STATE OF MICHIGAN

COURT OF APPEALS

ERIC HALL,

Plaintiff-Appellant,

v

BLACK & DECKER, INC.,

Defendant-Appellee.

UNPUBLISHED
November 28, 2000

No. 218150
Lapeer Circuit Court
LC No. 97-023816-NO

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

This is a product liability case in which plaintiff severely cut his left hand while operating a radial arm saw manufactured by defendant[1] on August 26, 1996, during the course of his employment with Peninsular Slate. One of plaintiff's jobs was to cut aluminum pieces of trim for chalkboards made by Peninsular Slate. During the course of cutting these aluminum trim pieces, plaintiff cut his hand on the saw blade. Plaintiff's complaint alleges negligence and breach of warranty in the design, manufacture, and sale of the radial arm saw. Specifically, with respect to the negligence claim, plaintiff alleges that defendant defectively designed the saw because it did not include a lower blade guard and an automatic return device as standard equipment on the saw and that defendant failed to warn about the dangerous propensities of the radial arm saw.

In ruling on the motion for summary disposition, the trial court ruled that plaintiff failed to establish a design defect because the evidence was undisputed that plaintiff's employer would not have used a lower blade guard. The trial court also ruled that there was no evidence that the use of rubber padding on the back of the table or an automatic return device would have prevented plaintiff's injury because there was no evidence that plaintiff was injured as a result of the saw drifting forward, thus, plaintiff did not prove causation. With respect to the failure to warn claim, the trial court ruled that the danger was open and obvious. Lastly, with respect to the

[1] The saw in question was manufactured in June 1968.

breach of warranty claim, the trial court ruled that, there being no proof of a design defect or causation, the breach of warranty claim could not stand.

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a claim and the court is to consider the pleadings, depositions, admissions, affidavits, and any other documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court must determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra*, p 337.

We need not address whether the trial court's ruling with respect to whether plaintiff established that the radial arm saw was defectively designed for failing to have a lower blade guard, rubber padding at the back of the table, or an automatic return device was proper because we find that the trial court correctly determined that there was no evidence that the radial arm saw actually drifted forward and cut plaintiff's hand. In other words, plaintiff has failed to set forth evidence regarding causation, therefore, he cannot establish a product liability claim. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

In the present case, even assuming that plaintiff established a design defect pursuant to the requirements of MCL 600.2946(2); MSA 27A.2946(2) in that the radial arm saw did not have a lower blade guard, rubber padding at the back of the table, and an automatic return device, plaintiff has not established how his hand was cut by the saw. There were no witnesses at the time that plaintiff cut his hand. The only testimony regarding how the injury occurred came from plaintiff's deposition testimony; however, his deposition testimony simply does not set forth sufficient evidence regarding how the radial arm saw actually cut his hand. We set forth the pertinent deposition testimony here:

> *Q.* [By defense counsel] Okay. What do you think happened differently at the time you injured your hand?
>
> *A.* [By plaintiff] That, I can't recall.
>
> *Q.* Well, the saw was on?
>
> *A.* The saw was on, yes.
>
> *Q.* Okay. And do you remember the position of the carriage at the time you injured your hand?
>
> *A.* No, I do not.
>
> *Q.* Do you know whether it was all the way back?
>
> *A.* Yes. I believe it was all the way back.
>
> *Q.* Okay. Had you just finished a cut?

A. Yes, I had.

Q. And –

A. I believe. I can't quite remember what I had been doing at the time. I was cutting, yes, but I don't remember whether I had just finished a cut or whether I was moving the piece.

* * *

Q. Okay. Now, just so I'm clear, were you cutting – you had finished a cut; is that right?

A. I'm not quite sure. I'm not quite sure. The thing I remember most is when my finger had flown across the saw. At that time, I hit the "Off" button.

Q. . . . If you had the work in there and you were making a cut, your right hand would be holding the piece and your left hand would be –

A. Pulling the saw, yes.

Q. – pulling the saw, grasping the handle here; right?

A. Yes.

Q. So, no injury under those circumstances, because your hand is nowhere near the blade; right?

A. Right.

Q. Okay, so in order for your hand to engage the blade, it could not have been on the handle; right?

A. Right.

Q. Okay. So, you must have completed the cut by then?

A. Best guess, yes.

Q. Okay. And you let go of the handle, and you think the carriage – you had pushed it all the way back, but you're not sure; right?

A. Well, I'm pretty sure. I mean in order to slide the trim or anything after I was done, no matter what, it would have to be back in order to slide the trim.

* * *

Q. Okay. And then what? Then what happened? You said you turned the saw off?

A. I pushed the saw itself, I pushed it back, because I mean it had been coming toward me.

Q. I had been coming toward you?

A. As it was cutting through my hand, yes.

Q. Okay, I didn't understand.

A. So, I pushed the saw back and turned the off button. I turned it off.

Q. Okay. Now, when you pushed the saw before your injury, when you pushed the saw back after your cut, if we could just fix on that moment in time for a minute, did the carriage have a tendency to drift toward you on its own during the hour and a half or two hours that you had been cutting?

A. That, I can't recall.

Q. Okay. You never saw that happen?

A. Never saw that happen. I just – like I said, I had pushed it back so –

Plaintiff also testified that he had never before used the saw that cut him. Plaintiff believed there were three working saws at the company. Plaintiff also stated that the saw in question did not float back like the other saws he had worked on, rather, he had to push it back. Moreover, the saw's return device was made by Peninsular Slate and not by defendant.

It is plaintiff's theory that the saw unexpectedly moved forward and cut his hand. However, plaintiff's deposition testimony does not provide support or evidence for this theory. Plaintiff does not really know what happened. Plaintiff's testimony was that he never saw the saw drift or move forward. In fact, plaintiff was not even certain if he had just completed a cut or if he actually pushed the saw all the way back. In this regard, plaintiff's testimony was somewhat contradictory because he testified that the saw would not float back by itself, that he had to push it back, and that when he pushed it back it would stay back. As has been set forth, plaintiff's testimony is fraught with uncertainty as to what occurred.

In *Skinner, supra,* our Supreme Court held that to establish proximate cause (here, specifically cause in fact), "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* p 164. Further, a causation theory must have some basis in established fact. *Id.* "[T]he plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.,* pp 164-165. Here, plaintiff's theory that he had completed a cut, pushed the saw back, and that the saw unexpectedly moved forward is a possibility, but there is no evidence that it is more probable than not that this is what actually occurred. Plaintiff's own deposition testimony simply does not establish any facts or evidence that this is what actually happened. Rather, his testimony is based on speculation or belief, but not on actual memory or observation. Thus, we disagree with plaintiff that the trial court improperly weighed the

conflicting evidence and made credibility determinations in ruling on the motion for summary disposition.

Consequently, plaintiff has not provided sufficient documentary evidence to create a material factual dispute as to causation. Therefore, the trial court did not err in ruling that there was no evidence that plaintiff was injured as a result of the saw drifting forward, thus, there is no evidence that use of a lower blade guard, rubber padding on the back of the table, or an automatic return device would have prevented plaintiff's injuries. Accordingly, there being no genuine issue as to any material fact regarding causation, the trial court did not err in granting summary disposition in favor of defendant as defendant was entitled to summary disposition on the defective design claim as a matter of law.

Plaintiff also argues that the trial court erred in determining that he failed to establish a failure to warn claim against defendant.[2] Because we have found plaintiff has not shown that the alleged defect (the lack of a lower blade guard, rubber padding on the back of the table, and an automatic return device on the saw) was a proximate cause of his injury, the failure to warn of the saw's dangerous propensity is moot. See *Skinner v Square D Co*, 195 Mich App 664, 670; 491 NW2d 648 (1992).[3]

Lastly, with respect to the breach of warranty claim, the trial court correctly ruled that because plaintiff did not prove that the defect caused his injury, his breach of warranty claim must also fail. *Gregory v Cincinnati Inc*, 450 Mich 1, 12; 538 NW2d 325 (1995).

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Brian K. Zahra

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[2] The trial court ruled that the failure to warn claim was precluded by the open and obvious danger rule. Although we need not address whether the open and obvious danger defense would preclude plaintiff's claim in this regard, we note that it is plaintiff's contention that defendant should have warned about the dangerous propensity of the saw to unexpectedly move forward without action by the operator. This was a known propensity of the radial arm saw by the manufacturer. The trial court's conclusion that plaintiff admitted to knowing that the saw itself was dangerous does not really address plaintiff's claim. In any event, whether the open and obvious defense should apply here is inapposite because plaintiff has not shown that the alleged defect actually caused the injury.

[3] The Supreme Court in *Skinner, supra*, p 175, affirmed the trial court's grant of the defendant's motion for summary disposition of the failure to warn claim "[f]or the reasons stated by the Court of Appeals."