

STATE OF MICHIGAN
COURT OF APPEALS

GARY DUBANIK,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 174334

LC No. 91-420362-NP

BRASS FORGINGS COMPANY,

Defendant,

and

NATIONAL MACHINERY COMPANY and
SQUARE D COMPANY,

Defendants-Appellees.

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

FITZGERALD, P.J. (dissenting).

I respectfully dissent from the majority's conclusion that National's failure to provide an interlocking die block is immaterial because plaintiff failed to use the die block provided by Quality Steel.

In *Prentis v Yale*, 421 Mich 670, 694; 365 NW2d 176 (1984), the Court determined that the necessary elements of a design defect claim are contained in the following jury instruction:

A manufacturer of a product made under a plan or design which makes it dangerous for uses for which it is manufactured is subject to liability to others whom he should expect to use the product or to be endangered by its probable use from physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

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

A manufacturer has a duty to use reasonable care in designing his product and guard against a foreseeable and unreasonable risk of injury and this may even include misuse which might reasonably be anticipated.

Here, plaintiff alleged that the press was defective because it did not contain adequate safeguards against unintended cycling and malfunctioning. Plaintiff presented expert evidence that interlocking die blocks and the knowledge to incorporate them were available at the time the press was manufactured. Plaintiff's expert testified that the interlocking die block would be interlocked in an electrical fashion where the machine would require that the die block be present in order for the machine to operate. Such an interlocking die block is clearly different from the die block provided to plaintiff that had to be manually placed and which was not required in order for the machine to operate. Plaintiff's expert testimony creates an issue of fact with regard to whether the lack of an interlocking die block was a design defect attributable to National.

National contends that, even if plaintiff is able to allege a design defect attributable to National, the defect was not the proximate cause of plaintiff's injury. *Skinner v Square D Company*, 445 Mich 153, 162; 516 NW2d 475 (1994). Proximate cause entails proof of cause in fact and legal cause. *Id.* at 162-163. Cause in fact generally requires a showing that "but for" the defendant's actions the plaintiff's injury would not have occurred. Legal cause normally involves examining the foreseeability of consequences, and whether defendant should be held responsible for such consequences. *Id.* at 163.

With regard to legal cause, defendant set forth specific warnings regarding the injuries that could occur if the die block was not in place and if the fly wheel had not come to a complete stop. Therefore, an issue of fact is presented whether plaintiff's injury and the circumstances surrounding it were in fact foreseeable to defendant.

With regard to cause in fact, defendant contends that even if the press had an interlocking die block in effect, if plaintiff did not place the die block in the press it would not have prevented his injury. However, plaintiff's expert testified that the interlocking die block would be interlocked in an electrical fashion where the machine would require that the die block be present before it would operate. Therefore, an issue of fact is presented whether the interlocking die block could have prevented plaintiff's injury.

Because a genuine issue of fact was presented with regard to the claim of design defect, I would find that the trial court erred in granting summary disposition of this claim in favor of defendant.

/s/ E. Thomas Fitzgerald