STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY GROSTIC, Personal Representative of the Estate of Gerald F. Grostic, and BEVERLY GROSTIC, GERALD GROSTIC, JR., and JASON GROSTIC, Individually,

Plaintiffs-Appellees,

v

AGCO CORP.,

Defendant/Cross-Defendant-Appellant,

and

S+L+H, SPA,

Defendant/Cross-Defendant,

and

DIUBLE EQUIPMENT, INC.,

Defendant/Cross-Plaintiff.

UNPUBLISHED
May 4, 2001

No. 218848
Livingston Circuit Court
LC No. 96-014968

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Defendant/Cross-Defendant,

and

S+L+H, SPA,

Defendant/Cross-Plaintiff-
Appellant,

and

DIUBLE EQUIPMENT, INC.,

Defendant/Cross-Plaintiff.

Before: Holbrook, Jr., P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

In this consolidated appeal, defendants AGCO Corporation and S+L+H, S.p.A., appeal as of right from a judgment for plaintiffs entered after a jury trial. Defendants' issues on appeal relate to the trial court's denial of their post-verdict motions for judgment notwithstanding the verdict and remittitur. We affirm in part, vacate in part, and remand.

The lawsuit underlying this appeal stems from the accidental death of Gerald F. Grostic at decedent's dairy farm. Decedent was killed when he became lodged inside a haybine while the machine was running. The haybine was attached to an AGCO-Allis 7600 farm tractor, which was manufactured by S+L+H, S.p.A., a foreign partnership, and distributed in the United States by AGCO. Decedent purchased the tractor new in 1992 from Diuble Equipment, Inc.[1] The hydraulically operated haybine was connected to, and powered by, the tractor's hydraulic system through the tractor's rear mounted power take-off (PTO).

Although there were no eyewitnesses to the accident, decedent's son, Jason Grostic, testified that a few minutes before the accident, decedent had disengaged the haybine and stopped the forward motion of the tractor. The tractor's engine, however, remained idling. Jason saw his father dismount the tractor, go to the toolbox on the haybine and remove something, and then move in front of the tractor, as if to work on the implement's cutting knives. Both Jason and his brother, Gerald Grostic, Jr., testified that while they did not see what their father was doing to the haybine, they believed he was changing the knives.

When Jason returned to the field about ten or fifteen minutes after dumping a load of hay, he saw his father lodged between the haybine's yellow tine reel and the knives. Jason rushed to

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[1] Diuble and plaintiffs settled prior to trial. Diuble is not a part of this appeal.

the tractor and moved the PTO control lever from a position midway between the "on" and "off" notches to the "off" notch, thereby shutting off the haybine. Decedent was pronounced dead shortly thereafter at McPherson Hospital.

The jury was presented with two competing explanations for how decedent became entangled in the haybine. Plaintiffs' theory was that decedent disengaged the PTO before beginning to work on the haybine's knives, and then was impaled when the PTO spontaneously reengaged. Defendants' theory was that after decedent failed to clear a hay clog by disengaging and reengaging the PTO, decedent became entangled in the haybine when he then tried to manually clear the clogged rollers while the PTO was engaged.

The jury found that S+L+H, S.p.A. had negligently designed the PTO control lever, and that both S+L+H, S.p.A. and AGCO had failed to provide proper warnings on "how to avoid dangers reasonably associated with the intended use or foreseeable misuse" of the PTO. The jury rejected both the MCPA and implied warranty claims, but found defendants liable for negligent infliction of emotional distress with respect to Gerald Grostic, Jr., and Jason Grostic. The trial court subsequently denied defendants' motions for JNOV and remittitur.

Docket No. 218848

AGCO first argues that because plaintiffs failed to present a legally cognizable failure to warn claim against AGCO, the trial court erred in denying its motion for JNOV. We disagree. "The grant or denial of a motion for . . . JNOV is reviewed de novo. . . . [T]his Court must view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. The denial of a motion for . . . JNOV is reviewed to determine whether the nonmoving party failed to establish a claim as a matter of law." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (2000)(citations omitted). In order to establish a prima facie case of negligent failure to warn, a plaintiff must show (1) that the defendant owed plaintiff a duty to warn, (2) that the defendant breached that duty, (3) that the breach was the proximate cause of the injuries sustained, and (4) damages. *Tasca v GTE Products Corp*, 175 Mich App 617, 622; 438 NW2d 625 (1988).

AGCO asserts that no cognizable claim was presented because the warnings actually given were adequate. It is not clear whether this assertion is focused on the second or third element of the prima facie case, i.e., it is not clear whether AGCO is simply arguing that there was no breach, or that the warnings could not be the proximate cause of decedent's injuries because decedent's actions contravened the warnings actually given. In either case, the issue is typically one for the jury.

The AGCO-Allis 7600's operation manual includes the following instructions on how to use the PTO: (1) to "ENAGE rear PTO, push lever FORWARD to ON position. Pull lever REWARD to DISENGAGE PTO;" and (2) to disengage the PTO, "pull [the PTO lever] reward to the off position." (Emphasis in original.) Additionally, the following warning was placed on the tractor below the PTO control panel: "DISENGAGE POWER TAKE-OFF, LOWER IMPLEMENT TO GROUND AND TURN OFF ENGINE. WHEN TRACTOR IS PROPERLY STOPPED SET PARKING BRAKE OR PARK LOCK BEFORE DISMOUNTING,

SERVICING OR MAKING ADJUSTMENTS TO TRACTOR OF IMPLEMENT." (Emphasis in original.)

We conclude that these instructions and warnings are inadequate because they don't warn against a foreseeable misuse of the tractor, i.e., leaving the PTO control lever in position between the "on" and "off" notches and working on an attached implement while the tractor is idling. Richard Job, chief engineer for tractors at AGCO, testified that the PTO of an AGCO-Allis 7600 tractor disengages at a point well before the "off" notch. According to Job, the PTO gradually engages as the lever is moved from the "off" notch to the "on" notch. Job testified that the point of engagement and the point of disengagement are roughly the same, and that this point is just below the "on" notch. In other words, this evidence establishes that the PTO of decedent's tractor can be disengaged by moving the PTO lever to a position several inches away from the "off" notch. Presumably, decedent, who had owned and used the tractor for over three years prior to the accident, was knowledgeable about the general location of the disengage point. Given that this point did not match the "off" notch, it is reasonable to assume that decedent would come to rely on the lack of motion in the attached implement to substantiate a belief that he had disengaged the PTO.

It is also reasonable to conclude that it was foreseeable that a farmer like decedent would work on an attached implement while the tractor engine was still idling. Jerry Snow, a dairy farmer and neighbor of decedent, testified that he would not typically turn off his tractor when changing knives on a haybine while out in the field. Snow explained that

> when we run [the tractor] when we are cutting hay, we're running a machine that is wide open, running hard, long hours, and we are trained—I don't know if its trained or a habit or whatever, we don't shut diesels down during the day time. If they are running long hard hours, its hard on the cooling system to cool the engines down and so to fix it we just let it idle, fix the part and go back on our way.

AGCO also explicitly asserts that plaintiffs failed to establish the requisite proximate causation necessary to sustain a cognizable claim. There were no eyewitnesses to the accident, so, of necessity, the case involves circumstantial evidence and the reasonable inferences that arise therefrom. At trial, both sides presented theories of how decedent became entangled in the haybine. Both theories begin with the premise that the PTO was initially disengaged by decedent prior to the deadly accident.

It is at this point that the causal theories of the parties diverged. Plaintiffs' theory was that decedent was impaled by the haybine when the PTO spontaneously reengaged as decedent was replacing some of the implement's knives. Defendants argued that there was no evidence to support the spontaneous reengagement theory. Instead, defendant opined that after repeatedly engaging and disengaging the PTO, decedent left the PTO engaged as he tried to manually clear an alleged hay clog.

It is a longstanding rule in Michigan jurisprudence that a plaintiff's theory of causation must not be based on mere speculation or conjecture. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994); *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 70 NW2d

899 (1956). By itself, mere speculation that an injury might have occurred in the way alleged by plaintiff does not offer adequate proof that it did occur in that manner. Rather, a plaintiff must come forth with proof from which the trier of fact may reasonably conclude that it was defendant's conduct that was the cause in fact of the injury sustained. *Skinner, supra* at 164-165.

> "'As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.'" [*Kaminski, supra* at 422, quoting *City of Bessemer v Clowdus*, 261 Ala 388, 394; 74 So2d 294 (1954), quoting *Southern Ry Co v Dickson*, 211 Ala 481, 486; 100 So 665 (1924).]

Given a fixed set of circumstances surrounding an unwitnessed accident, numerous plausible hypotheses could be constructed which both account for the circumstances and explain the occurrence of the injury. In the abstract, each of these hypotheses is said to be "consistent with known facts or conditions." However, if there is no evidence from which a given hypothesis could be inferred, then the explanation remains pure conjecture.

If, however, substantial evidence is adduced that "points to" any one hypothesis, then that theory of causation is removed from the realm of the purely speculative. This evidence need not establish with mathematical precision the causal chain, i.e., the "logical sequence." See *Skinner, supra* at 166. Such precision is not only antithetical to the nature of circumstantial evidence, see Prosser & Keeton, Torts (5th ed), § 41, pp 269-270, but is also not in keeping with the applicable burden of proof. Nevertheless, the evidence must provide a reasonable basis "from which a jury may conclude that more likely than not," the defendant's actions were the cause in fact of the injury sustained. *Skinner*, *supra* at 165.

The last eyewitness testimony provided established that the haybine was not operating when decedent dismounted the tractor. AGCO concedes that decedent must have initially disengaged the PTO. The record also establishes that when decedent was found, the PTO was engaged and the PTO lever was at a point between the "on" and "off" notches. Given that there is no evidence to support defendants' assertion that decedent must have returned to the tractor to reengage the PTO, it is not unreasonable to conclude that the PTO reengaged without human intervention.

AGCO relies heavily on the testimony of Piero Sacco to discredit plaintiffs' spontaneous engagement theory. Sacco identified himself as S+L+H, S.p.A.'s European service manager. After the accident, Sacco tested decedent's tractor in order to see if the PTO would spontaneously engage. Like Job, Sacco identified the PTO's disengagement point as being approximately three-quarters of an inch below the "on" notch. Sacco testified that he tested the tractor by placing the PTO lever in a "mid-position" and then reving the engine while an

associate banged on the tractor. Sacco stated that the PTO never spontaneously engaged during his tests.

We do not believe Sacco's testimony necessarily discredits plaintiffs' causal theory given the differences between the accident and Sacco's controlled tests. For example, there is no evidence that Sacco placed the PTO lever at the point where Jason Grostic found it. Indeed, there is no evidence that Sacco placed the lever at the disengagement point Sacco himself identified. Further, the record does not show that Sacco tested the tractor while it was hooked up to the Grostic haybine, let alone while the tractor was pulling the haybine through a field of hay.

AGCO also attempts to discredit plaintiffs' causal theory through the testimony of expert witness Joseph Abramczyk. Abramczyk opined that the PTO had to be engaged at the moment when decedent was working on the haybine because "[t]here is no force on any component in that linkage system to cause the lever or the valve to move to an engaged mode." Abramczyk is asserting, in effect, that there is no way that the PTO spontaneously engaged because there is no way the PTO can spontaneously engage. We do not find this circular reasoning to be persuasive.

Further, even if defendants' causal theory was not conjecture, we still believe that reasonable people could find AGCO liable. The unspoken premise in defendants' causal theory is that decedent believed the PTO was disengaged when he attempted to clear an alleged hay clog. As Abramczyk testified, "nobody, . . . would enter a [haybine] with the reel running." Given the testimony about where Jason Grostic found the PTO lever, and the testimony identifying the engagement/disengagement point, the issue then becomes whether the instructions and warnings given adequately dealt with the foreseeable probability that decedent would work on the haybine without putting the PTO in the "off" notch. We have already concluded that those instructions and warnings were not adequate.

AGCO also argues that the jury's finding of negligence on a failure to warn theory is inconsistent with the jury's rejection of plaintiffs' claim of breach of implied warranty of fitness. Again, we disagree. "[I]t is fundamental that every attempt must be made to harmonize a jury's verdict." *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987). "A jury's verdict is to be upheld, even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000), quoting *Granger, supra* at 7.

The jury was instructed on the claims of breach of implied warranty and negligent failure to warn as follows:

> When I use the words implied warranty, I mean a duty imposed by law, which requires that the manufacturer [sic] of product be *reasonably fit* for the purpose and *use intended*, or reasonably foreseeable by the manufacturer. Now, on this claim of breach of implied warranty, the Plaintiff has the burden of proof on each of the following, A-that the Agco 7600 was not *reasonably fit* for the *use and purpose anticipated* or reasonably foreseeable by the Defendant in one or more of the ways claimed by the Plaintiff, B-that the Agco 7600 was not *reasonably fit* for the *use and purpose anticipated* or reasonably foreseeable by the Defendant at the time it left the Defendant's control, C-that the Plaintiff Decedent was injured, D-

> that the PTO control lever mechanism was a proximate cause of the injuries to Plaintiff's decedent. . . . . I'll now turn to the claim of negligent design. . . . There are two theories that will support of [sic] finding of negligent design. The first theory is based on a failure to warn. . . . This warning includes the duty to warn about dangers regarding the intended uses of the product, as well as *foreseeable misuses*. [Emphasis added.]

We believe that based on the evidence adduced, and given the distinction drawn in the above instructions between foreseeable *use* and *misuse*, a jury could have logically concluded that the tractor performed as anticipated for the use intended, but that the warnings provided did not adequately account for decedent's foreseeable misuse. The verdict form question addressing the failure to warn claim presented the jury with the following alternative: "Did [AGCO and S+L+H, S.p.A.], negligently fail to warn Gerald Grostic, Sr., about how to avoid the dangers reasonably associated with the AGCO Allis 7600's intended use *or* foreseeable misuse?" (Emphasis added.) This inclusive disjunctive allows for a finding of liability if either disjunct is true. In other words, liability would attach if the jury found that while decedent had been adequately warned about dangers associated with the intended use of the tractor, he had not been adequately warned about those dangers reasonably associated with foreseeable misuse of the tractor. Thus, we do not believe the verdicts are inconsistent.

AGCO next argues that because plaintiffs did not show the requisite physical harm, they failed to establish a prima facie case of negligent infliction of emotional distress for either Gerald Grostic, Jr., or Jason Grostic. We agree.

In order to sustain a claim of negligent infliction of emotional distress, a plaintiff must show that the severe emotional distress sustained "results in actual physical harm." *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999). Plaintiffs' proof on the issue of physical harm rested on the testimony of Rudolph Bachmann, a clinical psychologist who was employed by plaintiffs to evaluate both brothers. Bachmann testified that since the accident, the brothers experienced "flashbulb memories" of the accident. Bachmann described the concept, "flashbulb memory," as follows:

> [I]n flashbulb memory its an instantaneous powerful etching that's there forever. In my case, and people in my generation, I can close my eyes and tell you exactly where I was, what I saw, how the day was, the people I was with and what I was feeling, the day John Kennedy was assassinated and the reason I can do that, it's a flash bulb memory, for two reasons. One it's a shock and the other it has consequences, and those to [sic] things together create flash bulb memory.

We conclude that flashbulb memories, as defined by Bachmann, do not constitute the type of physical manifestation that is compensable under a claim of negligent infliction of emotional distress. See *Daley v La Croix*, 384 Mich 4, 15; 179 NW2d 390 (1970); *Toms v McConnell*, 45 Mich App 647, 657; 207 NW2d 140 (1973). The fact that flashbulb memories are more distinct than other memories does not render the resulting mental disturbance compensable. Such memories are akin to fright—although intense, they are transient. Further, both can be easily faked. See Prosser, *supra*, § 54, p 361. Bachmann did not indicate that each time the memories surface, decedent's sons experienced nervousness, headaches, or other

comparable physical indications. It simply appears that like the Kennedy assassination or the Challenger accident, each time the brothers recall decedent's accident, their memories are more distinct than typical. This does not satisfy the physical injury requirement of the tort.

We also reject AGCO's argument that the trial court erred in denying their motion for remittitur because the jury's award for economic damages was not supported by non-speculative, non-conjectural evidence. "A trial court's decision on a motion for remittitur is reviewed for an abuse of discretion." *A S Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000). "When deciding a motion for remittitur, the trial court must determine whether the jury verdict was for an amount greater than the evidence supports. This Court must afford due deference to the trial court's unique ability to evaluate the jury's reaction to the evidence." *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 683; 607 NW2d 123 (1999)(citations omitted).

On the issues of damages, the parties presented competing expert testimony. Robert Rasche, Ph.D., professor of economics at Michigan State University, testified on behalf of plaintiffs. Using federal income tax forms from 1988 through 1994, and balance sheets on farming operations, Rasche provided an estimate of decedent's lost future earnings. First, Rasche computed decedent's economic income from farming during the years 1988 through 1994.[2] Finding no discernible trend in the yearly figures, Rasche averaged the yearly totals to arrive at an estimated real income of $125,000 per year. Assuming that decedent would have retired at age 65, Rasche then took the $125,000 figure and adjusted it by a declining probability of survival for the twenty-one year period up through the age of retirement. Rasche also assumed no federal tax rate for any of the years, given that the federal tax returns examined "indicates that in most years their tax bill was zero, and the years in which the tax bill was nonzero, it was a very small amount." Rasche then took the actuarial real income for the years and discounted it by three percent to arrive at a present value of lost income. Rasche concluded that the present actuarial value of lost income to be $1,831,012.

Defendants' expert, David Bojanic, CPA, testified that decedent's future lost earnings was zero. Bojanic testified that Rasche did not "understand the concept of the balance sheet," failed to account for applicable deprecation, "didn't do sanity checks," and did not consider what Bojanic considered to be the most relevant information— that in the nine month period before he died, decedent lost $100,000.

The jury was thus presented with two quite disparate damage awards: close to 2 million dollars and zero. The jury apparently rejected Bojanic's critique of Rasche's opinions and concluded that economic damages were proper.

After reviewing the record, we do not believe the award for economic damages was unsupported by competent evidence. There is no indication that Rasche improperly discounted

[2] Rasche considered such factors as (1) gross farm income, (2) farm expenses, (3) capital gains on property sold, (4) rents and royalties, (5) changes in book value of intermediate farm assets, (6) changes in book value of intermediate farm liabilities, and (7) the annual consumer price index.

any information supplied. His reliance on decedent's federal income tax forms was reasonable, and his measured approach at reaching the total damage figure appears logical and firmly rooted in legitimate economic assumptions. Further, we believe the jury could reasonably reject Bojanic's emphasis on the last nine months of decedent's life as being too narrow. While focusing on a brief period of time to the exclusion of others may be justified in some circumstances, we believe a reasonable jury could conclude that in the case at hand, such an approach unduly magnifies recent developments at the expense of others.

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S+L+H, S.p.A. argues that the trial court erred in finding that plaintiffs presented a prima facie product liability claim. We disagree. Plaintiffs' negligent design claim was premised on two theories: the design chosen and failure to warn. See *Gregory v Cincinnati, Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). As we concluded in Docket No. 218848, plaintiffs presented sufficient evidence for the jury to conclude that the instructions and warnings that accompanied decedent's tractor were inadequate, and that the failure to properly warn was, in part, a cause of the accident. Accordingly, we conclude that the trial court did not abuse its discretion in denying S+L+H, S.p.A.'s motion for JNOV.[3]

We affirm the verdict and damage award on plaintiffs' negligent design claim, vacate the verdict and damage awards to Gerald Grostic, Jr., and Jason Grostic on their claims of negligent infliction of emotional distress, and remand for entry of judgment consistent with this opinion.

/s/ Donald E. Holbrook, Jr.
/s/ David H. Sawyer

[3] Because we have concluded that the failure to warn theory of liability was established, we need not discuss S+L+H, S.p.A.'s challenge to plaintiffs' alternate theory.