STATE OF MICHIGAN

COURT OF APPEALS

DENNIS STRAUCH,

Plaintiff-Appellant,

v

RAYMOND CORPORATION, ANDERSEN & ASSOCIATES, INC., and RAYMOND INDUSTRIAL EQUIPMENT, LTD.,

Defendants-Appellees.

UNPUBLISHED
December 29, 2005

No. 254224
Macomb Circuit Court
LC No. 2002-003739-NP

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff Dennis Strauch appeals as of right from the trial court's opinion and order granting summary disposition to defendants in this products liability/negligent maintenance case. We affirm.

I. Basic Facts And Procedural History

This case arises from injuries Strauch suffered when the brakes on his employer's forklift failed. Defendant Raymond Corporation (Raymond) is the manufacturer of the forklift and defendant Andersen & Associates, Inc. (Andersen) contracted with Strauch's employer to maintain it.

II. Summary Disposition

A. Standard Of Review

Strauch contends that the trial court erred in granting defendants' motion for summary disposition, as there are genuine issues of material fact. We review de novo a trial court's ruling on a motion for summary disposition.[1] In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence

[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

submitted by the parties in the light most favorable to the nonmoving party.[2] Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[3]

B. Theories Of Liability

1. Overview

As to Strauch's claims against Raymond, manufacturers have a duty to design their products "to eliminate 'any unreasonable risk of foreseeable injury.'"[4] A plaintiff may proceed under several different theories in a products liability action.[5]

2. Duty to Warn

First, a plaintiff can show that a product was defective because of the manufacturer's failure to warn potential users of the dangers associated with both the intended uses and foreseeable misuses of the product.[6] In order to prevail under a failure to warn theory, a plaintiff must prove the following: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach was the proximate cause of the plaintiff's injuries; and (4) the plaintiff suffered damages.[7] A manufacturer has a duty to warn if it has actual or constructive knowledge of a danger that is not obvious to users and the manufacturer failed to use reasonable care in informing users of either the danger itself or the facts tending to make the condition dangerous.[8]

3. "Feasible Alternative Design"

Under the second theory of design defect, which is the more traditional approach, the plaintiff must show that: (1) the product was not reasonably safe when it left the control of the manufacturer and (2) a "feasible alternative" design was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to its users.[9]

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[2] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[3] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[4] *Ghrist v Chrysler Corp*, 451 Mich 242, 248; 547 NW2d 272 (1996), quoting *Prentis v Yale Mfg Co*, 421 Mich 670, 693; 365 NW2d 176 (1984).

[5] *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995).

[6] *Gregory*, *supra* at 11.

[7] *Warner v General Motors Corp*, 137 Mich App 340, 348; 357 NW2d 689 (1984).

[8] *Glittenberg v Doughboy Recreational Industries* (*On Rehearing*), 441 Mich 379, 389-390; 491 NW2d 208 (1992).

[9] MCL 600.2946(2); see also *Gregory*, *supra* at 11.

4. Breach Of Warranty

Further, while a design defect claim focuses on the conduct of the manufacturer and whether it was reasonable, a breach of warranty claim focuses on the fitness of the product.[10] To establish a breach of warranty claim, a plaintiff must "prove a defect attributable to the manufacturer and causal connection between the defect and the injury or damage of which [plaintiff] complains."[11] And while implied warranty and design defect claims remain separate causes of action, they "involve identical facts and require proof of exactly the same elements."[12]

5. Manufacturing Defect

Finally, manufacturers can also be held liable for manufacturing defects that existed at the time of manufacture and sale of the product.[13] A manufacturing defect claim generally requires evidence the "something [went] wrong in the manufacturing process and the product is not in its intended condition."[14] To prove a manufacturing defect, the product "may be evaluated against the manufacturer's own production standards, as manifested by that manufacturer's other like products."[15] Additionally, to maintain a manufacturing defect claim, a plaintiff "'must prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains.'"[16]

C. Strauch's Claims

1. Design Defect

Strauch claims a defect in the design of the operator's compartment of the forklift. However, Strauch has failed to establish a prima facie case for design defect because he has not shown that the forklift, as designed, presents an unreasonable magnitude of risk or that there is a safer, alternative design available.[17] Strauch's expert failed to provide any statistical data regarding how often this type of accident occurs.[18] Further, although Strauch's expert testified that the injury could have been prevented with a different design, he failed to demonstrate that

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[10] *Gregory*, *supra* at 12.

[11] *Id*., citing *Piercefield v Remington Arms Co*, 375 Mich 85, 98-99; 133 NW2d 129 (1965).

[12] *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001).

[13] *Gregory*, *supra* at 11 n 7.

[14] *Prentis*, *supra* at 683.

[15] *Id*.

[16] *Crews v Gen Motors Corp*, 400 Mich 208, 217; 253 NW2d 617 (1977), quoting *Piercefield*, *supra* at 98-99.

[17] *Cacevic v Simplimatic Engineering Co* (*On Remand*), 248 Mich App 670, 680; 645 NW2d 287 (2001).

[18] *Id*. at 680.

any of his suggested alternatives would either be safer than the original design or that they would not significantly impair the usefulness or desirability of the product to its users.[19] Therefore, because Strauch did not meet his burden for establishing a prima facie case of design defect, the trial court did not err in granting defendant's motion for summary disposition on that theory.

2. Duty To Warn

Strauch also argues that, because it was foreseeable that an operator of the forklift might lift his or her foot outside of the compartment while releasing the "dead-man's pedal," Raymond had a duty to warn him of such a danger. We disagree. Under the "sophisticated user" doctrine, because of the experience that Strauch had in using and handling forklifts, Raymond had no duty to warn him of the inherent dangers associated with the forklift.[20]

3. Breach Of Warranty

Further, Strauch has failed to present any evidence that the forklift, as designed, was unreasonably safe for its intended use. Therefore, his breach of implied warranty claim fails, and the trial court's grant of summary disposition with respect to that claim was also proper.[21]

4. Manufacturing Defect

Lastly, while Strauch argues that there was a manufacturing defect in the Q1 and power card components of the forklift because the parts had to be replaced in January 2000, he does not explain how the failure and replacement of those components in January 2000 contributed to his accident three months later. Therefore, because Strauch fails to show any causal connection between the alleged manufacturing defect and his injuries, we conclude that the trial court did not err in granting summary disposition as to his manufacturing defect claim.[22]

5. Negligent Maintenance

We also reject Strauch's argument that the trial court erred in granting summary disposition with respect to his claims against Andersen for negligent maintenance of the forklift. The Michigan Supreme Court has held that "[t]he threshold question for negligence claims brought against a contractor on the basis of a maintenance contract between a premises owner and that contractor is whether the contractor breached a duty *separate and distinct from those duties assumed under the contract*."[23] Therefore, if there is no independent duty owed to a

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[19] *Id*.

[20] MCL 600.2947(4); see also *Portelli v I R Construction Products Co, Inc*, 218 Mich App 591, 601; 554 NW2d 591 (1996).

[21] See *Prentis*, *supra* at 693.

[22] *Crews*, *supra* at 217.

[23] *Fultz v Union Commerce Assoc*, 470 Mich 460, 461-462; 683 NW2d 587 (2004) (emphasis added).

plaintiff, there can be no tort action based on the contract.[24] "[A] tort action will not lie when based solely on the nonperformance of a contractual duty."[25]

Strauch argues that Andersen was negligent in its performance under the contract in the following three ways: (1) its employees checked the brakes on the forklift by trying them out, rather than visually inspecting them; (2) its employees did not have adequate knowledge of the owner/operator manual and the maintenance instructions for the forklift; and (3) Andersen prepared its own substandard maintenance checklist, instead of the more detailed one that is provided by the manufacturer. Further, Strauch asserts that Andersen's use of the substandard maintenance checklist created a new hazard for him as he relied on Andersen to competently maintain the forklift. However, because Anderson owed no duty to Strauch that was separate and distinct from its contractual obligations, and because it created no new hazard through its inspection, the trial court properly granted summary disposition to Andersen.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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[24] *Id*. at 467.

[25] *Id*. at 466.