COURT OF APPEALS DECISION DATED AND FILED

November 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2005AP1927

Cir. Ct. No. 2003CV408

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

KEVEN P. MAHNER, LAUREN MAHNER AND HANNAH MAHNER, BY THEIR GUARDIAN AD LITEM, MARK P. WENDORFF,

PLAINTIFFS-APPELLANTS,

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF,

V.

REW MOTORS, INC. AND SENTRY INSURANCE, A MUTUAL COMPANY AND DOMESTIC INSURANCE CORPORATION,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

NOMINAL-DEFENDANT,

V.

NEW HOLLAND NORTH AMERICA, INC., A FOREIGN CORPORATION,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Reversed and cause remanded for further proceedings*.

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

¶1 HOOVER, P.J. Keven Mahner appeals a summary judgment dismissing his strict products liability and negligence claims against Rew Motors, Inc., and Rew's third-party complaint against New Holland North America, Inc. Mahner filed this action after he was injured while operating equipment sold by Rew and manufactured by New Holland. Mahner asserts that the court applied an incorrect legal standard to his products liability claim and that the negligence question should have been submitted to a jury. We agree with Mahner and, accordingly, reverse the judgment and remand for further proceedings.

Background

¶2 Mahner began working for Patios Plus, owned by Jeff Steinmetz, in 1999. Part of Mahner's job involved operating skid steer loaders. Steinmetz has been operating skid steer loaders since about 1979. Mahner claims to never have operated a skid steer loader prior to working at Patios Plus, although he did operate heavy machinery in the military.

¶3 In 1997, Steinmetz had acquired a New Holland-manufactured LX665 skid steer loader from Rew. Steinmetz considered himself knowledgeable about the loaders and knew he wanted one with a low profile bucket. According

to Rew, Steinmetz also planned to buy the minimum of optional add-on equipment to keep the purchase within his budget.

¶4 New Holland offered a forty-eight-inch spill guard as an optional feature.[1] The guard affixes to the seventy-two-inch bucket. The guard is intended "to reduce the amount of larger debris that may spill over the back of the bucket in the fully loaded condition." Rew did not specifically inform Steinmetz that the guard was available. At his deposition, Steinmetz testified that had he known the guard was available, he would have purchased it. However, he also admitted that he became aware of the guard's availability after the sale and prior to Mahner's injury.

¶5 Patios Plus uses skid steer loaders for multiple purposes, including light excavating, spreading soil and stone, unloading items, moving timbers, and rooting stumps. In addition, dump trucks transport leftover debris and garbage from landscaping projects back to Patios Plus and empty it onto dump piles. The piles are usually three to four feet high, but are occasionally as tall as six feet. At the end of each work week, an employee uses a loader to take material from the dump piles, move it onto low areas of the property, and spread it out, similar to a landfill.

¶6 Timbers are supposed to be removed from the dump piles and sent to a burn pile, but they are sometimes left with the other debris. The timbers are generally six-by-six or six-by-eight inches around and up to four feet long. Steinmetz opined that the timbers should be visible in the dump piles. Also, both

[1] While Mahner characterizes the guard as optional safety equipment, New Holland disputes the characterization of the guard as a safety feature.

he and Mahner knew from experience that small material sometimes fell off the back of the bucket.

¶7 On August 10, 2001, Mahner was injured when he picked up material from the dump pile with the loader. As the bucket dumped forward, a three- to four-foot long, six-by-six timber fell backwards from the top of the bucket and into the operator cab. It hit Mahner's hands and knee, then pinned his leg, causing injury.

¶8 Mahner brought this action against Rew, alleging negligence in the sale of the loader because Rew failed to advise Steinmetz that the spill guard was available, and alleging strict products liability for the equipment's "defective and unreasonably dangerous condition." Rew filed a third-party complaint against New Holland, seeking indemnity and contribution.

¶9 Rew moved for summary judgment. It asserted that Mahner had failed to state a claim on both negligence and products liability. Rew asked the court to apply ***Scarangella v. Thomas Built Buses, Inc.***, 717 N.E.2d 679 (N.Y. 1999), because that case dealt specifically with strict products liability when the product was optional safety equipment. Rew also filed a motion in limine, attempting to strike Mahner's expert's deposition testimony that the accident would not have happened had the spill guard been in place. New Holland moved for summary judgment as well, asserting that Mahner could not prove causation.

¶10 The circuit court granted Rew's motion, concluding there was no material difference between New York's danger-utility test for products liability and Wisconsin's consumer-contemplation test. Applying ***Scarangella***, the court concluded that Mahner could not maintain a claim because Steinmetz was a

knowledgeable purchaser of the loader and, under that case, an informed buyer absolves the manufacturer of liability.

Discussion

¶11 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 316-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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." WIS. STAT. § 802.08(2).[2]

I. Products Liability

¶12 "Strict products liability holds manufacturers and other sellers of products accountable for selling defective and unreasonably dangerous products that cause injuries to consumers." ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶23, 245 Wis. 2d 772, 629 N.W.2d 727. Wisconsin follows the rule set forth in the RESTATEMENT (SECOND) OF TORTS § 402A (1965):

> (1) 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, if
>
> (a) the seller is engaged in the business of selling such a product, and

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

¶13 To prevail on a claim under this rule, a plaintiff must prove:

> (1) that the product was in defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause [a substantial factor] of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he [or she] sold it.

Green, 245 Wis. 2d 772, ¶23 (quoting ***Dippel v. Sciano***, 37 Wis. 2d 443, 460, 155 N.W.2d 55 (1967)).

¶14 In Wisconsin, this standard is the consumer-contemplation test. The origin of the "contemplation" element is explained by comments g and i to the Restatement.[3] Comment g explains that § 402(A) "applies only where the product

---

[3] *See also* WIS JI—CIVIL 3260 (2003), which states, in relevant part:

> A manufacturer of a product who sells … a defective product which is unreasonably dangerous to the ordinary user or consumer, and which is expected and does reach the consumer without substantial change in the condition in which it is sold, is regarded by law as responsible for harm caused by the product …..

(continued)

is, at the time it leaves the seller's hands, *in a condition not contemplated by the ultimate consumer*, which will be unreasonably dangerous to him." (Emphasis added.) Comment i explains the danger element: "The article sold must be *dangerous to an extent beyond that which would be contemplated by the ordinary consumer* who purchases it, with the ordinary knowledge common to the community as to its characteristics." Wisconsin has explicitly adopted both comments. *See* ***Green***, 245 Wis. 2d 772, ¶29.

¶15 Here, however, the circuit court applied a New York case, ***Scarangella***, 717 N.E.2d at 679. New York utilizes a danger-utility test, rather than a consumer-contemplation test, for products liability cases. The danger-utility test involves "balancing the risks created by the product's design against its utility and cost." ***Id.*** at 681. The danger-utility test, as the circuit court noted and Rew conceded at oral argument, is significantly different from the consumer-contemplation test.

¶16 ***Scarangella***, however, goes beyond the basic danger-utility test, stating:

> We can thus distill some governing principles for cases where a plaintiff claims that a product without an optional safety feature is defectively designed because the

---

> A product is said to be defective when it is *in a condition not contemplated by the ordinary user or consumer* which is unreasonably dangerous to the ordinary user or consumer, and the defect arose out of design, manufacture, or inspection while the article was in the control of the manufacturer. A defective product is unreasonably dangerous to the ordinary user or consumer when it is *dangerous to an extent beyond that which would be contemplated by the ordinary user* … possessing the knowledge of the product's characteristics which were common to the community. A product is not defective if it is safe for normal use. (Emphasis added.)

> equipment was not standard. The product is not defective where the evidence and reasonable inferences therefrom show that: (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the *buyer*'s use of the product. In such a case, the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability.

Id. at 683.

¶17 Here, the circuit court noted that the consumer-contemplation and the basic danger-utility tests both deal with completed products. It thus considered ***Scarangella*** as establishing a "corollary" for products with optional safety equipment that could be applied regardless whether the basic liability test is consumer-contemplation or danger-utility. The court concluded that ***Scarangella*** was compatible with Wisconsin law.

¶18 Applying ***Scarangella***, the court determined that it was undisputed Steinmetz was thoroughly knowledgeable about the product and guard availability; there were normal circumstances where the loader was not unreasonably dangerous without the guard; and that Steinmetz had weighed the benefits and risks and chose not to purchase the safety equipment. Accordingly, Steinmetz's decision "excuse[d] the manufacturer from liability." *See* ***id.***

¶19 However, our supreme court has "reiterated this state's devotion to the consumer-contemplation test: Wisconsin strict products liability law applies the consumer-contemplation test *and only the consumer-contemplation test* in all

strict products liability cases." ***Green***, 245 Wis. 2d 772, ¶34 (emphasis added). Regardless whether we think ***Scarangella***'s corollary is valid, in light of ***Green***, we cannot create a new rule that would alter application of the consumer-contemplation test. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (the court of appeals cannot modify the supreme court's previous decisions). Application of an incorrect legal standard is reversible error. *See* ***State v. Head***, 2002 WI 99, ¶43, 255 Wis. 2d 194, 648 N.W.2d 413.

II. Negligence

¶20 Mahner also asserts Rew was negligent in its manner of selling the loader because it failed to inform Steinmetz of the guard's availability.[4] Steinmetz had testified at his deposition that he would have purchased the spill guard had he been told about it at the time of sale. However, the circuit court granted summary judgment to the defendants because it concluded that regardless whether Rew had a duty to inform Steinmetz about the guard, Steinmetz was nonetheless aware of its availability prior to Mahner's injury.

¶21 An action for negligence requires: (1) a duty of care on the defendant's part; (2) a breach of that duty; (3) a causal connection between the breach and the injury; and (4) actual loss or damage from the injury. ***Rockweit v. Senecal***, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995).

[4] At oral argument and in the reply brief, Mahner asserted in passing that Rew was negligent for failing to sell the loader with the guard already attached, despite the guard's "optional" designation by New Holland. In the reply brief, however, Mahner summarizes his negligence theory, claiming "Rew Motors was negligent in the sale of the equipment in that it did not advise Steinmetz he could have purchased a low profile bucket with a guard." Accordingly, we focus our analysis on the claim that Rew was negligent because it did not tell Steinmetz the guard was available.

¶22 The first step in the analysis is to determine whether Rew owed Mahner a duty of care.[5] "Each individual is held, at the very least, to a standard of ordinary care in all activities." ***Id.*** (citation omitted). The proper analysis of duty in Wisconsin is that "[t]he duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person … is unknown at the time of the act." ***A.E. Invest. Corp. v. Link Bldrs., Inc.***, 62 Wis. 2d 479, 483, 214 N.W.2d 764 (1974).

¶23 An alternate means of stating this test is that a "duty is established when it can be said that it was foreseeable that [the] act or omission to act may cause harm to someone. A party is negligent when he commits an act when some harm to someone is foreseeable." ***Rolph v. EBI Cos.***, 159 Wis. 2d 518, 532, 464 N.W.2d 667 (1991) (citation omitted). This analysis is not constrained to a particular plaintiff; the test is whether the conduct results in a risk to the world at large. ***Rockweit***, 197 Wis. 2d at 423.

¶24 Thus, the question here is whether some injury was foreseeable given Rew's failure to inform its loader purchasers of an available spill guard. If the harm was not foreseeable, Rew had no duty. Moreover, because the test

[5] Mahner would have us create a new legal duty, similar to that of physicians under informed consent rules. However, the issue here may be analyzed under conventional tort considerations. We therefore decline to address whether the narrow, topic-specific and codified principles of informed consent apply to the case at hand.

focuses on the foreseeability of harm based on an act or omission, the fact that Steinmetz came to be aware of the guard after his purchase is not dispositive.[6]

¶25 Foreseeability, however, is ordinarily a question for a fact-finder, not a court on summary judgment, even when facts and reasonable inferences are undisputed. ***Jankee v. Clark County***, 2000 WI 64, ¶110, 235 Wis. 2d 700, 612 N.W.2d 297 (Abrahamson, C.J., dissenting); *see also* ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976) ("[S]ummary judgment does not lend itself well to negligence questions and should be granted … only in rare cases."). Thus, we conclude summary judgment was inappropriate.

¶26 Rew asks us to reject the negligence claim, arguing that Mahner is suggesting a duty with no sensible stopping point.[7] This is a public policy argument. But "[t]he 'duty' ingredient of negligence should not be confused with public policy limitations on liability." ***Alvarado v. Sersch***, 2003 WI 55, ¶16, 262 Wis. 2d 74, 662 N.W.2d 350. Negligence and liability are distinct concepts. ***Id.***, ¶17. A jury may find negligence, but the court can nevertheless limit liability based on public policy. ***Id.*** Usually, though, "the better practice is to submit the case to the jury before determining whether the public policy considerations

---

[6] Indeed, Steinmetz's testimony that he would have bought the guard had he known about it at the time of purchase goes more to causation than to duty. If a jury concluded Rew had a duty to advise about the guard, the jury would then have to determine whether it believed Steinmetz would have purchased the guard. If a jury rejected that testimony, and instead believed Steinmetz wanted to spend as little as possible, the causal chain would be broken. Causation, however, is a factual question not appropriately resolved on summary judgment. *See* ***Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 306, 550 N.W.2d 103 (1996).

[7] Rew also asserts there are no facts in the record to show it is customary for sellers like it to advise buyers of all available optional equipment. We decline to reach the issue because the question of negligence should first be addressed to a jury. Industry practice is a factor that the jury may consider in its overall negligence determination if it is so instructed. *See* WIS JI—CIVIL 1019 (1995).

preclude liability."[8] ***Id.***, ¶18. Indeed, were a jury to find in Rew's favor and conclude it had no duty, the court would not need to reach the limitation of liability question.

III. Causation

¶27 On appeal, New Holland assented to Rew's arguments on the products liability and negligence questions. But New Holland also argues that Mahner cannot prove causation.[9] Mahner had offered deposition testimony from his expert, Dennis Skogen, that this accident would not have occurred with the spill guard installed on the loader. New Holland asserts it is purely speculation for Skogen to make this claim. We reject New Holland's argument on appeal because causation is a factual question. *See* ***Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 306, 550 N.W.2d 103 (1996). Any dispute over causation, at this stage,

---

[8] These considerations are:

> (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor's culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm; (4) allowing recovery would place too unreasonable a burden on the tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; [or] (6) allowing recovery would enter a field that has no sensible or just stopping point.

Alvarado v. Sersch, 2003 WI 55, ¶17, 262 Wis. 2d 74, 662 N.W.2d 350 (citation omitted.) Whether public policy precludes liability is a question of law. ***Fandrey ex rel. Connell v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶6, 272 Wis. 2d 46, 680 N.W.2d 345. If the circuit court undertakes this analysis at a future point, this may be where it chooses to consider Steinmetz's knowledge of the guard's existence.

[9] Causation is an element of both products liability and negligence. *See* ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶23, 245 Wis. 2d 772, 629 N.W.2d 727 (products liability), and ***Rockweit v. Senecal***, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995) (negligence).

simply forecloses summary judgment and requires a trial for the fact-finder to weigh competing evidence and reach a conclusion.

IV. Expert Testimony

¶28 In addition to the summary judgment motion, Rew filed a motion in limine in the trial court, seeking to strike Skogen's deposition testimony and to prevent him from testifying at trial. The motion was rendered moot when the court granted summary judgment to Rew and New Holland. Because we reverse and remand, the question of whether Skogen should testify is revived. However, the decision to allow expert testimony is discretionary with the trial court. ***State v. Zivcic***, 229 Wis. 2d 119, 127, 598 N.W.2d 565 (Ct. App. 1999). While it appears Mahner would have us address the motion on appeal, we will not exercise the circuit court's discretion before it has been given the opportunity to do so itself.

By the Court.—Judgment reversed and caused remanded for further proceedings. No costs to any party.

Not recommended for publication in the official reports.