STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KROL,

Plaintiff-Appellant,

v

ALLIED PRODUCTS CORPORATION, a/k/a VERSON DIVISION, and CHRYSLER CORPORATION,

Defendants-Appellees.

UNPUBLISHED
August 16, 1996

No. 175341
LC No. 91-001183-NP

Before: Neff, P.J., and Wahls and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from a May 3, 1994 order of the Macomb Circuit Court granting summary disposition in favor of both defendants pursuant to MCR 2.116(C)(8) and (10). We affirm in part and reverse in part.

I

This case arises out of the amputation of plaintiff's left hand while he was operating a press cycle manufactured by Allied Products (Verson Division). On October 3, 1989, plaintiff was employed by defendant Chrysler Corporation at its Warren Stamping Plant where plaintiff operated a 250-ton Verson Gap press. Plaintiff was operating the press to produce fenders. The press required plaintiff to load and unload parts into the die between each press cycle. Plaintiff reached in to remove a panel from the die when the press cycle repeated itself and plaintiff suffered a traumatic amputation to his left hand.

The press was comprised of component parts, including a rotary cam limit switch which was driven by a bevel unit where a gear was connected by one screw. The screw, located between the gear and the shaft, came loose causing the press to run in a continuous cycle. The press also contained a motion detector which functioned as a safety device disabling the press if there was some type of malfunction. However, the motion detector had been disconnected by Chrysler.

In his second amended complaint, plaintiff alleged design defect and failure to warn as against Allied Products. Specifically, plaintiff alleged that: (1) the press was defective as a result of one screw connection between the gear and the shaft; (2) that Allied Products breached express and implied warranties of merchantability and fitness; (3) that when the press left Allied Products' control, it was in a defective condition; (4) that Allied Products engaged in wilful, wanton, or reckless misconduct, and disregarded the safety of users. With regard to Chrysler, plaintiff alleged that it engaged in an intentional tort by disabling the motion detector, which would circumvent the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA).

Both defendants filed motions for summary disposition pursuant to MCR 2.116(C)(8) and (10) following the close of discovery. The trial court, in a written opinion, granted the motions. The trial court first found that plaintiff had failed to establish an intentional tort by Chrysler and that plaintiff's action was barred by the exclusive remedy provision of the WDCA. With respect to Allied Products, the trial court found that plaintiff had failed to introduce any evidence showing that the press was either unreasonably dangerous or negligently designed and manufactured. The trial court also noted that because the press was altered by Chrysler, plaintiff had failed to show that Allied Products knew or should have foreseen those alterations. The trial court, therefore, granted summary disposition in favor of both defendants.

II

We first address the intentional tort claim against Chrysler. MCL 418.131(1); MSA 17.237(131)(1) of the WDCA provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. The issue whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

We must agree with the trial court that plaintiff presented no allegations that would amount to an intent to injure; that is, that Chrysler had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge.

The issue whether the facts alleged by a plaintiff are sufficient to constitute an intentional tort is a question of law for the court. *Travis v Dreis & Krump Mfg Co,* ___ Mich ___; ___ NW2d ___ (Docket Nos. 101028, 102147; issued 7/31/96), slip op, p 38, citing *McNees v Cedar Springs Stamping Co,* 184 Mich App 101, 104; 457 NW2d 68 (1990). Whether the facts are as the plaintiff alleges is a question of fact for the jury. *Id.* We accept plaintiff's claim that Chrysler intentionally

disabled the motion detector, however, the statute requires that Chrysler must have had actual knowledge that an injury was certain to occur and that it wilfully disregarded that knowledge. According to plaintiff's second amended complaint, Chrysler knew that the press was malfunctioning because the motion detector would stop the press from operating. Chrysler then disabled the motion detector to keep the press running. Plaintiff also alleged that Chrysler knew that the bevel gear unit was malfunctioning and needed repairs, thus causing the motion detector to shut down the press.

Specifically, in paragraph 65 of his second amended complaint, plaintiff alleged that Chrysler "intended an injury, had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge when it jumpered out the motion detector, modified the design of the bevel gear, had Plaintiff work on a malfunctioning press in a dangerous condition, failed to supply tongs, and/or other acts." This bare allegation, unsupported by facts, is insufficient to permit an inference that Chrysler specifically intended to injure plaintiff, that is, that Chrysler had actual knowledge that injury was certain to occur because it disabled the motion detector. *Smith v Mirror Lite Co*, 196 Mich App 190, 193; 492 NW2d 744 (1992). In order to defeat a motion pursuant to MCR 2.116(C)(8), plaintiff must do more than allege in a conclusory fashion that Chrysler had actual knowledge that an injury was certain to occur and wilfully disregarded that knowledge. Rather, plaintiff must allege facts which support that allegation. It is not enough to restate the statutory language in the complaint without alleging specific facts tending to show that Chrysler intended to injure plaintiff. Plaintiff has simply not alleged sufficient facts in his second amended complaint tending to show that Chrysler intended to injure him.

Accordingly, the trial court did not err in granting defendant Chrysler's motion for summary disposition pursuant to MCR 2.116(C)(8). The allegations in plaintiff's second amended complaint are insufficient as a matter of law to constitute an intentional tort.

III

Next, we address plaintiff's claim of design defect against Allied Products. Plaintiff alleges that the press was negligently designed, when it was manufactured, because there was only one screw as a positive connection between the gear and the shaft in the bevel gear unit. Plaintiff alleges that the use of only one screw to make a positive connection between the gear and the shaft was a dangerous design because if the screw is displaced, as in this case, then the press will go into a continuous cycle. Allied Products, on the other hand, claims that the press was not designed with only one screw when it left its control in 1960.

In a design defect case, a pure negligence, risk-utility test is used against the manufacturer of the product. *Prentis v Yale Mfg Co*, 421 Mich 670, 691; 365 NW2d 176 (1984). "The competing factors to be weighed under a risk-utility balancing test invite the trier of fact to consider the alternatives and risks faced by the manufacturer and to determine whether in light of these the manufacturer exercised reasonable care in making the design choices it made." *Id.*, p 688. A manufacturer has a duty to design its product so as to eliminate any unreasonable risk of foreseeable injury. *Id.*, pp 692-693. Thus, a product is defective if it is not reasonably safe for its foreseeable uses. *Ghrist v Chrysler Corp*, 451 Mich 242, 249; 547 NW2d 272 (1996). Further, the focus of the duty begins with whether

the product was defective when it left the manufacturer's control. *Gregory v Cincinnati Inc*, 450 Mich 1, 11-12; 538 NW2d 325 (1995).

This issue is complicated by the fact that there is no direct evidence what the design of the press was in 1960, such as some type of original drawing. Additionally, the bevel gear unit was manufactured by Condensor Service and Engineering Company, Inc., and Allied Products selected this bevel gear unit and assembled it in its presses.

After plaintiff's injury, Chrysler investigated the press and discovered that the screw had come out of the bevel gear and that this was the cause of the press malfunction. Chrysler had five other identical presses made by Allied Products and those presses were also inspected. It was discovered that those presses also had only one screw between the gear and the shaft. As plaintiff observes, there are only three entities which could have placed one screw in the bevel gear unit: Condensor Service, Allied Products, or Chrysler.

Taken in a light most favorable to plaintiff, the evidence shows that all six presses manufactured by Allied Products that were in Chrysler's control had the one screw connection. A copy of Condensor Service's catalogue indicated that the bevel gear unit was not linked by a one screw connection. However, plaintiff's expert witness, Robert Hume, denied that the press contained the type of connection stated in the catalogue. Hume also personally inspected the press and testified that it was most probable that the one screw design was original with the press. Hume believed this to be the case because he found no evidence of a keyway that would be used for a roll pin. According to Condensor Service's catalogue, the description of the bevel gear stated that it was pressed in bronze gears and keyed with hardened pins. Hume disagreed with this description based on his inspection of the press. Hume further explained that there would be a reason for Allied Products to change the design of the bevel gears because this would be one manner for it to align the rotation.

Defendant's expert, Donald Bernotus, had been employed by Allied Products since 1955. He stated that he could not say that the bevel gear unit in the press that injured plaintiff was not the original bevel gear that came with the press in 1960. Bernotus also stated that, after looking at the bevel gear, its appearance was identical to the one that Allied Products originally provided. Bernotus stated that there was nothing in Chrysler's maintenance records indicating that the original bevel gear had been replaced. Bernotus could not give any reason why Chrysler might want to change the bevel gear units on the six presses.

Allied Products makes much of the evidence that the bevel gears were "modified" while in Chrysler's control. Allied Products points to the four half-circle drill holes in the bevel gear and the fact that Chrysler removed the safety device from the press. Even assuming that Chrysler made the drill holes in the bevel gear, Allied Products does not explain in its brief how these holes either affected the safety of the bevel gear unit or how the holes may have caused the press to go into a continuous cycle so as to cause the amputation of plaintiff's hand. Moreover, in the case before us, it is plaintiff's theory that the press was unsafe because of the one screw connection between the bevel gear and the shaft, and not because of the lack of any safety device.

Based upon the foregoing, there is sufficient circumstantial evidence that the press was defective (had only one screw between the bevel gear unit and the shaft) when it left Allied Product's control. While the evidence is not overwhelming, it is only necessary that plaintiff present a genuine issue on the material fact of whether the press was defective when it left Allied Products' control through record evidence and all reasonable inferences drawn therefrom. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Accordingly, we conclude that the trial court erred in granting defendant Allied Products' motion for summary disposition. Plaintiff has presented enough evidence that the press was defective when it left Allied Products' control to warrant a trial. Whether the press was defective when it left Allied Products' control is a question of fact for the jury to resolve.

IV

Last, we consider plaintiff's failure to warn theory against Allied Products. Plaintiff alleges that Allied Products breached its duty to warn of the risks involved with disconnecting the motion detector. Plaintiff argues that Allied Products supplied a defective product and removal of the motion detector made the product dangerous, and, therefore, the product required a warning. Allied Products, on the other hand, argues that disconnecting the motion detector created an open and obvious danger and that it cannot be liable under a failure to warn theory. The trial court ruled that the danger was open and obvious and that there was no duty to warn. The trial court also ruled that plaintiff had failed to show that Allied Products knew of or should have foreseen the alterations made to the press by Chrysler.

A manufacturer is liable in negligence for failure to warn the purchaser or user of its product about dangers associated with its intended use. *Antcliff v State Employees Credit Union*, 414 Mich 624, 637; 327 NW2d 814 (1982). A manufacturer is also required to warn of dangers associated with foreseeable misuse of the product. *Id.*, p 638. However, there is no duty to warn of known or obvious product-connected dangers where the product itself is not defective or dangerous. *Id.*, p 639.

We do not agree with the trial court that the open and obvious defense precludes liability in this case. First, plaintiff has presented evidence that the press was defective in that it was designed with only one screw between the bevel gear unit and shaft because if the screw is displaced, it causes the press to go into a continuous cycle. Therefore, because plaintiff has alleged and presented evidence that the press was defective, the open and obvious defense does not absolve Allied Products from liability for failure to warn. *Id.*, pp 639-640; *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 390; 491 NW2d 208 (1992) (a manufacturer has no duty to warn of open and obvious dangers connected with an *otherwise nondefective product*).

Reeves v Cincinnati, Inc, 176 Mich App 181; 439 NW2d 326 (1989) is not dispositive of this issue. In *Reeves*, the plaintiff filed suit against the manufacturer of the press (Cincinnati, Inc.) and against the seller of the press (Addy-Morand Machinery Company). The plaintiff's theory of liability was that the press unexpectedly cycled for unknown reasons, but that this was a common and foreseeable occurrence. The plaintiff contended that Cincinnati, Inc. should have designed and

implemented a more adequate safety device. Regarding the failure to warn theory, this Court only stated that Cincinnati, Inc. was under no duty "to place warnings on the press of this open and obvious danger." *Id.*, p 190.

We find that *Reeves* is distinguishable because in the present case, plaintiff has alleged a specific design defect, being that the one screw connection between the bevel gear unit and the shaft rendered the press to be unreasonably dangerous. Further, plaintiff's claim is not premised upon the lack of an adequate safety device, but that Allied Products should have warned about the danger of removing the motion detector device that was on the press. In *Reeves*, on the other hand, there was no allegation that the press was defectively designed. Rather, the theory of liability was that there was no adequate safety device. Therefore, the open and obvious danger defense did apply because there was no showing that the press was a defective product.

Further, we reject Allied Products' claim that it was not foreseeable that Chrysler would alter or remove the motion detector to render the press dangerous. Such an argument was rejected by our Supreme Court in *Ghrist*. The Supreme Court held that although an employer has the statutory duty to make the workplace safe for its employees, the Michigan Occupational Safety and Health Act does not abrogate the duty of a manufacturer to exercise the degree of care necessary in the design and manufacture of a product to avoid all reasonably foreseeable injuries. *Ghrist, supra*, p 250. The Court specifically rejected the defendant's contention that it was not legally possible to foresee that the die would be used by the plaintiff's employer in an unsafe manner. *Id.*

Accordingly, the trial court erred in ruling that the open and obvious defense precluded any liability on Allied Products' behalf with respect to plaintiff's failure to warn claim and erred in ruling that Allied Products could not have foreseen the alterations made to the press by Chrysler.

The trial court's grant of summary disposition in favor of Chrysler is affirmed. We reverse the trial court's grant of summary disposition in favor of Allied Products and remand for further proceedings on plaintiff's design defect and failure to warn claims. No further jurisdiction is retained.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Kathleen Jansen