STATE OF MICHIGAN

COURT OF APPEALS

RICHARD CLEGG,

Plaintiff-Appellant,

v

CROWN EQUIPMENT CORPORATION, an Ohio Corporation,

Defendant-Appellee,

UNPUBLISHED
April 22, 1997

No. 188885
Wayne Circuit Court
LC No. 94-416924-NP

Before: Michael J. Kelly, P.J., and Saad and H.A. Beach,* JJ.

SAAD, J (Dissenting).

I dissent. While the majority opinion carefully recites the law of products liability, it is equally careful to avoid defining the "defect" at issue – just as plaintiff failed to identify any defect. That something mechanical no longer works is not a substitute analytically or legally for proving that a product is defective. Indeed, products wear out, require routine maintenance (as here), and may not work for a myriad of reasons unrelated to a defect. Simply because Kuczynski (who as the employer's agent, had motive to point a finger at the *manufacturer*), labels a machine "defective" because it did not work, does not create or define a defect. Kuczynski's statement does not prove that something was wrong with the machine, as *manufactured by defendant*.

Here, defendant unambiguously established that plaintiff failed to pinpoint any defect in the product, as required by Michigan law. *Klinke v Mitsubishi*, 219 Mich App 500, 510; 556 NW2d 528 (1996); *Bullock v Gulf & Western Manufacturing*, 128 Mich App 316, 319; 340 NW2d 274 (1983). As a result, plaintiff theorized a defect by arguing that, if a switch wears out, the manual should have detailed when and how to fix the switch – and that defendant's failure to do so constitutes the "defect." This ignores the fact that no one has identified that anything was wrong with the machine as it left the manufacturer. This also ignores the fact that the employer was responsible for maintenance of the forklift, yet the employer essentially ignored the manufacturer's instructions in the manual to check the switches regularly.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The majority's opinion also ignores the "but for" causation argument of defendant which would also, independently mandate affirmance of the trial court's dismissal of plaintiff's case. That is, given the speed at which plaintiff operated the forklift and the very limited space available, (approximately nine feet) even if the "plugging" mechanism worked, the forklift would have crashed into the freezer racks. Because plugging required thirteen to fifteen feet to stop (as compared to 5 ½ to just over 6 feet to stop with the brakes), plaintiff's use of the forklift in the confined space would have caused the crash even in the absence of any alleged defect.

Further, had the forklift simply crashed into the freezer racks, plaintiff would not have sustained the injuries he did. It was because plaintiff exited the vehicle while it was still in motion (contrary to a prominent warning glued to the forklift in plain view of the operator), that he was injured. Absent his reckless driving and his exiting the forklift contrary to explicit warnings, these injuries would not have occurred, regardless of the alleged, but unproven and unidentified defect. Accordingly, I would affirm, concluding that the trial court properly granted summary disposition.

/s/ Henry William Saad