

STATE OF MICHIGAN
COURT OF APPEALS

JUAN TOLEDO, personal representative
of the ESTATE OF VINCENTE TOLEDO,

UNPUBLISHED
December 20, 2005

Plaintiff-Appellant,

v

GATEWAY PRECISION TECHNOLOGIES,
LLC,

No. 263836
Kent Circuit Court
LC No. 03-005231-NP

Defendant-Appellee.

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff Juan Toledo, personal representative of the Estate of Vincente Toledo (the personal representative), appeals as of right the trial court's order granting summary disposition to defendant Gateway Precision Technologies, L.L.C. (Gateway), under MCR 2.116(C)(10), on the personal representative's product liability and negligence claims arising out of an industrial accident that caused the death of Vincente Toledo (Toledo). We affirm.

I. Basic Facts And Procedural History

Falcon Manufacturing of Michigan, Inc. (Falcon) hired Toledo as temporary unskilled labor to work as a "block hauler" at Falcon's manufacturing facility. Falcon processes expanded polystyrene foam, used primarily as insulating material. The foam arrives at Falcon in large blocks, which Falcon then cuts down with specialized equipment, including "hot-wire" cutters. A hot-wire cutter consists of a bed with rollers, on which the blocks of foam are placed and then rolled into position for cutting. The block is positioned inside a large frame, where the cutting mechanism, or "carriage," is located. The carriage is equipped with thin, electrically charged wires that stretch across it. Once the block is properly positioned inside the frame, the machine operator activates the carriage, which then ascends up through the frame, causing the wires to slice through the foam. The carriage continues its ascent until it reaches the top of the frame. The cut foam is then rolled out of the frame. The operator must then re-activate the carriage to descend and return to its original position.

On October 26, 2000, Toledo's third or fourth day of employment with Falcon, while presumably attempting to gather scrap foam from underneath one of the hot-wire cutters, Toledo's head became caught between the outer frame and the descending carriage, in an area

known as a “pinch point.”¹ No one witnessed the actual event. The machine operator explained that after reactivating the carriage to the descend mode he had walked away from the machine. The machine operator was alerted to the accident by Toledo’s screams. Toledo died at the scene. Patrick Henderson, Toledo’s supervisor, could not explain why Toledo was even near that machine, hot-wire cutter #5, let alone leaning into it, because he assigned Toledo to work on hot-wire cutter #4 that day.

Hot-wire cutter #5 was designed, manufactured, and installed by Gateway in June 1999. Gateway produced the hot-wire cutter in accordance with Falcon’s specifications. Falcon specified that it needed an emergency stop cable around the perimeter of the hot-wire cutter and a flashing red beacon light to signal when the equipment was energized. These two safety features were necessary to comply with a 1996 variance that Falcon had secured from the Michigan Department of Labor.² Absent the variance, Michigan Occupational Safety and Health Administration (MIOSHA) regulations would have required Falcon to place physical barriers around each hot-wire cutting machine. But Falcon claimed that the barriers would have eliminated the operator’s necessary access to the machine while it was energized. Therefore, the variance required, in pertinent part, readily accessible emergency stop mechanisms.

An emergency stop cable was strung around the perimeter of hot-wire cutter #5 through eye bolts permanently affixed to the frame of the machine. The cable was designed to deactivate the carriage when the cable was pulled up, out, or down, or when pushed toward the frame. During his investigation of the accident, MIOSHA Senior Safety Officer Gary Fancett discovered that the eye bolts on hot-wire cutter #5 were bent down to varying degrees from their allegedly original 90-degree position. Gateway presented testimony that the eye bolts were not bent when the machine was installed. The personal representative presented testimony that the bolts were always bent but the cable “always worked.” However, Fancett explained that during his post-accident investigation the emergency stop cable only worked when he pulled it up, out, or down; it would not work when he pushed against it. Following his investigation, Fancett issued two citations against Falcon: one for failure to guard the pinch point between the carriage and frame and one for failure to properly train employees regarding hazards, including reaching between the carriage and frame while the carriage was descending.

The personal representative filed a two-count complaint, alleging products liability and negligence. According to the personal representative, Gateway had a duty to use reasonable care in the design, manufacture, and installation of its products. But, the personal representative alleged, Gateway negligently breached that duty when it designed, manufactured, and installed the subject hot-wire cutter and failed to incorporate barrier guards, presence-sensing devices, controls that require the operator’s constant presence,³ adequate emergency stop controls,

¹ A pinch point is an area where a person’s body parts could be caught in the machinery. *Hadley v Trio Tool Co*, 143 Mich App 319, 322; 372 NW2d 537 (1985).

² There is no dispute that the 1996 variance applied to all subsequently-acquired hot-wire cutters.

³ As installed, the operating controls permitted the operator to activate the carriage and then walk away from the hot-wire cutter while the carriage was in motion.

adequate devices to warn when the carriage was in motion, or other means of guarding the pinch point, in violation of various MIOSHA regulations.

Gateway moved for summary disposition under MCR 2.116(C)(10). At the hearing on the motion, the trial court rendered its decision on the record, first noting that there was no dispute that the emergency stop cable was not working properly at the time of the accident because it did not deactivate the machine when pushed toward the frame, a function that it indisputably did perform at the time of installation. The trial court then turned to consideration of whether Gateway was entitled to the rebuttable statutory presumption. The trial court explained that the crux of that determination was whether compliance with the 1996 variance was sufficient to satisfy the statutory language requiring a showing of “compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or [approval] by, or . . . compliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product.”⁴

The trial court noted that case law, though unpublished, indicated that compliance with the variance was sufficient for purposes of triggering the presumption, a conclusion further supported by the language in the variance providing that “[c]ompliance with the requirements of this variance will be considered as abatement of the requirement of the standard.” The trial court noted that it seemed a high hurdle for a plaintiff to succeed in rebutting the presumption given the language presuming a defendant was “not liable” as opposed to merely not *negligent*. But the trial court then concluded that “[t]here does not seem to be any competent evidence that the machine was not in compliance with the variance.” The trial court reasoned that after the emergency stop cable was installed properly, Falcon had the responsibility to maintain it. And the trial court opined that, had the emergency stop cable been working properly, there would have been no basis for the MIOSHA citation. The trial court clarified that “the product was misused deliberately or was allowed, through lack of maintenance, to deteriorate to the point where it didn’t function properly.” The trial court therefore concluded “that since the cable was functioning when the machine was delivered and set up, . . . the product was compliant at the time it left defendant Gateway’s possession, and . . . Gateway is entitled to the protection of the presumption.”

Turning to whether the personal representative succeeded in rebutting the presumption, the trial court acknowledged that the personal representative’s rebuttal consisted of arguing that other safety devices might have prevented the accident. But the trial court explained that, under MCL 600.2946(4), such a claim was not sufficient to rebut the presumption that “the device was compliant when delivered[.]” The trial court held, therefore, that Gateway met “the statutory requirements of entitlement to the presumption,” and that the personal representative’s argument was insufficient to rebut the presumption. Accordingly, the trial court granted Gateway’s motion for summary disposition.

⁴ MCL 600.2946(4).

II. Motion for Summary Disposition

A. Standard of Review

The personal representative argues that the trial court erred in granting Gateway summary disposition based on its conclusion that the 1996 variance was related to the pinch point injury, that Gateway complied with the variance, and that the presumption in MCL 600.2946(4) “cuts off” liability in this “species” of cases.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues, and support its position with documentary evidence.⁵ The court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁶ We review de novo a trial court’s ruling on a motion for summary disposition.⁷ We also review de novo the proper interpretation of a statute.⁸

B. Compliance With Falcon’s Specifications

Manufacturers have a duty to furnish a product that is not unreasonably dangerous when used in a manner intended, or in a manner reasonably foreseeable, by the manufacturer.⁹ “A product may be unreasonably dangerous if the manufacturer omits a safety device.”¹⁰ However, there is an exception to this rule when the product is manufactured according to the purchaser’s plans and specifications.¹¹ Yet, the plans cannot be “so obviously dangerous that they should not reasonably be followed.”¹² As explained in Prosser, Law of Torts (4th ed), § 104, p 681:

“[The] contractor is not liable if he has merely carried out carefully the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer, at least where the plans are not so obviously defective and dangerous that no reasonable man would follow them. Where this is the case, there appears to be no doubt that there will be liability.”¹³

⁵ MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁶ MCR 2.116(G)(4); *Maiden*, *supra* at 120.

⁷ *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

⁸ *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

⁹ *Huff v Ford Motor Co*, 127 Mich App 287, 293-294; 338 NW2d 387 (1983).

¹⁰ *Id.* at 294.

¹¹ *Id.*

¹² *Id.*, quoting *Spangler v Kranco, Inc*, 481 F2d 373, 375 (CA 4, 1973).

¹³ *Id.* at 294-295.

In this case, the personal representative admits that Gateway designed and manufactured hot-wire cutter #5 according to Falcon's specifications. And there is no dispute that the emergency stop cable and beacon light were functioning properly at the time of installation. Thus, the personal representative's claims are limited to an allegation that Gateway fabricated a defectively designed product.¹⁴ Therefore, the personal representative must show that Falcon's specifications were obviously dangerous and defective.¹⁵ But we conclude that the personal representative has not so shown such an obviously dangerous condition in light of application of MCL 600.2946(4).

C. MCL 600.2946(4) Rebuttable Presumption

The violations that prompted negotiation of the 1996 variance were based on two MIOSHA regulations. Design Safety Standards for Electrical Systems Standard, Part 39, Rule 1910.303(g)(2)(i), requires that "live parts of electrical equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved cabinets or other forms of approved enclosures" or by other means to reduce the risk of accidental contact with "live parts." And Plastic Molding Standard, Part 62, Rule 6235(3), states: "A multiple hot-wire cutter shall be equipped on both sides of the moving portion of the machine with a barrier that is designed to prevent an employee from reaching the hot wires."

These two provisions required installation of physical barriers that "would eliminate the operator's access to the cutting machines while they are energized . . . to protect employees from possible electrical shocks and/or burns from contact with the equipment." But, as mentioned, Falcon claimed that the barriers would eliminate the operator's necessary access to the machine while it was energized. Falcon submitted that it was "not aware of any available technology that would allow it to maintain the necessary quality of its product without the operators having" direct access to the machines while in use. Thus, rather than requiring Falcon to install the normally required physical barriers around the hot-wire cutter, MIOSHA agreed to the terms of the 1996 variance, which required the following safety features: regularly tested and inspected ground fault interruption protective devices, heat protective gloves, readily accessible emergency stops, warning lights, bilingual signs stating "Danger Hot" and "Danger High Voltage," limited access delineated by painted lines on the floor and appropriate signs, training for machine operators, and check valves of hydraulic systems "when necessary to eliminate the possibility of the carriage traveling down on the operator." The variance provided that compliance with its requirements "will be considered as abatement of the requirement of the standard."

Consideration of MIOSHA regulations in designing industrial equipment does not establish that a manufacturer assumed a duty to comply with such regulations because the MIOSHA regulations only apply to employers and employees.¹⁶ However, MIOSHA does not abrogate a manufacturer's general duty to exercise care in the design and manufacture of a

¹⁴ See *id.* at 295.

¹⁵ See *id.*

¹⁶ *Davis v Link, Inc.*, 195 Mich App 70, 73; 489 NW2d 103 (1992).

product to avoid all reasonably foreseeable injuries.¹⁷ Manufacturers may not rely on MIOSHA as a shield to justify the manufacture of products guarded with only the bare minimum of safety features.¹⁸ Nevertheless, there is a rebuttable presumption that a manufacturer is not liable if, at the time the product was delivered,

the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or was approved by, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product.¹⁹

Noncompliance with the relevant government standard does not raise a presumption of negligence.²⁰ And “[e]vidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury is not admissible.”²¹

1. Scope Of MCL 600.2946(4) Rebuttable Presumption

The personal representative argues that the trial court erred in holding that the presumption in MCL 600.2946(4) “cuts off” liability in this “species” of case. The personal representative points to the trial court’s statement, that by using the words “not liable” instead of “not negligent,” the statute reflects the Legislature’s attempt to “cut off a whole species of litigation.” The trial court’s statement, in context, was as follows:

[T]he statute was designed to cut off liability in a wide range of product cases, and it was, presumably, remedial legislation adopted by the legislature to address a perceived need to step into an area where there had been perceived abuse, that the legislature was trying to cut off a whole species of litigation where certain conditions precedent had been met.

We find no error in the court’s analysis. In *Mut Ins Co of America v Royal Appliance Mfg Co*, the United States Court Of Appeals for the Sixth Circuit explained that “[b]y its terms, the rebuttable-presumption statute appears to cover [the] four theories of [products] liability: defective design, failure to warn, breach of implied warranty of merchantability and breach of express warranty.”²² Therefore, we agree with the trial court that by specifying that a defendant

¹⁷ *Ghrist v Chrysler Corp*, 451 Mich 242, 250; 547 NW2d 272 (1996); see *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989).

¹⁸ *Ghrist*, *supra* at 250-251.

¹⁹ MCL 600.2946(4).

²⁰ *Id.*

²¹ *Id.*

²² *Mut Ins Co of America v Royal Appliance Mfg Co*, unpublished opinion of the United States Court Of Appeals for the Sixth Circuit, issued Aug. 17, 2004 (Docket No. 03-1269). Given the lack of published Michigan case law on point, we find this unpublished, federal interpretation of our state statute helpful.

may be “not liable” rather than “not negligent,” the Legislature intended to cover products liability actions premised on all four theories of liability. In other words, the Legislature intended to “cut off liability in a wide range of product cases,” including the claims raised in the present action.

2. Compliance With 1996 Variance

The personal representative contends that the sole purpose of the 1996 variance was to protect workers from contact with the “live parts” and the hot wires strung across the cutter’s carriage; it was not intended to protect workers from the pinch points. Accordingly, the personal representative argues that the trial court’s reliance on the 1996 variance was misplaced in the context of a pinch point injury. The personal representative argues that the MCL 600.2946(4) presumption does not apply because the subject governmental standard—the 1996 variance—was not relevant to the event causing the death. We, however, conclude that the terms of the 1996 variance were relevant to the subject pinch point injury.

In support of his claims, the personal representative points to the fact that Fancett’s post-accident citation was for violation of General Provisions, Part 1, Rule 34(9), which is the pinch point abatement provision and which was not mentioned in the 1996 variance. Rule 34(9) mandates that the employer “guard pinch point or otherwise protect the employee exposed to contact.” The personal representative argues that “Fancett does not assert that the 1996 variance related to this 2000 pinch point citation.” And the personal representative further argues that the trial court erroneously concluded that a properly functioning stop cable would have satisfied Rule 34(9) relating to pinch point guarding. We disagree.

Following his investigation, Fancett concluded that the emergency stop cable did not comply with the 1996 variance because the bent eye bolts allowed unacceptable slack in the cable line. The cable was to be taut, such that a minimal amount of pressure would deactivate the machine. Fancett stated at his deposition that the post-accident citation was for “no guard for pinch point between the carriage and the frame.” The following exchange by Fancett and Gateway counsel then took place:

Q. Under the standards, was a guard required?

A. Well, the guard – the standard says, under part I general provisions, guard or otherwise protect employees.

Q. All right. A guard would be an actual physical item installed on a piece of equipment to ideally prevent injury, correct?

A. *Not necessarily.* [Emphasis added.]

Fancett explained that he was actually referring to the absence of constant touch operating controls. Fancett then testified that there are numerous acceptable ways to guard the equipment, including physical guards, constant pressure controls, and sensory devices, like safety mats or light curtains. The personal representative finds significant that Fancett did not list a stop cable as an adequate pinch point guard. However, Fancett explicitly explained, “We don’t tell the employer how to guard the machine. We may give them, such as I just gave you, options that this would be acceptable methods.” Elaborating on the post-accident citation, he explained that

“[t]he stop cable was not in compliance,” noting, more specifically, the fact that there was slack in the cable. Fancett explained that the stop cable was designed for two purposes: (1) to “have safe equipment, and (2) to “protect employees from . . . catastrophic or serious injuries.”

Contrary to the personal representative’s argument, there has been no testimony that the emergency stop cable did not guard the pinch point. Fancett, the MIOSHA safety officer, made it clear that the emergency stop cable was intended to protect employees from catastrophic or serious injuries, which logically includes both hot-wire injuries and pinch point injuries. By complying with the more specific regulations applicable to protection of electrical parts, Gateway also complied with the general regulations applicable to protection of pinch points. Rule 34(9) merely requires that an employer guard a pinch point or otherwise protect employees from contact. The emergency stop cable was adequate to “otherwise protect” employees from exposure to the pinch point.

MCL 600.2946(4) provides that there is a rebuttable presumption that the manufacturer is not liable if the aspect of the product that allegedly caused the harm “was approved by, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product.” Falcon successfully petitioned for relief from regulations specifically concerned with limiting access to the moving portions of the machine. Thus, the use of the emergency stop cable and the absence of any other barrier to prevent access to the hot wires or the machine itself was approved by the Department of Labor. Accordingly, Falcon specifically requested from Gateway a product omitting those barriers, and Falcon therefore assumed the responsibility for its employees’ safety. In other words, in light of the variance, Falcon’s plans were not so obviously defective and dangerous that no reasonable man would follow them.²³

3. Rebuttal of Presumption

The personal representative contends that, assuming the presumption of non-liability applies, he has presented sufficient evidence to rebut it. The personal representative primarily argues that there were alternative safety devices available that may have prevented the accident. But we conclude that the personal representative presented no evidence that the pinch point, as guarded by the emergency stop cable, which was the aspect of the product that allegedly caused the harm, did not comply with MIOSHA regulations.²⁴

The personal representative relies on *Shanks v Home Depot, Inc.*,²⁵ in which the United States District Court for the Western District of Michigan indicated that the presumption may be

²³ See *Huff*, *supra* at 294-295.

²⁴ See *Lavin v Child Craft Industries, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued Apr. 20, 2004 (Docket No. 245386); *Michal v PDK Labs*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 18, 2003 (Docket No. 234943). Given the absence of published Michigan cases on point, we find these unpublished decisions helpful.

²⁵ *Shanks v Home Depot, Inc.*, unpublished opinion of the United States District Court for the Western District of Michigan, issued Dec. 7, 2001 (Docket No. 1:00-CV-383).

rebutted by a showing, through expert testimony, that the applicable governmental standard was inadequate to address the pertinent hazard. Thus, the personal representative argues that the 1996 variance was inadequate to address the pinch point hazard, noting again that the primary purpose of the variance was to address hot wire hazards, and that the post-accident citation was issued for violation of Rule 34(9). The personal representative asserts that the variance was, therefore, unrelated to “the aspect of the product that allegedly caused the harm[.]”²⁶ In other words, the personal representative contends that the emergency stop cable was irrelevant to compliance with Rule 34(9). Therefore, the personal representative argues, he has rebutted the presumption of non-liability.

However, the personal representative’s expert, Robert Yano, did not aver that the applicable standards—Rule 34(9) or the 1996 variance—were inadequate to guard against pinch point accidents. And at no point did Yano state that the emergency stop cable, as installed, was an *inadequate* device to provide pinch point guarding. He merely stated that the variance did not specifically address pinch point regulation, Rule 34(9). Further, by advocating for alternative devices to a physical barrier, Yano admitted that another type of safety device could “otherwise protect” an employee from the pinch point. The personal representative has failed to establish that any industry standard mandates incorporation of the various alternative safety devices that he advocates. In fact, Donald McKenzie, Production Manager for Big W Industries, Inc. (Big W), a leading competitor of Gateway, testified that Big W had never incorporated guards to prevent a person from accessing a pinch point. He explained that Big W had never incorporated any presence-sensing devices into its hot-wire cutters. And he stated the Big W had never incorporated continuous-pressure operating controls. Similarly, Gateway President Richard Schuler explained that he had never seen any presence-sensing devices, like pressure mats or photoelectric eyes, in use on a hot-wire cutter.

The personal representative also argues the significance of the fact that after the accident Falcon replaced the existent operating controls with a constant-pressure type control. While evidence of subsequent remedial measures, normally inadmissible when implemented by a defendant,²⁷ may be admissible when the measures were taken by a nonparty,²⁸ we nevertheless find it irrelevant in this case given that Gateway complied with the plans provided by Falcon at the time of manufacture.

Although the personal representative still attempts to argue noncompliance with the check valve requirement, as mentioned, his counsel conceded below that that requirement did not apply to hot-wire cutter #5’s non-hydraulic system. And we conclude that the plain language of the variance does not allow for any further interpretation.²⁹

²⁶ MCL 600.2946(4).

²⁷ MRE 407.

²⁸ *Hadley, supra* at 327-328.

²⁹ See MCL 8.3a; *Nicholas v Mich State Employees Retirement Bd*, 144 Mich App 70, 74; 372 NW2d 685 (1985) (stating that further construction is to be avoided when a statute is unambiguous).

We conclude that Gateway was entitled to a presumption of non-liability.

D. Affirmative Defenses of Alteration and Misuse

Given our conclusion that Gateway was entitled to the presumption of non-liability, we need not address the alternate defenses of alteration and misuse.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Jane E. Markey