

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT SCHOHL and SHARON SCHOHL,

Plaintiffs-Appellees,

v

LODGE & SHIPLEY COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 5, 2000

No. 215080
Macomb Circuit Court
LC No. 89-004478-NP

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber *, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered in favor of plaintiffs. We vacate the judgment and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1989 plaintiffs filed a products liability action, alleging that in 1987 Albert Schohl was injured during the course of his employment while using a squaring shear manufactured by defendant. Defendant's successor, Lodge & Shipley, Inc., was added to the suit via an amended complaint. An answer filed on behalf of both Lodge entities alleged various affirmative defenses, including comparative negligence. In 1992 a default judgment of liability was entered against both entities. Subsequently, the court entered judgment in favor of plaintiffs.

In *Schohl v Lodge & Shipley Co*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 180137, issued 06/13/97), another panel of this Court vacated the judgment on the ground that defendant was not served with notice that a default judgment would be taken. We remanded for a new hearing on the issue of damages only.

On remand, defendant filed a motion in limine to admit evidence of Albert Schohl's comparative negligence. The trial court denied the motion, finding that comparative negligence went to the issue of liability, and that if such evidence were introduced, the hearing on remand would no longer deal with damages only. Following a three-day jury trial on the issue of damages, the trial court entered judgment in favor of plaintiffs in the amount of \$401,673.06.

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

Defendant moved for a new trial, arguing that evidence of Albert Schohl's comparative negligence should have been admitted. The trial court denied the motion, finding that by defaulting on the day of trial, defendant waived the defense of comparative negligence. In addition, the trial court concluded that this Court's decision remanding for a hearing on the issue of damages only constituted the law of the case.

Comparative negligence encompasses aspects of both liability and damages. The doctrine of pure comparative negligence does not bar a plaintiff's recovery. Rather, it reduces the amount of the recovery, and allocates liability in proportion to fault. *Jennings v Southwood*, 446 Mich 125, 131; 521 NW2d 230 (1994), after remand 224 Mich App 15; 568 NW2d 125 (1997), vacated in part on other grounds 457 Mich 884; 586 NW2d 925 (1998).

We vacate the judgment in favor of plaintiffs, and remand for further proceedings. The trial court erroneously concluded that this Court's remand for a hearing on the issue of damages only, *Schohl, supra*, precluded introduction of evidence of Albert Schohl's comparative negligence. In *Kalamazoo Oil Co v Boerman*, 242 Mich App 75; ___ NW2d ___ (2000), another panel of this Court held that under certain circumstances, admission of evidence of comparative negligence during the damages phase of proceedings is appropriate; the decision to admit such evidence is within the discretion of the trial court. In this case defendant was not defaulted as a sanction for discovery abuse, as was the defendant in *Boerman, supra*, where we held that given the facts, the trial court did not abuse its discretion by precluding introduction of evidence of comparative negligence. *Id.*, slip op, 7-8. Here, defendant did not participate in the case after counsel withdrew; however, it neither failed to answer the complaint nor abused the discovery process.

The trial court was unaware that it had the discretion to admit evidence of Albert Schohl's comparative negligence in the damages phase of the proceeding. We cannot determine that if the trial court had been aware of its discretion in the matter, it would have reached the same result. Cf. *Boerman, supra*. We vacate the judgment and remand for further proceedings consistent with this opinion. The trial court is to consider defendant's request to admit evidence of Albert Schohl's comparative negligence in light of *Boerman, supra*.

Vacated and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber