he needed to use the equipment to grind feed for his animals that day. After grinding, Buchholz and his brother, Harvey, drove the tractor pulling the grinder/mixer to the area where they store their feed. Harvey backed the grinder/mixer up to the feed room and Buchholz guided the discharge auger into the feed room. The process went smoothly until the feed reached the level of the auger. At that point, Buchholz needed to move the auger to the left, so he grabbed the handles and turned the auger. He testified that he used caution because he was aware of the risks posed by the missing guard. He also testified that there was patchy ice on the ground in the area where he was working.

¶4 As Buchholz was pushing the auger, he lost his footing and his feet slipped out from under him. Buchholz's left hand fell through the beveled gears of the discharge auger. As a result, Buchholz lost the four fingers on his left hand. Surgeries to reattach the fingers were unsuccessful, and in January 1999, Buchholz had two toes removed from his left foot and transplanted onto his left hand.

¶5 At trial, the parties introduced competing testimony, particularly regarding an alleged conversation between Hafemeister and both Buchholz brothers at the time of the delivery of the grinder/mixer to Buchholz. Farmers insists that when Buchholz pointed out the missing guard, Hafemeister offered to take the grinder/mixer back to the shop to replace it. Buchholz insists that the machine was dropped off when no one was home. Nonetheless, Farmers concedes there was clear evidence that its agents "were negligent in servicing the grinder/mixer and missed the fact that there was a missing shield over the auger arm."

¶6 A jury determined that both parties were negligent and assessed sixty percent of the fault to Farmers and forty percent to Buchholz. The circuit court entered judgment in conformity with the jury's verdict.

DISCUSSION

¶7 On appeal, the only issue presented is whether Buchholz's negligence was an intervening force and therefore a superseding cause of the accident.[1] More specifically, Farmers asserts that "Buchholz's stubborn insistence

[1] An intervening force is one that actively operates to produce harm to another after the actor's negligent act or omission has been committed. RESTATEMENT (SECOND) OF TORTS § 441 (1965).

that he be allowed to use the grinder/mixer under the dangerous conditions of the machine's configuration and in the work area where he used it constituted a superseding cause of the accident." Farmers observes that a superseding cause is an intervening force that relieves an actor from liability for harm that his or her negligence was a substantial factor in producing. *See* ***Stewart v. Wulf***, 85 Wis. 2d 461, 475, 271 N.W.2d 79 (1978). In other words, Farmers argues, its own negligence was too remote from the subsequent injury to impose liability. *See* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 738, 275 N.W.2d 660 (1979).

¶8 We begin by noting that Farmers' framing of the issue is somewhat outdated. Wisconsin employs a two-step legal cause analysis. First, the substantial factor test is used to determine cause-in-fact, which is a question for the jury. ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶12, 272 Wis. 2d 46, 680 N.W.2d 345. Second, a court must look to "proximate cause," a concept used interchangeably with public policy factors. ***Id.***, ¶10 n.7. Under current Wisconsin jurisprudence, the doctrine of superceding cause is subsumed in the public policy analysis. ***Id.***, ¶12 n.8.[2] Therefore, where a defendant's negligence is a cause-in-fact of the plaintiff's injury, the defendant is shielded from liability, if at all, by consideration of public policy factors. ***Id.***, ¶14. Accordingly, we look to public policy factors to determine whether Farmers should be relieved of liability for its negligence. The application of public policy

[2] In ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶12 n.8, 272 Wis. 2d 46, 680 N.W.2d 345, our supreme court explained that "it is important to note that Wisconsin's substantial factor test for cause-in-fact … eliminates the doctrines of superceding and intervening cause. [T]hese doctrines are now subsumed in the public policy analysis." (Citation omitted.)

presents an issue of law, which this court reviews de novo. ***Morgan***, 87 Wis. 2d at 737.

¶9 In ***Colla v. Mandella***, 1 Wis. 2d 594, 598-99, 85 N.W.2d 345 (1957), our supreme court first articulated six public policy considerations to be used by courts to limit liability in tort claims where the chain of causation is complete and direct: (1) the injury is too remote from the negligence, (2) the injury is wholly out of proportion to the culpability of the negligent party, (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, (4) allowing recovery would place too unreasonable a burden upon users of the highway, (5) allowing recovery would be too likely to open the way to fraudulent claims, or (6) allowing recovery would take us down a path that has no sensible or just stopping point.

¶10 We will not discuss all six factors because Farmers' argument on appeal is limited to only the first public policy factor, whether the injury is too remote from the negligence. Whether the injury is too remote from the negligence, "is a restatement of the old chain of causation test…. What this factor does … is to revive the 'intervening' or 'superceding' cause doctrine and dress it in new clothes." ***Fandrey***, 272 Wis. 2d 46, ¶15 n.12 (quoting Kendall W. Harrison, *Wisconsin's Approach to Proximate Cause*, 73 WIS. LAW. 20, Feb. 2000, at 55-56). Therefore, because the doctrine of superceding or intervening cause is "another way of saying the negligence is too remote from the injury to impose liability," we limit our discussion to the first public policy factor. *See* ***Morgan***, 87 Wis. 2d at 738.

¶11 Farmers devotes a substantial amount of its argument to demonstrating that Buchholz knew of the danger the auger presented but decided

to use the machine anyhow. Farmers asserts that its own agent, Hafemeister, recognized the danger and attempted to stop Buchholz from using the grinder/mixer until he had a chance to add the guard. Farmers concludes that all liability for the injuries Buchholz sustained should be born by Buchholz because he decided to use the grinder/mixer despite the clear danger it presented.

¶12 We are not persuaded that public policy supports this argument. First, an injured person's "causal negligence for his [or her] own safety is considered within the scope of the doctrine of contributory negligence." ***Presser v. Siesel Constr. Co.***, 19 Wis. 2d 54, 61, 119 N.W.2d 405 (1963).[3] Wisconsin law contemplates that a plaintiff's negligence will be "measured separately against the negligence of each person found to be causally negligent." WIS. STAT. § 895.045. Here, the jury determined that Buchholz bore some responsibility for his own injuries and apportioned him forty percent of the blame. Farmers' proposition that Buchholz should be held accountable for his negligence is adequately addressed by the doctrine of contributory negligence and the assessments of the jury.

¶13 Second, we are not convinced that Buchholz's injury was so wholly removed from Farmers' negligence as to raise public policy concerns. Farmers concedes it was negligent in failing to install a guard over the beveled gears of the discharge auger. There is no dispute that Farmers delivered the grinder/mixer

[3] The court's analysis in ***Presser v. Siesel Constr. Co.***, 19 Wis. 2d 54, 61, 119 N.W.2d 405 (1963), focused on the doctrine of superceding cause, a doctrine subsequently subsumed by the public policy analysis. *See* ***Fandrey***, 272 Wis. 2d 46, ¶12. It is useful to note, however, that the ***Presser*** court concluded, "The defense of an intervening and superseding cause as such is not applied to the plaintiff's negligence." ***Presser***, 19 Wis. 2d at 61.

without the guard,[4] and the parties acknowledge that Buchholz's injury resulted when he slipped and his left hand went through the unguarded gears.

¶14 Finally, Farmers cites to ***McGuire v. Ford Motor Co.***, 360 F. Supp. 447, 448 (E.D. Wis. 1973), for the proposition that a defendant will be relieved from liability if an intervening force "outside the range of reasonable anticipation as a consequence of the defendant's wrongful conduct" occurs. Farmers asserts that it was outside the range of reasonable anticipation that an experienced farmer would use such dangerous machinery knowing a guard was missing. We disagree. Farmers delivered the grinder/mixer without the guard and could reasonably have anticipated that Buchholz, who needed to grind feed for his cattle, would use the grinder/mixer in the condition in which it was delivered. Furthermore, Hafemeister and Terry Theusch, the president of Farmers, both testified that they recognized that selling machines without guards could result in harm and be dangerous to farmers.

CONCLUSION

¶15 In essence, Farmers asks us to reverse the circuit court's judgment on the verdict on public policy grounds. Our analysis reveals no compelling reason for doing so. Buchholz's negligence was compared to Farmers' negligence just as contemplated by WIS. STAT. § 895.045. Furthermore, Buchholz's injury was not so wholly removed from Farmers' negligence so as to relieve Farmers of its liability. Accordingly, we affirm the judgment of the circuit court.

[4] We acknowledge Farmers' position that Hafemeister offered to take the machine back to have the guard installed before Buchholz used it to grind feed. However, Farmers does not dispute that the grinder/mixer was delivered without the guard in the first place.

By the Court.—Judgment affirmed.

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