

STATE OF MICHIGAN
COURT OF APPEALS

DAVID APSEY and SUSAN APSEY,

Plaintiffs-Appellants,

v

NORTHWEST KENT MECHANICAL CO and
HARRISON PIPING SUPPLY CO,

Defendants-Appellees.

UNPUBLISHED
December 10, 2009

No. 288011
Osceola Circuit Court
LC No. 06-010887-NO

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

In this suit to recover damages for personal injuries, plaintiffs David and Susan Apsey appeal as of right the trial court's orders dismissing their claims against defendant Northwest Kent Mechanical Co. (Northwest Kent). Because we conclude that the trial court properly granted summary disposition in favor of Northwest Kent, we affirm.

I. Basic Facts and Procedural History

A. Basic Facts

In July 2003, David Apsey¹ worked as a maintenance worker at a processing facility operated by Dean Foods-Liberty Dairy (Liberty Dairy). Liberty Dairy processes milk. As part of its operations, Liberty Dairy sterilizes its milk lines and pasteurization tanks using one of six cleaning stations referred to as Clean in Place (CIP) units. The water used in the cleaning process is heated in a heat exchanger using steam.

Some months before the accident, Liberty Dairy decided to reconstruct the steam components of the CIP units. David Sherman testified at his deposition that he was the plant engineer for Liberty Dairy and that he was responsible for the reconstruction project. Sherman said that he asked two different companies to design schematics for the system and that he

¹ Because Susan Apsey was not involved in the incident leading to this suit, we shall use "Apsey" to refer solely to David Apsey.

eventually selected the design by Michigan Steam. After selecting the design, Sherman had two suppliers bid to supply the necessary parts. Sherman testified that they initially intended to perform the reconstruction internally, but determined that they did not have sufficient time to handle the project. For that reason, Sherman hired Northwest Kent to perform the reconstruction. Sherman stated that he expected them to do work consistent with the schematic.

Sherman did not at first intend to replace the existing ball valves that controlled the steam access to the CIP units' heat exchangers. He stated that they initially intended to use the old ball valves, but that in considering the issue in consultation with Northwest Kent, he determined that the ball valves should be replaced as well. Sherman said that Northwest Kent recommended that the ball valves be replaced with Apollo brand ball valves.

Sherman testified that, after the reconstruction of the steam components, they began to have problems with the ball valves. The ball valves for three of the CIP units were not closing properly, which permitted steam to remain in the system. They knew about the problem because the temperature gauges would indicate that the line was over temperature. Sherman stated that they attempted to resolve the problem by ordering heavier actuators for the valves. Sherman also testified that the maintenance personnel were aware of the problem.

On the day of the accident, Apsey was attempting to replace a leaking gasket on a CIP unit's heat exchanger with the help of Gregory Blanchard. Apsey testified at his deposition that he had to remove a section of the water line leading to the heat exchanger of an adjacent CIP unit in order to get to the leaking gasket. Before proceeding to remove the piping, Apsey manually shut the valves to the lines that fed steam to both CIP units' heat exchangers. Apsey noted that he did not need to close the ball valves because they were always in the closed position when the system was not calling for hot water. He also tagged both CIP units out of service. Apsey then began to loosen the piping he needed to remove. Blanchard testified that the over temperature alarm was not going off and they expected the water in the line to be cold, as it usually is at the end of a cycle. However, when Apsey began to loosen the line it suddenly broke loose and sprayed them with boiling water and steam. Apsey had second and third degree burns on his torso, arms and legs. The burns on his torso extended from his sternum downward including the uppermost eight inches of his thighs.

B. Procedural History

In July 2006, plaintiffs sued Northwest Kent and Harrison Piping Supply Co. (Harrison Piping) for damages arising from the incident. In their complaint, plaintiffs alleged that Harrison Piping agreed to supply Northwest Kent with the parts for the CIP units and that Harrison Piping failed to provide a "regulator system" or "pressure release system" that "would have allowed [Apsey] to either determine the amount of pressure buildup or . . . to release the pressure before attempting to change the seal." Plaintiffs alleged that, by failing to provide the regulator or pressure relief system, Harrison Piping breached "any and all duties" that it had "to ensure that it had properly and adequately inspect[ed] the product" and did not constitute a hazardous condition.

Plaintiffs also alleged that Liberty Dairy hired Northwest Kent to supply a "safe product" and that Northwest Kent was permitted to inspect the system before "supply parts" or "making modifications" to the system. Plaintiffs alleged that Northwest Kent failed to advise anyone of

the potential for heat and pressure buildup in the system. They also alleged that Northwest Kent breached its duty to provide a safe system that “incorporated pressure relief valves” or devices that would have allowed Apsey to determine whether there was pressure buildup and by failing to provide a “lockout procedure” for the system.

In September 2006, after a stipulation between plaintiffs and defendant Harrison Piping, the trial court entered an order dismissing the claims against Harrison Piping without prejudice.

In April 2008, Northwest Kent moved for summary disposition under MCR 2.116(C)(10). Northwest Kent first argued that summary disposition was appropriate because plaintiffs could not establish that any action on Northwest Kent’s part proximately caused Apsey’s injuries. Northwest Kent noted that, although there was evidence that some of the ball valves connected to the CIP units had failed, plaintiffs could not show that the ball valve connected to the CIP unit at issue was one of those faulty valves. Further, there was evidence to suggest that the CIP unit at issue was in mid-cycle when Apsey closed the valve and locked out the system. If the CIP unit was in mid-cycle, one would expect hot water to be in the line. For these reasons, it is just as likely that Apsey’s injuries were not the result of a failed ball valve.

Northwest Kent also argued that, to the extent that plaintiffs’ complaint can be read to state a claim for failure to warn about the dangers inherent in a steam system, Northwest Kent had no duty to warn either Liberty Dairy or its employees because they were sophisticated users. Finally, Northwest Kent argued that plaintiffs failed to establish the breach of any duty owed by Northwest Kent to plaintiffs. Northwest Kent explained that the evidence showed that it reconstructed the system according to Liberty Dairy’s plans and requirements and that Liberty Dairy did not ask Northwest Kent to evaluate the design, inspect the system, or make recommendations with regard to the system. Indeed, Northwest Kent did not even work on the water line at issue and, therefore, could not have been expected to recommend a release valve for that line. In addition, any defect in the valves was hidden and could not have been known to Northwest Kent. Because plaintiffs had no evidence tending to suggest that Northwest Kent’s actions amounted to a breach of any duty that it might have owed to plaintiffs, Northwest Kent asked the trial court to dismiss plaintiffs’ suit.

In response, plaintiffs argued that Northwest Kent breached its duty to provide a valve that was suitable for its intended use when it installed the ball valve at issue. Plaintiffs also appeared to argue that Northwest Kent had a duty to remedy the defective valves and a duty to warn about the dangers inherent in the system, which it did not do.

The trial court held a hearing on Northwest Kent’s motion in July 2008. At the hearing, the trial court expressed concern that plaintiffs had not established that Northwest Kent had a duty to recommend pressure relief valves, to educate Liberty Dairy’s employees about the steam system, or to use a different type of valve. Plaintiffs disagreed with the trial court’s concerns and stated that Northwest Kent was responsible for selecting the ball valve at issue and argued that its selection of the ball valve breached its duty to recommend and use an appropriate valve. Plaintiffs also argued that, as a supplier of parts, Northwest Kent could also be liable under a products liability theory for providing the defective valve and failing to warn Liberty Dairy and its employees about the dangers inherent to the steam system. Plaintiffs also argued that Northwest Kent allowed the defective valves to remain in use even after learning about the problem.

After hearing the arguments, the trial court determined that plaintiffs' complaint should be dismissed to the extent that it was premised on ordinary negligence. The trial court noted that there was no evidence that relief valves were a standard requirement, no evidence that the ball valve actually used during the reconstruction did not meet the industry standard, and no evidence that the industry standards required some sort of pressure gauges for the water line involved in the incident. The trial court also determined that there was no evidence that Northwest Kent responded unreasonably to Liberty Dairy's inquiries to Northwest Kent after the ball valves began to show signs of not closing properly. For these reasons, the trial court dismissed plaintiffs' claims to the extent that they were premised on negligence.

The trial court also expressed some concern about whether plaintiffs actually stated a products liability claim in their complaint. Nevertheless, the trial court left open the possibility that Northwest Kent might be liable under a product liability theory for failure to warn, but decided to defer its decision with regard to that until after it reviewed that area of law.

On August 7, 2008 the trial court signed an order dismissing plaintiffs' claim to the extent that it stated a claim for failure to warn. The trial court concluded that Northwest Kent had no duty to warn under Michigan's product liability statute because Liberty Dairy and its employees were sophisticated users.

On September 5, 2008, the trial court signed an order dismissing plaintiffs' claims premised on negligence for the reasons stated at the hearing on Northwest Kent's motion.²

This appeal followed.

II. Summary Disposition

A. Standard of Review

On appeal, plaintiffs argue that the trial court erred when it granted Northwest Kent's motion for summary disposition and dismissed plaintiffs' complaint. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 378; 761 NW2d 353 (2008).

B. General Legal Principles

In the present case, Northwest Kent moved for summary disposition, in part, on the grounds that there was no evidence that Northwest Kent's acts or omissions with regard to its handling of the reconstruction project or its efforts to assist in troubleshooting the problems with the valves constituted a breach of any duty that it owed to plaintiffs. The trial court essentially agreed and determined that Northwest Kent either did not have a duty to act in a particular way

² There was apparently a mistake with regard to the notice of the trial court's orders and the parties later agreed by stipulation that the September 5, 2008 order was the final order for purposes of appeal. The trial court signed an order to that effect on September 19, 2008.

or, where there was a duty, the undisputed evidence did not permit an inference that Northwest Kent breached the duty.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A party may be entitled to summary disposition under MCR 2.116(C)(10) if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact” Once the moving party makes a properly supported motion for summary disposition, the burden “then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In order to establish a claim for ordinary negligence, “a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Duty comprehends whether a defendant has any obligation to the plaintiff to avoid negligent conduct. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). Generally, whether a defendant has a duty to the plaintiff is a question of law for the courts. *Moning v Alfonso*, 400 Mich 425, 437; 254 NW2d 759 (1977). However, duty does not encompass “the nature of the obligation: the general standard of care and the specific standard of care.” *Id.* at 437. Although the general standard of care is also a question of law for the courts, whether the defendant’s conduct fell below that standard—often referred to as the specific standard of care—is a question of fact for the jury. *Id.* at 438. Thus, once Northwest Kent challenged the factual support for plaintiffs’ claims on the grounds that there was no evidence the Northwest Kent had a duty to plaintiffs or breached any duty that it might have had, plaintiffs were obligated to show that Northwest Kent had a duty and to present evidence from which a jury could conclude that it breached the duty. *Quinto*, 451 Mich at 362.

C. Recommending and Installing the Ball Valves

Plaintiffs argue that there was evidence from which a jury could conclude that Northwest Kent knew or should have known that the ball valves at issue were prone to failure. Given this evidence, plaintiffs further contend, a reasonable jury could conclude that Northwest Kent breached its duty to recommend and install only parts that were reasonably fit for use in Liberty Dairy’s low-pressure steam system.

At his deposition, Sherman stated that Liberty Dairy commissioned a schematic for the reconstruction of the steam system and solicited bids for the supply of the parts. He also stated that, although Northwest Kent suggested replacing the old ball valves at issue, he was familiar with the brand and type of ball valve ultimately used and thought they were appropriate for the steam system. He also stated that several companies build similar ball valves. Sherman testified that the ball valves were fine for the system as long as they functioned properly and that after the defective ball valves were replaced with new ones, there were no further problems.

Martin Morris, who was a pipe fitter and foreman with Northwest Kent, stated that he installed the new steam lines for Liberty Dairy and that he installed the ball valves because that was what Sherman wanted. Morris also testified that he ordered the ball valves based on the specifications for the steam system. In addition, several other witnesses testified that the ball valves used met the specifications for Liberty Dairy’s steam system. Thus, there was evidence

that the ball valves at issue were appropriate for Liberty Dairy's steam system. There was also no evidence that Northwest Kent knew or should have known that the actual ball valves installed were defective; the undisputed evidence disclosed that defects in the ball valves were latent.

Despite the evidence tending to show that the ball valves were appropriate for the steam system at issue, plaintiffs argued before the trial court—and continue to argue on appeal—that Northwest Kent breached its duty to plaintiffs by recommending and installing the ball valves. Plaintiffs contend that Morris himself admitted at his deposition that he knew that the ball valves were not suitable for use with Liberty Dairy's steam system. During Morris' deposition, plaintiffs' trial counsel began to question Morris about how he determined which parts to use. And, after Morris stated that he always used Black Union gate valves, plaintiffs' trial counsel asked how it was that he decided to use the ball valves at issue:

A. I wouldn't have used ball valves.

Q. Did you tell anybody that?

A. That's the original equipment. That's what Dave Sherman wanted.

Q. Did you tell Dave Sherman that he shouldn't use ball valves?

A. No.

* * *

Q. So if Dave Sherman tells us that you were the one that recommended ball valves, you would disagree with that; correct?

A. Yes.

Q. Okay. Why wouldn't you have used ball valves?

A. I have never used a ball valve on steam before.

Q. Why is that?

A. I have never trusted them.

Q. Why?

A. Because they don't last.

Q. And you know they can fail?

A. Right.

This testimony is not evidence that the ball valves at issue were inappropriate for the steam system and, therefore, that Northwest Kent breached any duty it might have had to the extent that it recommended and installed ball valves. Although Morris testified that he would not

have chosen to use ball valves on the project, he also expressed this view as a personal preference: he only uses Black Union gate valves on steam. Further, while he stated that the reason he did not use gate valves was because he did not trust them and he felt that they did not last, he did not specifically state that it was the industry practice to refrain from using ball valves on steam lines. Indeed, he acknowledged that the original equipment had ball valves and stated that he selected the ball valves actually used on the basis of the specifications for the steam system. Thus, this testimony actually supports an inference that ball valves are made for use with steam systems such as the one at Liberty Dairy and that the actual valves selected were selected with the requirements of that steam system in mind. Further, Morris did not testify that he had specific knowledge that the ball valves actually used were defective or otherwise not suitable for the system.

Assuming that Northwest Kent was actually responsible for selecting the ball valves at issue and that it had a duty to select only valves that were reasonably suited to that system,³ this testimony does not permit an inference that Northwest Kent's decision to use the ball valves fell below the applicable standard of care. Moreover, because there was no other evidence from which a jury could conclude that Northwest Kent's installation of the ball valves was unreasonable—that is, that Northwest Kent breached any duty it might have had, the trial court properly dismissed plaintiffs' claims to the extent that they were premised on the selection and installation of those ball valves. *Quinto*, 451 Mich at 362; MCR 2.116(C)(10).

D. Diagnosing and Repairing the Ball Valves

Plaintiffs also argue that there was clear evidence that Northwest Kent breached its duty of care when it failed to properly diagnose and repair the ball valve problem. Specifically, plaintiffs argue that Northwest Kent's decision to upgrade the actuators rather than replacing the ball valves amounted to negligence. Plaintiffs also argue that Northwest Kent was negligent by allowing Liberty Dairy to continue using the system with the defective valves.

Although plaintiffs argue on appeal that Northwest Kent "may be liable" for failing to exercise reasonable care "in the repair and maintenance" of the steam system, plaintiffs did not present any evidence that Northwest Kent was responsible for the maintenance or repair of the ball valves. There is evidence that Northwest Kent was consulted about the problem and eventually hired to put new actuators in place, but this evidence does not permit an inference that Northwest Kent took on the responsibility for diagnosing and troubleshooting the problem.

³ Where the claimed negligence does not involve matters of common knowledge, a plaintiff may be required to establish the applicable standard of care through expert testimony. See *Zaremba Equip, Inc v Harco Nat'l Ins*, 280 Mich App 16, 44-45; 761 NW2d 151 (2008). However, we need not determine whether this case required expert testimony regarding the applicable standard of care. Whatever the standard of care applicable to the design and selection of parts for a steam system, plaintiffs needed to present some evidence from which a jury could find that Northwest Kent's decision to use ball valves was unreasonable, which they did not do. As we have already noted, the undisputed evidence was that the ball valves selected were appropriate for their intended use, if in proper working condition.

Indeed, other testimony established that Liberty Dairy primarily handled the problem and that Sherman himself was the person who recommended replacing the actuators rather than the valves. Sherman stated that he came to this conclusion based on the fact that the ball valves could still be manually closed. Under these facts, we conclude that Northwest Kent had no duty to diagnose the problem or recommend a course of action with regard to handling the problem. *Moning*, 400 Mich at 437.

Even if Northwest Kent had a duty to properly diagnose and repair the ball valves, plaintiffs failed to present any evidence that Northwest Kent's actions under the facts were unreasonable. The evidence indicated that some of the valves were not closing properly. The evidence also suggested that the problem could be with the actuators or several factors related to the operation of the CIP units—such as airflow—and not necessarily a defect in the ball valves. Further, the fact that the ball valves could be closed with a wrench suggested that the ball valves were not themselves the problem. There were also no obvious defects in the ball valves; the defects were not discovered until the valves were sent back to the manufacturer and it dismantled the valves. Finally, under the totality of the circumstances, Northwest Kent had no obligation to recommend that Liberty Dairy cease using the CIP units until the problem could be solved. The dangers associated with continuing to use the CIP units with valves that might not be closing properly were obvious. Because there was no evidence from which a reasonable jury could conclude that Northwest Kent's actions were unreasonable in this regard, summary disposition was appropriate. *Quinto*, 451 Mich at 362.

E. Products Liability

Finally, plaintiffs argue that the trial court erred when it determined that plaintiffs' claim for failure to warn under the products liability statute should be dismissed because Apsey was a sophisticated user.⁴ At the hearing on Northwest Kent's motion for summary disposition, plaintiffs briefly raised the issue that Northwest Kent might be liable under a products liability theory. In asserting this theory at the hearing, plaintiffs argued that once Northwest Kent understood that the valves were defective, it had a duty to warn Liberty Dairy and its employees about the danger. Although the trial court questioned whether plaintiffs had pleaded a products liability claim, it took the matter under advisement. In an opinion and order entered sometime later, the trial court determined that Northwest Kent could not be liable under a products liability theory for a failure to warn because Apsey was a sophisticated user and, for that reason, dismissed plaintiffs' claim to the extent that it encompassed a failure to warn claim under the products liability statute.

We agree with the trial court's concerns regarding whether plaintiffs actually pleaded a products liability claim. We conclude that plaintiffs' complaint was insufficient to put Northwest Kent on notice that it could be liable under a product liability theory. See MCR 2.111(A)(1) (stating that the allegations must be clear) and MCR 2.111(B)(1) (stating that the

⁴ We note that, on appeal, plaintiffs did not assert any error with regard to the trial court's dismissal of their claim that Northwest Kent had a duty to modify Liberty Dairy's system to include a relief or dump valve on the water line at issue or to recommend such a modification.

complaint must state the “specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.”). And Northwest Kent cannot be faulted for failing to properly plead defenses to a claim for which it had no notice. MCR 2.111(F)(2). Nevertheless, the trial court has the discretion to grant leave to amend pleadings such as plaintiffs’ complaint and Northwest Kent’s defenses, which should be freely given when justice requires. MCR 2.118(A)(2). Therefore, we shall consider whether the trial court properly concluded that plaintiffs’ claim should also be dismissed to the extent that it could be read to plead a failure to warn under products liability.

Assuming that Northwest Kent was a seller within the meaning of Michigan’s products liability statute, see MCL 600.2945 *et seq.*, it had no duty “to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.” MCL 600.2948(2). We conclude that it is clearly within the realm of common knowledge that a system designed to heat water with steam will in fact generate steam and hot water and that the steam and water heated by the steam might scald a person who opens a pipeline containing the steam or hot water. Hence, even if Northwest Kent were a seller of the steam system, it had no duty to warn about the dangers inherent in that system.⁵ *Id.* We also conclude that the danger associated with continuing to use the steam system even after discovering that the system had a malfunctioning valve would be obvious to a reasonably prudent product user—that is, it was obvious that the water line might contain hot water even when the CIP units were off because the steam valves might not be closed enough to prevent steam from heating the water lines. Accordingly, Northwest Kent did not have a duty to warn Liberty Dairy or Apsey about the dangers inherent in using a system with a defective valve. *Id.* Liberty Dairy was fully capable of evaluating the situation and determining whether and to what extent it wanted to alter the use and maintenance of the CIP units pending resolution of the problem. Therefore, even though the trial court dismissed plaintiffs’ product liability claim premised on a failure to warn for a different reason, we nevertheless conclude that the trial court did not err in dismissing plaintiffs’ claims to the extent that they were premised on a failure to warn under Michigan’s product liability statute. See *Coates v Bastian Brothers, Inc.*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

There were no errors warranting relief.

Affirmed. As the prevailing party, Northwest Kent may tax its costs. MCR 7.219(A).

/s/ Jane M. Beckering

/s/ Mark J. Cavanagh

/s/ Michael J. Kelly

⁵ As already noted, there is no evidence that Northwest Kent knew that the valves were defective at the time of the installation. Thus, MCL 600.2949a does not apply.