

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2003

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. 02-1355
STATE OF WISCONSIN**

Cir. Ct. No. 00 CV 3010

**IN COURT OF APPEALS
DISTRICT I**

GREGORY TOTH AND ROBIN TOTH,

PLAINTIFFS-RESPONDENTS,

v.

**RICHCO STRUCTURES AND INDIANA LUMBERMEN'S MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Richco Structures and Indiana Lumbermen's Mutual Insurance Company (collectively, Richco) appeal a judgment in favor of Gregory and Robin Toth. The issues are: (1) whether there was sufficient evidence to submit the question of strict liability to the jury; (2) whether the circuit

court should have included Trusswall Corporation and the Truss Plate Institute, who are not parties to this case, in the special verdict question on comparative fault; (3) whether Toth failed to prove the negligence claim; and (4) whether recovery for future pain and suffering should have been barred because Toth did not introduce a life-expectancy table into evidence during his case-in-chief. We affirm.

¶2 Toth was injured by a roof truss at a residential construction site. While the truss was being lowered into place by a crane, he reached up to grab the truss and his finger got hooked while the truss was still moving, lacerating his finger and causing him to fall to the ground from roof height, causing him serious injury. Toth sued Richco, the company that manufactured the truss, and its insurer. The jury returned a verdict finding Richco both strictly liable and negligent. The jury apportioned negligence sixty-one percent to Richco and thirty-nine percent to Toth. The jury concluded that the Toths had sustained \$926,000 in damages. After reducing the award to account for Toth's contributory negligence and adding taxable costs, the circuit court entered judgment in favor of the Toths for \$583,073.

¶3 Richco argues that the circuit court should not have included strict liability on the verdict. To recover on a theory of strict liability, a plaintiff must prove that "the product reached him [or her] in a dangerously defective condition." *Morden v. Continental AG*, 2000 WI 51, ¶43, 235 Wis. 2d 325, 611 N.W.2d 659. "Claims brought under a strict liability theory thus focus on the condition of the product." *Id.* "[A] product is defective 'where the product 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 [or her]." *Green v. Smith &*

Nephew AHP, Inc., 2001 WI 109, ¶29, 245 Wis. 2d 772, 629 N.W.2d 727 (emphasis and quotation omitted).

¶4 Richco’s argument focuses on two points. First, it contends that the truss was not defective because it was made according to industry standards. However, the customary practice of an industry, while relevant to whether the truss was defective, is not determinative of the question. *Cf. D.L. v. Huebner*, 110 Wis. 2d 581, 618-19, 329 N.W.2d 890 (1983). Second, Richco contends that the circuit court should not have allowed the issue of strict liability to go to the jury because the evidence was insufficient as a matter of law. Richco bases its argument on the fact that Toth’s expert did not specifically testify that the truss was “unreasonably dangerous.” This argument, too, misses the mark. Whether the truss was unreasonably dangerous is a factual question that the jury could decide based on evidence about the device, its purpose, use, and construction. The jury did not need an expert to specifically state that the truss was “unreasonably dangerous” to find it so. And, as the circuit court ruled when Richco objected to submitting the strict liability question to the jury, there was sufficient evidence presented at trial, expert and otherwise, to support Toth’s claim that the truss was unreasonably dangerous. Testimony was presented that the overplated splice joint on the truss was a hazard, that overplating the splice joint was not structurally required, that it would add little to the cost of the truss to block the overplating with a piece of wood, which would make the truss safer, and it would not be expensive to warn of the danger. This evidence was sufficient to allow the circuit court to submit the strict liability question to the jury and to support the jury’s verdict finding Richco strictly liable.

¶5 Richco raises two arguments regarding the jury’s verdict that it was negligent. Richco first argues that the circuit court should have included the

Trusswall Corporation, which created a computer program that Richco used to construct its trusses, and the Truss Plate Institute, which regulates the engineering, design, and manufacture of wood trusses, on the special verdict question. Richco also argues that Toth failed as a matter of law to prove his negligence claim. We need not reach these issues because the strict liability verdict independently supports the judgment. *See Morden*, 235 Wis. 2d 325, ¶¶78-79 (because the jury's verdict that a defendant was negligent was supported by credible evidence, the supreme court did not address questions pertaining to the jury's verdict that the defendant was responsible based on the theory of strict liability).

¶6 Finally, Richco argues that Toth should have been barred from receiving damages for future pain and suffering and future wage loss because he failed to introduce a life-expectancy table into evidence during his case-in-chief. After Toth rested, Richco brought a motion to preclude any damages for future pain and suffering and future wage loss because Toth did not introduce mortality tables to show how long he was likely to live. The circuit court then allowed the tables into evidence. We reject Richco's argument because life-expectancy tables are not a necessary prerequisite to future damages. A jury can use its common sense to estimate how long a defendant is likely to live to determine compensation. Therefore, even if the circuit court had disallowed the tables, as Richco contends it should have done, the questions regarding future damages were properly submitted to the jury.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

