STATE OF MICHIGAN

COURT OF APPEALS

MARK MILLER,

Plaintiff-Appellant,

v

E.W. BLISS COMPANY, INC. and LEAR SEATING CORPORATION,

Defendants-Appellees.

UNPUBLISHED
March 14, 2000

No. 209017
Oakland Circuit Court
LC No. 96-514389-NO

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from orders granting summary disposition in favor of defendants Lear Seating Corporation (Lear) and E. W. Bliss Company, Inc. (Bliss). We affirm.

Plaintiff suffered an injury to his hand while operating a press manufactured by defendant Bliss. Plaintiff's employer, Stramco, was producing brackets for defendant Lear. Plaintiff alleged that Bliss was liable for the unsafe condition of the press, and that Lear was vicariously liable for Stramco's negligence in allowing unsafe operation of the press. The trial court granted defendants' separate motions for summary disposition pursuant to MCR 2.116(C)(10).[1] We review the trial court's decision de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for defendants as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we must view the documentary evidence presented to the trial court in a light favoring plaintiff, the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We also bear in mind that this Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998).

Plaintiff first argues that the trial court prematurely granted Lear's motion for summary disposition before discovery was completed. However, our review of the trial court's scheduling orders reveals that the discovery period had closed by the time of the hearing on Lear's motion. In any event, plaintiff failed to adequately specify what factual support would be uncovered during any remaining

discovery. Accordingly, summary disposition was not premature. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994).

Plaintiff next argues that the trial court erred in granting Lear's motion for summary disposition. Plaintiff maintains that he presented evidence that raised a genuine issue of material fact regarding whether Lear maintained control over Stramco's production of the brackets, whether the operation of a press is an inherently dangerous activity, and whether Lear negligently selected and retained Stramco in light of Stramco's poor safety record.

Generally, an employer of an independent contractor is not liable for the contractor's negligence. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985); *Reeves v Kmart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998). However, the employer may be subject to liability where it retains control over the independent contractor's performance. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994). This exception to the general rule is actually comprised of two distinct theories of liability. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). First, where the employer retains control over the method of performance, such that the person performing the work is not an actual independent contractor, the employer may be vicariously liable for negligence under a respondeat superior theory. *Id*. at 72-73. In this case, the parties apparently agree that Stramco was an independent contractor of Lear. The second theory of liability under the "retained control" exception provides that the employer is directly liable where it unreasonably exercises its retained control over a common work area. *Id*. at 73-74. This theory is only available where multiple subcontractors work in the same area. *Id*. at 75. In this case, there was no common work area; thus, the second theory of liability is also inapplicable.

In any event, plaintiff failed to present facts to support its contention that Lear retained control over Stramco's production of the brackets. In order to impose liability under the "retained control" exception, "[t]here must be a high degree of actual control; general oversight or monitoring is insufficient." *Phillips*, *supra* at 408. See also *Candelaria*, *supra* at 75-76. The employer has not sufficiently retained control by merely possessing a general right to inspect the progress of the work and to order the work stopped if performance is unsatisfactory. *Plummer v Bechtel Construction Co*, 440 Mich 646, 660-661; 489 NW2d 66 (1992). Safety inspections and general oversight are not enough; the employer must retain "at least partial control and direction of *actual* construction work . . . ." *Samodai v Chrysler Corp*, 178 Mich App 252, 256; 443 NW2d 391 (1989). In this case, plaintiff argues that the deposition of Lear's senior buyer demonstrates that it retained significant control over Stramco's production of the brackets. However, our review of that deposition reveals that, although Lear retained the right to inspect performance and stop production if unsatisfied, Lear did not actually exercise any control over the production of the brackets. Lear only retained the right to general oversight—this is an insufficient retention of control to impose liability. Although the question whether an employer retained control is generally a question of fact for the jury, *Phillips*, *supra* at 408, plaintiff presented no evidence to raise a genuine issue of fact that would preclude summary disposition on this issue. In order to avoid summary disposition, the nonmoving party must set forth specific facts showing

a genuine issue for trial. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(G)(4).

An employer is also vicariously liable for an independent contractor's negligence where the work to be performed is inherently dangerous. *Bosak*, *supra* at 724; *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633-634; 601 NW2d 160 (1999). Work is inherently dangerous where it necessarily involves danger to others absent great care, or where it involves a "peculiar risk" or "special danger" that requires special precautions. *Bosak*, *supra* at 727-728; *Phillips*, *supra* at 406. Although this is generally a question of fact for a jury, *id*., the nonmoving party must nonetheless specify facts showing a genuine issue for trial in order to avoid summary disposition. *Maiden*, *supra* at 120.

In this case, plaintiff failed to present evidence raising a genuine issue of material fact regarding whether the production of brackets was inherently dangerous. Plaintiff merely cites various publications providing that many injuries occur during the operation of power presses. In plaintiff's response to Lear's motion for summary disposition, he stated that he expected to be able to offer substantial expert testimony that the work was inherently dangerous. However, a mere promise to support a claim with evidence produced later is insufficient to avoid summary disposition under the court rules. *Id*. at 120-121. Rather, the nonmoving party must submit documentary evidence, such as affidavits, depositions, or admissions, that raise a genuine issue of material fact. *Id*.; MCR 2.116(G)(4). In the absence of documentary evidence that the work was inherently dangerous, we conclude that plaintiff failed to raise a genuine issue of fact on this issue. We also note that this Court has previously declined to declare that the operation of a power press is inherently dangerous. See *Bradford v General Motors Corp*, 123 Mich App 641, 646; 333 NW2d 109 (1983).

Plaintiff, relying on 2 Restatement Torts, 2d, § 411, p 376, also urges us to hold that Lear is subject to liability for negligently selecting and retaining Stramco as its independent contractor, in light of Stramco's poor safety record. However, this Court has expressly rejected such a theory of liability in *Reeves*, *supra* at 475-476. Section 411 of the Second Restatement of Torts has not been adopted in Michigan. *Id*. at 473-475.

We conclude that, because plaintiff failed to establish a genuine issue of material fact that Lear was liable for the negligence of Stramco as an independent contractor, the trial court properly granted Lear's motion for summary disposition under MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in granting Bliss's motion for summary disposition under MCR 2.116(C)(10). Plaintiff alleged that Bliss was liable for negligence and breach of implied warranty because the press was unsafe and Bliss failed to adequately warn of the dangers of operating the press.

Although negligence and breach of warranty are separate and distinct theories of product liability, the plaintiff must in both instances demonstrate that the product was defective. *Ghrist v Chrysler Corp*, 451 Mich 242, 249; 547 NW2d 272 (1996); *Gregory v Cincinnati Inc*, 450 Mich 1, 12; 538 NW2d 325 (1995). "A manufacturer has a duty to design its product so as to eliminate any unreasonable risk of foreseeable injury." *Prentis v Yale Mfg Co*, 421 Mich 670, 692-693; 365

NW2d 176 (1984). Under a breach-of-warranty theory, the plaintiff must establish "that the product is not reasonably safe for the uses intended, anticipated, or reasonably foreseeable." *Id*. at 693. Under a negligence theory, defective design may be established by showing a failure to warn of the dangers of the intended use and foreseeable misuse of the product, or by showing that the design rendered the product defective because it was not reasonably safe for its foreseeable uses. *Gregory*, *supra* at 11; *Ghrist*, *supra* at 249. Therefore, to successfully impose product liability on a manufacturer, the plaintiff must demonstrate either a failure to warn of the risks involved with both intended and foreseeable uses of the product, or a design that is not reasonably safe for both intended and foreseeable uses of the product.

The plaintiff bears the burden of producing expert testimony that a design was defectively unsafe. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 435; 542 NW2d 612 (1995). Where the alleged design defect is premised on the omission of a safety device, the plaintiff must present evidence of the magnitude of foreseeable risks, taking into consideration both the likelihood and severity of injuries without the safety device, and the plaintiff must show that an alternative design incorporating the safety device would be a reasonable means of minimizing those risks. *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 757-758; 593 NW2d 219 (1999), quoting *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989).

In this case, plaintiff argues that Bliss negligently failed to include a guard on the press to ensure that the operator's hands could not be inside the press during operation. Plaintiff presented the testimony of a former engineer of Bliss, taken from an unrelated lawsuit in 1979. However, this testimony does not raise an issue of fact regarding whether the design of the press in this case was defective. In fact, the engineer testified that, because presses are used for a variety of purposes, the manufacturer is unable to install a guard on the press. The type of guard required depends on how the press will be used; there is no universal guard. He also testified that safety regulations provided that the installation of a guard is the responsibility of the employer using the press. Thus, plaintiff failed to raise an issue of fact regarding whether the press was defective at the time it was manufactured due to the omission of a guard.[2]

Moreover, even were we to conclude that the omission of a guard rendered the design defective, we would also conclude that the substantial, unforeseeable alterations of the press by plaintiff's employer would sever any liability on the part of Bliss. *Shipman v Fontaine Truck Equipment Co*, 184 Mich App 706, 714; 459 NW2d 30 (1990). Here, the evidence demonstrated that Stramco disabled significant safety devices on the press, allowed plaintiff to operate the press without appropriate training, and instructed plaintiff to manually remove any jammed material with his hands. The negligent conduct of Stramco would constitute an intervening act severing any liability of Bliss. In any event, we conclude that plaintiff failed to present factual evidence that Bliss negligently designed the press.

Plaintiff also maintains that Bliss was negligent by failing to warn of the dangers of the foreseeable misuse of the press. However, Stramco's misuse of the press was egregious, and plaintiff failed to demonstrate that it was foreseeable that the press would be stripped of many safety features and operated by untrained employees. Plaintiff only presented evidence that Bliss was aware of many

injuries to operators of presses, stressing that Bliss was aware of many different accidents involving many different misuses of the product. However, to impose liability on the basis of this evidence would be to hold that *any* misuse of the press was foreseeable to Bliss. Additionally, the evidence indicated that Bliss had, in fact, sent a substantial safety packet to Stramco years before plaintiff's injury, complete with warnings to be placed on the press. However, Stramco failed to place the warnings on the press. Those warnings clearly informed operators to never operate the press until it was equipped with a guard or other safety device and to never place any body part into the press while it was in operation. Thus, even were we to conclude that Bliss owed a duty to warn about the removal of safety devices, plaintiff failed to show that Bliss did not provide those warnings.

Moreover, a manufacturer is relieved of its duty to warn the ultimate user where the purchaser of the product is a sophisticated user, who is experienced in using and handling the product. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 18-19; 596 NW2d 620 (1999). Here, Stramco was experienced in the use of presses and was in a better position to warn plaintiff of the dangers associated with operating the press. *Id*. However, instead of warning plaintiff, Stramco instructed him to insert his hands into the press to manually remove jammed material. Under these circumstances, Bliss was relieved of any duty to warn plaintiff about the dangers of operating the press.

In short, plaintiff failed to raise a genuine issue of material fact regarding whether Bliss breached any warranties, negligently designed the press, or negligently failed to warn of its dangers. Accordingly, the trial court properly granted defendant Bliss's motion for summary disposition.

Lastly, plaintiff contends that he was denied due process of law because the trial judge relied on his own personal experience and knowledge of operating a press. During a hearing, the judge informed counsel that he used to operate a press at a stamping plant owned by his family. Although this issue is raised in plaintiff's brief in the statement of questions presented, plaintiff presents no argument or authority on this issue, and only mentions it elsewhere in the statement of facts. Therefore, we consider this issue abandoned for failure to adequately argue it on appeal. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kathleen Jansen

[1] Lear's motion was brought under MCR 2.116(C)(8) and (10), and the trial court did not specify which subrule it was relying on in granting the motion. However, because the trial court considered documentary evidence beyond the pleadings, we will review the court's decision under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

[2] We also note that, had Bliss later become aware that the press was being used without a guard, it would have no duty to warn, repair, or recall the press. *Gregory*, *supra* at 10. Plaintiff must demonstrate that the design of the press was defective when manufactured. *Id*.