

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1970

Cir. Ct. No. 2006CV504

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RANDEL G. PIERCE,

PLAINTIFF-APPELLANT,

V.

**LA CROSSE TRUCK CENTER, INC. AND UNIVERSAL UNDERWRITERS
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

WASTE MANAGEMENT OF WISCONSIN,

DEFENDANT.

APPEAL from an order of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Randel Pierce appeals an order granting summary judgment in favor of La Crosse Truck Center, Inc., and Universal Underwriters Insurance Company (collectively, “La Crosse Truck Center”). We conclude that the circuit court improperly granted summary judgment because its decision was based on an error of law. We also conclude that summary judgment was not appropriate because there are disputed issues of material fact. Therefore, we reverse.

¶2 Pierce brought this action sounding in negligence and strict liability against La Crosse Truck Center for injury he sustained at work while using a tarp strap sold by La Crosse Truck Center to his employer, Waste Management. La Crosse Truck Center moved for summary judgment dismissing the case on the grounds that the tarp strap that injured Pierce had not been preserved and that it was impossible to prove causation without the specific tarp strap that caused Pierce’s injury. The circuit court dismissed the case.

¶3 We review a circuit court’s decision granting summary judgment de novo, applying the same methodology as the circuit court. *Johnson v. Rogers Mem’l Hosp., Inc.*, 2005 WI 114, ¶30, 283 Wis. 2d 384, 700 N.W.2d 27. “Summary judgment must be entered ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Id.*, quoting WIS. STAT. § 802.08(2) (2001-02).¹ “All reasonable inferences drawn from the underlying facts contained

¹ The decision cites the 2001-02 version of the Wisconsin Statutes, which is identical to the current 2005-06 version for purposes of this appeal.

in these documents ... must be viewed in the light most favorable to the non-moving party.” *Id.* “[T]his court does not resolve issues of fact on summary judgment, but rather decides whether genuine issues of material fact exist.” *Id.*

¶4 To prove a strict liability claim, a plaintiff must show: (1) that the product was in defective condition when it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the plaintiff’s injuries; (4) that the seller engaged in the business of selling the product; and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when it was sold. *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55 (1967).

¶5 The circuit court concluded that Pierce’s claim must be dismissed because Pierce did not have the particular tarp strap that caused his injury, and thus was unable to prove causation. The court reasoned that Pierce’s expert should not be allowed to testify that the particular tarp strap that injured Pierce was defective based solely on the expert’s conclusion that the type of tarp strap Pierce used had a defective design. Without the particular tarp strap that caused the injury, the court concluded, the expert’s opinion regarding the defective condition of the strap would be nothing more than speculation. We disagree.

¶6 Pierce does not contend that the strap injured him because it was *different* from other straps made by the manufacturer and thus contained a unique flaw that made the strap dangerous. Instead, he contends that the inherent design of the strap was unreasonably dangerous. In the context of this claim, Pierce needs to show that the *design defect* was a cause of his injury, not that a defect in the particular strap was a cause of his injury. It is true that Pierce needs to present

evidence that would permit a fact-finder to conclude that the particular injury causing strap had not been modified after it was manufactured, but this requirement may be met by the absence of any reason to believe the strap was modified. Because Pierce's claim is based on a design defect, he can prove cause in his case without the particular strap that injured him.

¶7 Having concluded that the circuit court improperly granted summary judgment based on an error of law, we return to standard summary judgment methodology to decide whether there are genuine issues of material fact that preclude summary judgment. *See Johnson*, 283 Wis. 2d 384, ¶30 (we review summary judgment decisions using the same methodology as the trial court).

¶8 As indicated above, La Crosse Truck Center moved for summary judgment dismissing the case on the grounds that it was impossible to determine cause without the specific tarp strap at issue. La Crosse Truck Center also argued that Pierce had no evidence of who actually sold and distributed the tarp strap involved in the accident. In opposition to the motion for summary judgment, Pierce submitted an affidavit in which he averred that he was using a rubber tarp strap with an S-hook attached to each end when the strap snapped, injuring him. Pierce also averred that he had examined the strap and hooks before using it, that the strap had round rubber ends and were in good condition.

¶9 In addition, Pierce submitted the affidavit of Randy Mezera, a Waste Management employee with responsibility for purchasing the tarp straps, who stated that Waste Management had purchased all of its tarp straps from La Crosse Truck Center in the ten years prior to the accident. Pierce also submitted the April 20, 2007 affidavit of William Pedretti, a parts manager for La Crosse Truck Center, in which Pedretti averred that La Crosse Truck Center sold tarp straps

from only two companies to Waste Management in the three years before the accident. He averred that one of the types sold was acquired from New Life Transport Parts Center and had a rounded rubber end. He also averred that the other type sold was acquired from ITW CargoSafe and that the photograph in the ITW catalog showed that these straps had a square rubber end.

¶10 Finally, Pierce presented a report from Dennis Brickman, an engineer who specializes in mechanical safety and design of industrial machinery and consumer products. Brickman tested an exemplar tarp strap of the S-hook design sold by La Crosse Truck Center and supplied by New Life Transport Parts Center and concluded that the strap was defective and unreasonably dangerous for its intended use at the time of manufacture and sale and at the time of Pierce's accident, and that the defective and unreasonably dangerous condition of the strap was a cause of Pierce's injury.

¶11 In support of its motion for summary judgment, La Crosse Truck Center submitted a second affidavit of Pedretti, dated May 25, 2007, in which he averred that at least ten companies manufacture and sell black rubber tarp straps. He also averred that the catalog picture showing that the ITW strap that had a square rubber end, to which he had referred in his April 20 affidavit, was from 1999, and that in his experience parts ordered from catalogues do not always look the same as the pictures in the catalog.

¶12 The parties' submissions show that there are disputed issues of material fact that preclude summary judgment. Pierce's submissions about who supplied the tarp strap he was using negate La Crosse Truck Center's claim that Pierce can present "no evidence of who actually sold and distributed the tarp strap

involved in the accident.” Therefore, we reverse the order granting summary judgment and remand for further proceedings.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

