COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP748 **Cir. Ct. No. 1999CV2117**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BRYAN BAUMEISTER, ROBIN BAUMEISTER, JEFFREY BROWN AND STACEY BROWN,

PLAINTIFFS-APPELLANTS,

HERITAGE MUTUAL INSURANCE CO.,

SUBROGATED-PLAINTIFF,

V.

AUTOMATED PRODUCTS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Bryan Baumeister (Baumeister), Robin Baumeister, Jeffrey Brown (Brown), and Stacey Brown (collectively, "appellants") appeal from an order of the circuit court denying their motion for a new trial. The appellants brought negligence and strict liability claims against Automated Products, Inc., for injuries sustained by Baumeister and Brown while they were installing trusses, manufactured by Automated, which collapsed during installation. The circuit court dismissed the strict liability claim, on the ground that Baumeister and Brown were not users or consumers of the trusses, and thus not protected by strict products liability in Wisconsin. The appellants' negligence claim was submitted to the jury, which returned a verdict in favor of Automated Products. On appeal, the appellants argue that Baumeister and Brown were in fact users or consumers of the trusses and the circuit court thus erred in dismissing their strict liability claim on those grounds. We disagree and affirm.

BACKGROUND

¶2 In 1997, Baumeister and Brown were employed by Diamond Builders as construction workers on a crew that was erecting sixty-foot scissors trusses designed and built by Automated above the unfinished chapel of the Holy Trinity Lutheran Church in Marshall, Wisconsin. Baumeister and Brown sustained injuries when the trusses collapsed while they were working on them, causing them to fall to the ground.[1]

[1] The facts underlying this case have given rise to a long and complicated history of litigation, which is not recounted here. We set forth only those facts which are relevant to the appeal at hand. For further information, please refer to ***Baumeister v. Automated Prods., Inc***., 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1.

¶3 In 2000, the appellants intervened in the present action, which was originally instituted by the property and casualty insurance carrier for the church, General Casualty Company of Wisconsin, against Diamond Builders. The appellants alleged both negligence and strict products liability against Automated.[2]

¶4 Both claims against Automated proceeded to jury trial. At the trial, appellants presented expert testimony that the accident was caused by insufficient bracing of the sidewalls that supported the trusses. The experts opined that scissors trusses, unlike standard trusses, exert unusually strong lateral pressure outward on the supporting walls, which can cause the wall to bow outward, allowing the trusses to drop. The appellants claimed that Automated, as the manufacturer of the trusses, had failed to warn the installers of the need for extraordinary measures to counter this force.

¶5 Automated denied that it had failed to warn. Automated's expert witnesses, while not uniformly rejecting the need for sidewall bracing or denying that the scissors trusses exerted stronger lateral forces than standard trusses, put forth a different theory of the cause of the accident. Pointing to the detailed instructions for bracing the trusses in place during construction that were provided to the installers, the defense experts opined that the required truss bracing was not installed by Diamond Builders and that the failure to do so caused the accident.

[2] The appellants also brought a negligence action against the architect. However, that action was dismissed and is not part of the present appeal.

Appellants, for their part, presented testimony that the proper truss bracing was installed.[3]

¶6 At the close of evidence, Automated moved the circuit court for "dismissal or directed verdict" of appellants' strict products liability claim on the ground that Baumeister and Brown were not users or consumers under Wisconsin law, and thus not subject to the protection of strict products liability. The court granted the motion[4] and the case was submitted to the jury only on appellants' negligence claim, which resulted in special verdicts finding that Automated was not negligent and that Diamond Builders was negligent.[5]

¶7 The appellants moved the circuit court for a new trial on the basis that the court erred in dismissing their strict liability claim against Automated. The court denied the appellants' motion, and the appellants appealed. The appellants appeal only from the circuit court's dismissal of the strict products liability claim and the court's denial of its motion for a new trial on the same issue.

[3] The resolution of the dispute over the cause of the accident is not germane to the issue before us. However, the undisputed facts upon which the experts based their respective theories are critical to our conclusion that Baumeister and Brown were not users or consumers, as we discuss below.

[4] In granting the motion, the court did not specify whether it was dismissing the strict products liability claim or granting directed verdict for Automated upon the claim. As the briefs have generally referred to the court's action as dismissing the claim, we shall also.

[5] On the special verdict questions, the jury found in question 1 that Automated was not negligent, and in questions 3 and 4 that Diamond Builders was causally negligent. As Diamond Builders was the only party found negligent, the jury properly did not answer question 5, the apportionment question.

DISCUSSION

¶8 The appellants contend that the circuit court erred in dismissing their strict liability claim against Automated on the basis that Baumeister and Brown were not users or consumers of the trusses when they were injured and thus are not among the class of people covered by strict products liability in Wisconsin. We are thus presented with a single issue on review: whether Baumeister and Brown were users or consumers of the trusses for purposes of strict products liability in Wisconsin. This requires us to apply undisputed facts to the applicable legal principles, in this case principles found in RESTATEMENT (SECOND) OF TORTS § 402A (1965). The application of undisputed facts to a legal standard is a question of law which we review de novo. ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶31, 283 Wis. 2d 384, 700 N.W.2d 27.[6] We begin with a brief review of strict products liability in Wisconsin.

¶9 In ***Dippel v. Sciano***, 37 Wis. 2d 443, 459, 155 N.W.2d 55 (1967), the Wisconsin Supreme Court adopted the rule of strict liability for products liability cases in tort, as set forth in the RESTATEMENT (SECOND) OF TORTS §402A.[7] Section 402A provides:

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[6] Appellants raise a second issue regarding whether the circuit court should have submitted the strict liability claim to the jury. However, because we conclude, as a matter of law, that Baumeister and Brown were not users or consumers of the trusses under Wisconsin strict products liability law, it is not necessary to address these additional arguments. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

[7] Prior to ***Dippel v. Sciano***, 37 Wis. 2d 443, 451-52, 155 N.W.2d 55 (1967), Wisconsin based non-negligence tort liability on an implied warranty theory, which required privity of contract. It was in response to the problems created by the requirement of privity that the court in ***Dippel*** adopted strict liability. *See* ***id.*** This history is consistent with the development of strict liability generally among the states. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965).

> 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the *user or consumer* or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the *user or consumer* without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the *user or consumer* has not bought the product from or entered into any contractual relation with the seller. (Emphasis added.)

¶10 To prove strict liability, the plaintiff must establish the following five elements:

> (1) [T]hat 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 (a substantial factor) of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, 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 he sold it.

Dippel, 37 Wis. 2d at 460 (emphasis added).

¶11 As stated above, Baumeister and Brown were installing the trusses on a structure that would become a church when completed. Clearly, they were not the *ultimate* users or consumers, who would be the church as a legal entity,

and/or its members.[8] The question is thus whether Baumeister and Brown are included within the meaning of users or consumers, even though they were not the ultimate users or consumers.

¶12 Appellants argue that a comment to RESTATEMENT (SECOND) OF TORTS § 402A discussing the term "user or consumer" demonstrates that § 402A allows them to sue as plaintiffs under strict products liability. This comment reads, in relevant part

> "Consumers" include not only those who in fact consume the product, *but also those who prepare it for consumption*; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink…. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. l (emphasis added). The appellants assert that they are "one short step away" from the ultimate users or consumers. Automated, on the other hand, asserts that Baumeister and Brown were many steps away from being the ultimate user or consumer when they were injured and, thus, distinguishable from the housewife discussed in comment l. We agree with Automated.

[8] While the church as an entity was the purchaser of the trusses, anyone occupying the chapel of the completed church would clearly be covered, as well. "It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser." RESTATEMENT (SECOND) OF TORTS § 402A cmt. l.

¶13 This case is similar to ***Tatera v. FMC Corp***., 2009 WI App 80, ¶7, 319 Wis. 2d 688, 768 N.W.2d 198.[9] In ***Tatera***, the plaintiff was the spouse of a worker who died from exposure to asbestos as a result of grinding brake linings. The brakes were manufactured by FMC Corporation, but the linings were purchased by FMC from outside suppliers, and the linings were ground to fit the brakes by a subcontractor who employed Tatera as a machinist. In deciding that Tatera was not a user or consumer, the court stated:

> Tatera characterizes the work done by her husband as "preparing the product for consumption" and therefore covered by § 402A. FMC takes the contrary view. While the comments state that the "consumer" does not have to actually consume the product (instead he can be one who prepares the product for consumption like a cook or an employee of a car sales company preparing the car for the buyer), the "user/consumer" in the examples in the comments is only one short step from the *ultimate* consumer, lending support to FMC's position.... [W]e conclude that the meaning of "user," as applied here, excludes a processor under the facts of this case.

Id., ¶23.

¶14 We conclude that Baumeister and Brown resemble the "processor" characterization used in ***Tatera.*** Like Tatera, Baumeister and Brown assert that

[9] The supreme court reversed our decision in ***Tatera v. FMC Corp.***, 2009 WI App 80, 319 Wis. 2d 688, 768 N.W.2d 198, but did so on other grounds. ***Tatera v. FMC Corp.***, 2010 WI 90, 328 Wis. 2d 320, 786 N.W.2d 810. ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶46, 326 Wis. 2d 729, 786 N.W.2d 78, holds that when a court of appeals decision is overruled by the supreme court on any grounds, it no longer possesses any precedential value.

Earlier in this proceeding, we interpreted Blum as applying equally to cases that the supreme court reverses. That interpretation was apparently incorrect. The supreme court clarified in ***State v. Harris***, 2010 WI 79, ¶34, n.12, 326 Wis. 2d 685, 786 N.W.2d 409, that the rule in Blum does not apply to cases that are reversed by it, but not overruled. Our holding in ***Tatera*** with regard to users and consumers under RESTATEMENT (SECOND) OF TORTS §402A thus remains binding precedent. *See* ***State v. Jackson***, 2011 WI App 63, ¶15 n.3, 333 Wis. 2d 665, 779 N.W.2d 461.

they were merely preparing a product, here the trusses, for use by the ultimate users or consumers, and thus were but "one short step" from the ultimate users or consumers, here the church congregation. *See* ***id.*** This was the argument rejected in ***Tatera***.

¶15 Appellants argue that this case can be distinguished from ***Tatera*** and that Baumeister and Brown are users and consumers because they are "one short step" away from the ultimate users or consumers. The following analysis of the facts demonstrates both that the trusses are processed, that is, substantially changed,[10] and that Baumeister and Brown are far more than "one short step" from the ultimate users or consumers.

¶16 The trusses at issue here were delivered in halves to the job site by Automated. Extensive documentation that accompanied the delivery, provided by Automated, described the proper process of joining the halves, erecting them onto the structure, and bracing them. Irrespective of whether the accident was caused by failure to adequately brace the sidewalls or failure to properly brace the newly installed trusses in place, it is undisputed that the process of taking the half trusses and making them an integral part of the structure is detailed, technical and extensive. Further, even after that is completed, the structure remains incomplete. The roof must be sheathed and weatherproofed and the rest of the structure below the roof must be completed before the church will be ready for occupancy by the ultimate users or consumers. Many steps remain; perhaps months of work will be involved, even if all goes well. This is not "one short step," but many, complex steps.

[10] *See* RESTATEMENT (SECOND) OF TORTS § 402A, cmt. p.

¶17 Just how far Baumeister and Brown are from the ultimate users or consumers is further demonstrated by the fact that their employer, Diamond Builders, was a subcontractor of the company building the church, hired for the limited purpose of erecting the trusses. Thus, the situation is directly analogous to that in ***Tatera***, in that Baumeister and Brown were not completing the church for its ultimate use; they were installing only one component part for others to use in completing the structure.

¶18 In ***Tatera***, we declined to extend the application of RESTATEMENT (SECOND) OF TORTS § 402A to "the processing situation presented" there in the absence of precedent. ***Tatera***, 319 Wis. 2d 688, ¶29. We are similarly bound. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Accordingly, we conclude that Baumeister and Brown were not users or consumers and thus not entitled to the protection of strict products liability under Wisconsin law.

CONCLUSION

¶19 We conclude the undisputed facts demonstrate, as a matter of law, that Baumeister and Brown were not users or consumers under RESTATEMENT (SECOND) OF TORTS § 402A, and thus not entitled to the protection of strict products liability under Wisconsin law. Accordingly, we conclude that the circuit court properly entered summary judgment in favor of Automated on the appellants' strict liability claim.

By the Court.—Order affirmed.

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