STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2021 CA 0338

CHARLES E. BATES AND STACY BATES

VERSUS

PROGRESSIVE TRACTOR AND IMPLEMENT CO., LLC, KEN BORDELON, EMC INSURANCE COMPANY, MACDON, INC., AND CNH INDUSTRIAL AMERICA, LLC

Judgment Rendered: DEC 22 2021

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number C672829

Honorable Donald R. Johnson, Judge Presiding

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Holdridge, J. concurs.

GUIDRY, J.

This is an appeal from a grant of a motion for summary judgment in favor of a defendant, MacDon, Inc. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This litigation arises from an accident that occurred at Progressive Tractor and Implement Co., LLC on August 28, 2017, when Mr. Charles E. Bates was inspecting a combine header, farm equipment, for potential purchase of the equipment. While Mr. Bates was inspecting the combine header's "wobble box," Mr. Kenneth Bordelon, a salesman, turned on the combine header, causing the wobble box and the drive belt to start, and resulting in severe personal injuries to Mr. Bates.

Subsequently, Mr. Bates and his wife (the plaintiffs) filed suit against the manufacturer of the combine header, MacDon, Inc., and others including Progressive Tractor and Implement Co., LLC, Ken Bordelon, and EMC Insurance Company (collectively, "PTI"). With respect to MacDon, the plaintiffs asserted in their petition for damages that MacDon violated the Louisiana Products Liability Act (LPLA) because the manufacture of the combine header was unreasonably dangerous in construction or composition and design at the time it left MacDon's control, and/or because MacDon failed to use reasonable care to adequately warn users of the combine header's dangerous characteristic.

MacDon filed a motion for summary judgment asserting that it was not liable for the plaintiffs' injuries, as there was no reasonably anticipated use of the combine header by Mr. Bates.[1] Following a hearing on August 17, 2020, and after considering the evidence, the trial court granted MacDon's motion in a judgment

[1] MacDon also argued that its product was not unreasonably dangerous. MacDon's motion for summary judgment was opposed by co-defendant PTI, but not by the plaintiffs.

signed on December 5, 2020. PTI now appeals the judgment, arguing the trial court erred by sustaining the motion for summary judgment that dismissed MacDon from this litigation. PTI contends the trial court erred when "PTI presented evidence that there were two reasonable alternative designs and additional warnings which would have prevented or greatly reduced the chances of the accident in question from occurring." PTI also asserts in its brief to this court that summary judgment was in error because the trial court failed to consider the affidavit of its expert engineer, Edward Beard.

DISCUSSION

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). An issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. Smith v. Our Lady of the Lake Hospital, Inc., 93-2512, pp. 27 (La. 7/5/94), 639 So. 2d 730, 751.

The Code of Civil Procedure places the burden of proof on the party filing a motion for summary judgment. La. C.C.P. art. 966(D)(1). The mover can meet its burden by filing supporting documentary evidence consisting of pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions with its motion for summary judgment. La. C.C.P. art. 966(A)(4). The mover's supporting documents must prove the essential facts necessary to carry the mover's burden. Jenkins v. Hernandez, 19-0874, p. 4 (La. App. 1st Cir. 6/3/20), 305 So. 3d 365, 370, writ denied, 20-00835 (La. 10/20/20), 303 So. 3d 315.

Once the mover properly establishes the material facts by its supporting documents, the mover does not have to negate all of the essential elements of the adverse party's claims, actions, or defenses if he will not bear the burden of proof at trial. La. C.C.P. art. 966(D)(1); Babin v. Winn-Dixie Louisiana, Inc., 00-0078, p. 4 (La. 6/30/00), 764 So. 2d 37, 39; Jenkins, 19-0874 at p. 4, 305 So. 3d at 371. The moving party must only point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(D)(1); Mercadel v. State Through Department of Public Safety and Corrections, 18-0415 (La. App. 1st Cir. 5/15/19), 2019 WL2234404, *3. The burden then shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its opposition, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1); see also La. C.C.P. art. 966, comments-2015, comment (j). If the non-moving party fails to produce sufficient factual support in its opposition which proves the existence of a genuine issue of material fact, Article 966(D)(1) mandates the granting of the motion for summary judgment. Babin, 00-0078 at p. 4, 764 So. 2d at 40; Jenkins, 19-0874 at p. 5, 305 So. 3d at 371.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Succession of Hickman v. State through Board of Supervisors of Louisiana State University Agricultural and Mechanical College, 16-1069, p. 5 (La. App. 1st Cir. 4/12/17), 217 So. 3d 1240, 1244.

Further, the LPLA provides "the exclusive theories of liability for manufacturers for damage caused by their products." La. R.S. 9:2800.52. To successfully bring a products liability action under the LPLA, a plaintiff must

establish four elements: (1) the defendant is a manufacturer of the product; (2) the claimant's damage was "proximately caused by a characteristic of the product"; (3) this characteristic "renders the product unreasonably dangerous";[2] and (4) the claimant's "damage arose from a reasonably anticipated use of the product by the claimant" or someone else. See La. R.S. 9:2800.54(A).

As it concerns "reasonably anticipated use," a manufacturer is liable only for those uses it should reasonably expect of an ordinary consumer. Butz v. Lynch, 99-1070, p. 6 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1214, 1218, writ denied, 00-2660 (La. 11/17/00), 774 So. 2d 980; Walker v. Manitowoc Company, Inc. 16-897, p. 11 (La. App. 3d Cir. 10/10/18), 259 So. 3d 465, 474. "Reasonably anticipated use" is defined as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." La. R.S. 9:2800.53(7). The standard for determining a reasonably anticipated use is an objective one (an ordinary person in the same or similar circumstances). Butz, 99-1070 at p. 7, 762 So. 2d at 1218; Walker, 16-897 at pp. 11-12, 259 So. 3d at 474. "[W]hat constitutes a reasonably anticipated use is ascertained from the point of view of the manufacturer at the time of manufacture," thus precluding "the factfinder from using hindsight." Payne v. Gardner, 10-2627, p. 3 (La. 2/18/11), 56 So. 3d 229, 231.

Here, in its motion for summary judgment, the defendant MacDon challenged the ability of the plaintiffs to establish that Mr. Bates was engaged in a reasonably anticipated use of their product at the time of the accident. PTI,

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[2] Under the LPLA, a product is unreasonably dangerous if and only if: (1) the product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55; (2) the product is unreasonably dangerous in design as provided in R.S. 9:2800.56; (3) the product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or (4) the product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58. La. R.S. 9:2800.54(B).

however, urged that summary judgment was inappropriate and argued that the combine header was unreasonably dangerous based on its design defect and inadequate warning. The record summary judgment evidence includes deposition testimony from Mr. Bates and Mr. Bordelon (the salesman and employee of PTI), the combine header operator's manual, and an expert affidavit.

According to the evidence, Mr. Bordelon turned on the combine header as Mr. Bates was inspecting it. As stated by Mr. Bordelon in his deposition testimony, "[Mr. Bates] knew what I was getting in the combine to do. We both did. I mean, that's what he wanted done. He wanted the header engaged." Consequently, when the combine header was turned on by Mr. Bordelon, Mr. Bates' right hand was on the belt and his fingers were taken off. According to Mr. Bates, he was unaware that Mr. Bordelon was about to turn on the header, and had he known, he "wouldn't have even stepped close to it." Mr. Bates stated during his deposition testimony that he was not surprised that the combine header could be turned on with the shield up, and did not need a specific warning in that regard.[3] Mr. Bordelon stated in his deposition testimony that he understood the danger of Mr. Bates not being "clear" from the combine header. Mr. Bordelon testified that it is "pretty standard design" for the header to power on with the safety shield open. According to Mr. Bordelon, when he turned on the combine header, he thought Mr. Bates was "clear" of it. Mr. Bordelon also thought Mr. Bates heard him say he was turning on the header.

The operator's manual for the combine header, submitted by MacDon in support of its motion, includes general warnings to keep hands, feet, clothing, and hair away from moving parts and instructs users to "[n]ever attempt to clear obstructions or objects from a machine while the engine is running" and to "[k]eep

[3] Mr. Bates affirmed that he did not know of a header that has "anything" to prevent the header from being operated with the shield up.

all shields in place." The operator's manual also instructs users to never start or move the machine until all bystanders have cleared the area.

The expert affidavit, submitted by PTI in opposition to summary judgment, asserts that the subject incident "could have been prevented or the chances of it greatly reduced" with the addition of an interlock device or a metal grating/screen, and that the cost of such devices would have been minimal in comparison to the overall cost of the combine header. PTI's expert engineer also opined that the subject incident "could have been prevented or the chances of it greatly reduced" with the addition of warnings in the operator's manual as well as safety signs and labels on the end of the header.[4]

We have reviewed the record herein, and based on our *de novo* review find that MacDon satisfactorily pointed out the absence of factual support for a finding that Mr. Bates' accident arose from a reasonably anticipated use of the combine header. Thereafter, it was incumbent upon PTI to come forward with evidence establishing that there was a genuine issue of material fact on the issue of reasonable use by an ordinary person in the same or similar circumstance, and we conclude PTI failed to do so. See La. C.C.P. art. 966(D).

While PTI's affidavit was objected to by MacDon and not specifically ruled on by the trial court, we find that any error of the trial court is of no moment under the facts of this case—because even if the affidavit is considered, the affidavit would not defeat summary judgment. The availability of an alternative design, as addressed in PTI's affidavit, is relevant *only if* the user was engaged in a "reasonably anticipated use" of the product, for unless that threshold element is

[4] Despite MacDon's written objection to the affidavit, the record before us does not reflect that the trial court ruled on the objection during the hearing on the summary judgment motion. Neither does the issued judgment address the matter. Therefore, the affidavit should be considered because the trial court failed to specifically hold that the affidavit was inadmissible. See La. C.C.P. art. 966(D)(2).

satisfied, a manufacturer does not have a legal duty to design its product to prevent such use. See Butz, 99-1070 at p. 6, 762 So. 2d at 1217-1218. Likewise, before reaching the question of whether a product is unreasonably dangerous because of an inadequate warning, as asserted by PTI in the affidavit, a plaintiff must first meet the threshold requirement of showing that the injury arose from a "reasonably anticipated use" of the product. It is only after such use is shown that the inquiry moves on to whether an adequate warning was required. See Kelley v. Hanover Insurance Company, 98-506, p. 5 (La. App. 5th Cir. 11/25/98), 722 So. 2d 1133, 1136, writ denied, 98-3168 (La. 2/12/99), 738 So. 2d 576; see also Payne, 10-2627 at p. 4, 56 So. 3d at 231 ("knowledge of the potential and actual intentional abuse of [a] product does not create a question of fact on the question of reasonably anticipated use").

In the present matter, PTI had to make a sufficient evidentiary showing that, at the time of manufacture, MacDon should have reasonably expected an ordinary consumer or user of its combine header to open the safety shield and touch a moving part while the machine was powered on. However, it is undisputed that the subject combine header operated as other headers operated, powering on even with the safety shield open. This was a fact known by Mr. Bates and Mr. Bordelon, both sophisticated users of the product. It is undisputed that the combine header was turned on by Mr. Bordelon at the same time Mr. Bates had his hand on the header. Mr. Bates stated that he would not have touched the combine header had he known the machine was being powered on. Mr. Bordelon stated he thought Mr. Bates heard him when he said he was turning on the combine header.

From our view, given the undisputed facts, it is apparent that Mr. Bates was engaged in a misuse rather than a reasonably anticipated use of the combine header

at the time he was injured.[5] Further, we find no evidence which would support the conclusion that MacDon should have reasonably anticipated such use by an ordinary consumer. Accordingly, we find no genuine issues of material fact in dispute on this threshold question. We therefore conclude, as a matter of law, that the trial court properly granted the motion for summary judgment.

CONCLUSION

For the above and foregoing reasons, the December 5, 2020 judgment appealed from is affirmed. All costs of this appeal are assessed to the appellants, Progressive Tractor and Implement Co., LLC, Ken Bordelon, and EMC Insurance Company.

AFFIRMED.

[5] The LPLA's "reasonably anticipated use" standard should be contrasted with the pre-LPLA "normal use" standard; "normal use" included "all intended uses, as well as all reasonably foreseeable uses and misuses of the product." "Normal use" also included "reasonably foreseeable misuse that is contrary to the manufacturer's instructions." Blanchard v. Midland Risk Insurance, 01-1251, p. 3 (La. App. 3d Cir. 5/8/02), 817 So. 2d 458, 460-461, writs denied, 02-1517, 1594 (La. 9/20/02), 825 So. 2d 1178, 1181. It is clear that by adopting the reasonably anticipated use standard, the Louisiana Legislature intended to narrow the range of product uses for which a manufacturer would be responsible. Under the LPLA, a manufacturer will not be responsible for "every conceivable foreseeable use of a product." Blanchard, 01-1251 at p. 3, 817 So. 2d at 461; see also Payne, 10-2627 at pp. 3-4, 56 So. 3d at 231.