STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY GROSTIC, as Personal Representative of the Estate of GERALD F. GROSTIC, GERALD GROSTIC, JR., and JASON GROSTIC,

Plaintiffs-Appellees,

v

AGCO CORP.,

Defendant/Cross-Defendant-Appellant,

and

S+L+H SPA,

Defendant/Cross-Defendant,

and

DIUBLE EQUIPMENT INC.,

Defendant/Cross-Plaintiff.

UNPUBLISHED
May 4, 2001

No. 218848
Livingston Circuit Court
LC No. 96-014968-NP

BEVERLY GROSTIC, as Personal Representative of the Estate of GERALD F. GROSTIC, GERALD GROSTIC JR., and JASON GROSTIC,

Plaintiffs-Appellees,

v

AGCO CORP.,

Defendant/Cross-Defendant,

and

No. 218849
Livingston Circuit Court
LC No. 96-014968-NP

S+L+H SPA,

Defendant/Cross-Plaintiff-
Appellant,

and

DIUBLE EQUIPMENT INC.,

Defendant/Cross-Plaintiff.

Before: Holbrook, Jr., P.J., and Sawyer and Zahra, JJ.

ZAHRA, J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that plaintiffs failed to demonstrate the requisite physical harm to establish a prima facie case of negligent infliction of emotional distress. However, I respectfully dissent from the majority's conclusion that the trial court properly denied defendants' motions for JNOV. Plaintiffs failed to introduce evidence from which the jury could logically conclude that defendants caused plaintiffs' injuries. Because I would reverse on the basis that there was not evidence to support plaintiffs' product liability claim, I would not reach the issue whether the jury rendered inconsistent verdicts.

Skinner v Square D Company, 445 Mich 153, 159; 516 NW2d 475 (1994), provides that a prima facie case for products liability requires proof of a causal connection between an established defect and injury. A plaintiff is not required to present evidence that positively eliminates every other possible cause. However, a plaintiff's evidence must be sufficient to establish a logical sequence of cause and effect. *Id*. at 159-160. *Skinner* involved an unwitnessed mishap with an electric tumbling machine. Our Supreme Court stated: "While plaintiffs may show causation circumstantially, the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation . . ." *Id*. at 163. The Court clarified:

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation . . . at a minimum, a causation theory must have some basis in established fact. However a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Id*. at 164-165.]

In the present case, plaintiffs theorized at trial that just prior to the accident, the decedent disengaged the tractor's power takeoff switch (PTO), leaving the control lever somewhere

between the "On" and "Off" positions. The decedent then began to change the blades on the haybine, during which the PTO spontaneously engaged and caused his death. Importantly, plaintiffs failed to introduce evidence regarding the means by which the disengaged PTO might have engaged without any intervention. Plaintiffs' expert, John Sevart, testified that the PTO was defective because it lacked "positive control," which only allows two positions, on or off. Sevart's testimony suggested that a PTO without positive control may be prone to spontaneous engagement. However, Sevart never testified regarding the means by which the PTO in question could have spontaneously engaged. Defendants' expert, Richard Job, was questioned regarding quality reviews of AGCO tractors that indicated dirt in PTO parts, overheating of hydraulic fluid and burnt-out clutch mechanisms could cause a disengaged PTO to engage even though the control lever was in the "Off" or disengaged position. Job also testified that he knew of one occurrence where a broken "snap ring" caused spontaneous engagement of a PTO. However, Job unequivocally testified that none of those things occurred in the present case. Plaintiffs did not present evidence suggesting any of the mechanical problems referenced by Job caused the PTO on the decedent's tractor to engage. Nor did plaintiffs introduce evidence of any other mechanical explanation for the alleged spontaneous engagement.

Instead, plaintiffs and the majority have focused on defendants' inability to prove their theory of causation. The majority's reasoning that "[because] there is no evidence to support defendants' assertion that decedent must have returned to the tractor to reengage the PTO, it is not unreasonable to conclude that the PTO reengaged without human intervention" is backward. It was plaintiffs' burden to affirmatively prove their case. That burden included the duty to effectively demonstrate causation. *Skinner, supra*. Focusing on whether there is evidence supporting defendant's theory of causation serves no purpose except to suggest that the accident did not occur as defendants contend. It certainly does nothing to establish that the accident may have, in fact, occurred as plaintiffs surmise.

Without any evidence of the means by which the PTO could have spontaneously engaged, plaintiffs' theory of causation is no more plausible than any other. Plaintiffs did not introduce evidence from which the jury could conclude that more likely than not, but for defendants' conduct, their injuries would not have occurred. Therefore, plaintiffs failed establish a logical sequence of cause and effect. *Skinner, supra*. For these reasons, I would reverse the entire judgment.

/s/ Brian K. Zahra