STATE OF MICHIGAN

COURT OF APPEALS

ALFRED BANKS and MABLE BANKS, Plaintiffs-Appellants, v EATON CORP, Defendant-Appellee.	UNPUBLISHED December 6, 2002 No. 235203 Wayne Circuit Court LC No. 99-929728-NP

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiffs Alfred Banks and Mable Banks appeal by right the circuit court's order granting defendant Eaton Corporation's motion for summary disposition pursuant to MCR 2.116(C)(10) in this products liability case. We affirm.

In this case, Alfred was operating a forklift for his employer, General Motors Corporation (GM), when he was severely injured. Alfred was a trained and licensed forklift operator, with about fourteen years' experience. On the day at issue, Alfred lifted a load when the forklift engine stalled. Alfred went to the rear of the cab to reach the battery to restart the forklift, and the vehicle began to tip over to the right. As he had been trained by his employer, Alfred jumped out of the cab and away from the tipping vehicle, to the left. Unfortunately, the forklift hit a wall and slid to the left, pinning Alfred, and injuring his head and pelvis. Alfred survived, but suffered a closed head injury that continues to impair his ability to think clearly. Subsequently, plaintiffs claimed that defendant, the forklift manufacturer, knew that forklift operators should stay seated in the cab with feet firmly planted on the ground in the event of a tipover. Plaintiffs contended that because of the risk of crush injuries, defendant knew that evacuating the forklift was inadvisable, and that staying in the cab during a tipover yielded less injury.[1] Plaintiffs then

[1] We agree with defendant that plaintiffs' claim that there are two competing versions of the incident is not significant to the outcome of this case. That is, Alfred clearly testified, as plaintiffs now acknowledge, that Alfred was standing when the forklift tipped over. It does not matter whether General Motors Corporation's (GM) investigators are correct that Alfred had improperly backed up the forklift while the lift was in its highest position, especially because defendant does not raise this factual issue. Rather, the dispositive questions in this case are

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

commenced this products liability suit for negligent design, on failure-to-warn and safety design theories.[2]

This Court reviews a decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Spiek*, *supra* at 337, citing *Singerman v Municipal Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997). This Court will give the nonmoving party the benefit of all reasonable inferences when determining whether summary disposition is appropriate. *Betrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995).

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Generally, a manufacturer has a duty to design its product to eliminate any unreasonable risk of foreseeable injury. *Cacevic v Simplematic Engineering Co*, 241 Mich App 717, 723; 617 NW2d 386 (2000), footnote vacated and remanded 463 Mich 997 (2001). Regarding the duty element:

> In Michigan, there are two theories that will support a finding of negligent design.
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> The first theory is based on a failure to warn. This theory renders the product defective even if the design chosen does not render the product defective. See *Gerkin v Brown & Sehler Co*, 177 Mich 45, 57-58; 143 NW 48 (1913); *Comstock* [*v General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959)]; American Law of Products Liability, 3d, § 32:2, pp 17-19. This warning includes the duty to warn about dangers regarding the intended uses of the product, as well as foreseeable misuses. *Antcliff v State Employees Credit Union*, 414 Mich 624, 637-638; 327 NW2d 814 (1982). If, however, the manufacturer is not aware of the defect until after manufacture or sale, it has a duty to warn upon learning of the defect; if there exists a point-of-manufacture duty to warn, a postmanufacture duty to warn necessarily continues upon learning of the defect. *Comstock*, *supra*; Products Liability, *supra* at § 32:79, p 130.
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> The other, more traditional means of proving negligent design questions whether the design chosen renders the product defective, i.e., whether a risk-utility analysis favored an available safer alternative. *Prentis v Yale Mfg Co*, 421 Mich 670; 365 NW2d 176 (1984). In such a complaint, the focus of any duty begins with whether the product was defective when it left the manufacturer's control. *Holloway v General Motors Corp (On Rehearing)*, 403 Mich 614, 621;

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whether defendant had a duty to warn Alfred or provide the forklift with additional safety measures.

[2] Plaintiffs also filed a derivative loss of consortium claim for Mable, Alfred's wife, and a breach of warranty claim, which is not before us on appeal.

271 NW2d 777 (1978). [*Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995) (footnote omitted).]

Breach of duty requires determination of the standard of care; causation requires both cause in fact and proximate cause. *Case, supra* at 6 n 6; *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998); see also *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 545; 421 NW2d 230 (1988). "In most failure-to-warn cases, proximate cause is not established absent a showing that the plaintiff would have altered his behavior in response to a warning." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997).

Plaintiffs' interrelated claims will be discussed together. Contrary to plaintiffs' argument, the "sophisticated user" doctrine precludes defendant's duty to warn in this case.

> [A] sophisticated user is charged with knowledge of the product. The rationale behind the sophisticated-user doctrine is that the manufacturer markets a particular product to a class of professionals that are presumed to be experienced in using and handling the product. Because of this special knowledge, *the sophisticated user will be relied upon by the manufacturer to disseminate information to the ultimate users* regarding the dangers associated with the product. Hence, the manufacturer is relieved of a duty to warn. See *Jodway* [*v. Kennametal, Inc*, 207 Mich App 622, 627-629; 525 NW2d 883 (1994)]; *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 246-248; 492 NW2d 512 (1992). [*Portelli v IR Construction Products Co, Inc*, 218 Mich App 591, 601; 554 NW2d 591 (1996) (emphasis added).]

As a "[c]ommercial enterprise[] that use[s] materials in bulk" in an established industry, GM "must be regarded as sophisticated users, as a matter of law." *Bock v General Motors Corp*, 247 Mich App 705, 714; 637 NW2d 825 (2001); see also *Ross v Jaybird Automation, Inc*, 172 Mich App 603, 607; 432 NW2d 374 (1988).[3] Thus, the duty requirement of a negligence prima facie case was lacking, requiring dismissal of the action. See *Case, supra* at 6.

Even if plaintiffs could establish a duty in this case, plaintiffs cannot establish proximate cause. See *Allen, supra*. As an initial matter, it hardly need be stated that in contrast with plaintiffs' argument invoking the law of other jurisdictions,[4] the present case is not a situation "[w]here the consequences of the exposure are severe, the lack of warning is undisputed, *and* the person exposed is *dead*." *Bordeaux v Celotex Corp*, 203 Mich App 158, 166; 511 NW2d 899 (1993) (emphasis added). In only that type of case, "the jury . . . [may] infer that a warning would have been heeded and that the failure to warn was a proximate cause of the injury." *Id*.

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[3] Note that this Court in *Bock v General Motors Corp*, 247 Mich App 705, 714-715; 637 NW2d 825 (2001), specifically determined that it was an issue of fact whether GM was a sophisticated user.

[4] We remind plaintiffs that this Court is bound to follow Michigan Supreme Court decisions under the doctrine of stare decisis, *Topps-Toeller, Inc v Lansing*, 47 Mich App 720, 729; 209 NW2d 843 (1973), and we are bound to follow decisions of this Court published on or after November 1, 1990, according to the no-conflict court rule, MCR 7.215(I)(2).

Concerning the outcome-determinative causation principle, Alfred's testimony is significant in two ways. First, it was generally plaintiffs' burden to show a genuine issue of material fact in this case. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001) (when the burden of proof at trial would rest on the party opposing the motion for summary disposition, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial). Because a pivotal question regarding causation was whether Alfred would have heeded a warning to stay seated had it been given, *Allen*, *supra*, only plaintiffs could have provided evidence on this issue. They did so, and plaintiffs' counsel now asks this Court to disregard Alfred's unfavorable deposition, claiming that it was compromised by his closed head injury. See *Dykes v William Beaumont Hospital*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001) (generally, party's deposition testimony binds party). However, if we did disregard that testimony, there would be no evidence left in the record regarding Alfred's intent. Thus, plaintiffs would fail to show a genuine issue of material fact for trial, and we would have to affirm the trial court's ruling anyway. See generally *id*.; *Spiek*, *supra* at 337.

Second, Alfred's testimony has specific legal relevance. See, e.g., *Spencer v Ford Motor Co*, 141 Mich App 356, 361-362; 367 NW2d 393 (1985). In *Spencer*, *supra*, the plaintiff testified that he would not have heeded the manufacturer's warning and would have continued (and, in fact, did continue) installing tires in the manner he did when the accident occurred. Compare *Allen*, *supra* at 407 (verdict for plaintiff affirmed where witness testified that "decedent was a conscientious worker who avoided harmful conduct and followed all the rules pertaining to the job . . . [,] read[] directions and then follow[ed] them, and in addition . . . [,] [wore] safety equipment"). In the present case, there is no like showing that Alfred would have followed a warning to stay seated printed on the forklift itself or the manual, rather than follow his employer's longstanding advice to evacuate during a tipover.[5] Moreover, with regard to plaintiffs' request for "accident reconstructionist" testimony, this information could not replace Alfred's own testimony of his future intent to take a particular safety action. See *id*. at 406. Consequently, contrary to plaintiffs' contentions, "rebuttable presumption" that Alfred would have followed defendant's warning did not arise in this case.

With regard to proximate causation in plaintiffs' safety restraints claim, we conclude it is even more clear that because Alfred was standing at the time of the tipover, he could not have availed himself of any added safety features like restraints, a seatbelt, a padded seat with arm rests, a winged seat, etc. See generally *id*. These features protect a seated individual in the event

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[5] Plaintiffs also claim as an aside that *Alfred's employer* would have instructed him to stay seated during a tipover if defendant had warned Alfred's employer of the danger in evacuating during a tipover. See, e.g., *May v Parke, Davis & Co*, 142 Mich App 404, 418; 370 NW2d 371 (1985) (products liability failure-to-warn case where doctor testified if manufacturer had warned him about side effect of medication that killed patient, he would have warned patient). However, we conclude that even if defendant had warned GM to instruct forklift operators to stay seated in the event of a tipover, Alfred's injuries still would not have been prevented, because he was already standing up and away from his seat. See also generally *Bock*, *supra*, and *Spencer v Ford Motor Co*, 141 Mich App 356, 361-362; 367 NW2d 393 (1985).

of a crash – they do not assist the operator in a situation where the operator has already chosen to stand up before a crash occurs. Thus, in contrast to plaintiffs' argument, the question of causation was precluded as a matter of law before this case could reach a jury. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 596 n 30; 513 NW2d 773 (1994) ("Where reasonable minds can reach only one result, causation is a question of law."). As a result, there are no reasonable inferences we can make in favor of plaintiffs. See *Betrand*, *supra* at 615.

Therefore, we conclude that plaintiffs have failed to show a genuine issue of material fact regarding whether defendant had a duty to warn Alfred or GM of or provide Alfred or GM with certain safety precautions, the breach of which proximately caused Alfred's injuries. See generally MCR 2.116(C)(10).

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie