COURT OF APPEALS
DECISION
DATED AND RELEASED

December 10, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2559

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STEVEN JOEL SHARP, A MINOR,
BY COREY L. GORDON,
HIS GUARDIAN AD LITEM,
AND RANDOLPH SHARP AND
BETTY SHARP, INDIVIDUALLY,

PLAINTIFFS-RESPONDENTS,

V.

CASE CORPORATION,
A DELAWARE CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Case Corporation appeals from a judgment awarding damages to Joel Sharp for injuries he suffered while attempting to clear

the baler on a tractor manufactured by Case. The issues on appeal are whether the action is barred or limited by laws of the State of Oregon, whether the jury's verdict answers are inconsistent, whether the evidence is sufficient to support the jury's finding that Case breached its post-sale duty to warn, and whether the $2 million punitive damages award is supported by the evidence or is excessive. We are constrained by ***Leverence v. United States Fidelity & Guaranty,*** 158 Wis.2d 64, 462 N.W.2d 218 (Ct. App. 1990), to hold that Sharp's action is not barred by the Oregon statute of repose. We reject the claims that the verdict is improper. We affirm the judgment.

Sharp was injured when he was using a Case tractor with an attached hay baler. The baler was controlled by a power take-off (PTO) lever located in the cab of the tractor. The baler clogged and Sharp dismounted to clear the baler. Sharp believed that the PTO was in the disengaged position. As Sharp cleared the baler, the rollers began to turn and his arms were pulled into the baler. Both of Sharp's arms were amputated near the elbow.

Case is a Wisconsin corporation and the tractor involved in the accident was manufactured in 1972. Sharp is a resident of the State of Oregon and was injured while working on an Oregon farm in 1992. The tractor had been purchased by Sharp's Oregon employer in 1979.

Case sought summary judgment dismissing Sharp's action on the ground that it was untimely filed under Oregon law. Oregon's statute of repose provides that an injury which occurs more than eight years after a product was first purchased for use may not be the basis for a product liability claim. *See* OR. REV. STATS. § 30.905(1) (1996). The trial court concluded that ***Leverence,*** 158 Wis.2d

at 93, 462 N.W.2d at 231, holds that a statute of repose of a foreign jurisdiction is not "borrowed" in a Wisconsin case. Summary judgment was denied.[1]

Case argues that whether the Oregon statute of repose applies is a question of substantive law which must be resolved by a common-law choice of law analysis. The choice-influencing factors in a choice of law analysis are not to be applied when determining the timeliness of an action. That question is governed not by common law but by statute—Wisconsin's borrowing statute, § 893.07, STATS. *See* ***Guertin v. Harbour Assur. Co.***, 141 Wis.2d 622, 631-32, 415 N.W.2d 831, 834-35 (1987). Two conflict of law issues exist at the start of any action involving a foreign cause of action: (1) the initial conflict determination of timeliness of the action; and (2) the selection of law to resolve substantive issues. *See* ***Thimm v. Automatic Sprinkler Corp.***, 148 Wis.2d 332, 339, 434 N.W.2d 842, 845 (Ct. App. 1988). "The timeliness question is resolved entirely by sec. 893.07." ***Thimm***, 148 Wis.2d at 339, 434 N.W.2d at 845.

Turning to § 893.07, STATS.,[2] we must follow the interpretation of that provision explained in ***Leverence***. Borrowing an analysis from the Seventh Circuit Federal Court of Appeals in ***Beard v. J.I. Case Co.***, 823 F.2d 1095, 1097

---

[1] A petition under RULE 809.50, STATS., for leave to appeal the trial court's order denying summary judgment was denied by this court on August 31, 1995.

[2] Section 893.07, STATS., provides:

> **(1)** If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in this state.
>
> **(2)** If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies to that action has not expired, but the applicable Wisconsin period of limitation has expired, no action may be maintained in this state.

n.1 (7th Cir. 1987), the court in ***Leverence*** seized upon the difference between a period of limitation and a period of repose in determining whether a statute of repose in the State of Minnesota applied to the action brought in Wisconsin. The court held:

> We conclude that the plain language of sec. 893.07, Stats., refers to a period of limitation, not a period of repose, and, even if, as the insurers suggest, the distinction between the two terms is sufficiently blurred as to result in an ambiguity, we agree with the rationale expressed in ***Beard***: The Wisconsin Supreme Court has chosen a route of statutory construction that avoids potential constitutional impediments.[3]

Leverence, 158 Wis.2d at 93, 462 N.W.2d at 231.

Leverence holds that a foreign statute of repose is not borrowed in a Wisconsin action. Case argues that ***Leverence*** only holds that a statute of repose is not statutorily required to be "borrowed" and that it leaves the door open for application of the statute of repose under a conflict of law analysis. We reject Case's suggestion that ***Leverence*** is of no precedential value because of its "unexplained failure to address whether a foreign statute of repose may be applied under general conflicts principles." ***Leverence*** relies on ***Beard***. ***Beard*** explicitly rejected the notion that a conflicts analysis lurks behind the borrowing statute. *See* ***Beard***, 823 F.2d at 1099. Moreover, that the borrowing statute is conclusive is consistent with ***Thimm***, 148 Wis.2d at 339, 434 N.W.2d at 845, cited above.

[3] The constitutional impediment that ***Leverence v. United States Fidelity & Guaranty,*** 158 Wis.2d 64, 93, 462 N.W.2d 218, 231 (Ct. App. 1990), refers to is a possible violation of WIS. CONST., art. I, § 9, which guarantees a remedy for wrongs. The court sought to avoid a construction which bars the right to sue before it arises. *See* ***Leverence***, 158 Wis.2d at 93, 462 N.W.2d at 231.

Case presents compelling arguments that ***Leverence*** and ***Beard*** pay unjustified homage to the remedy for wrongs provision of the Wisconsin Constitution, that the decisions contradict the policy behind § 893.07, STATS., to discourage forum shopping, and that the decisions elevate form over substance. We may not, however, overrule, modify or withdraw language from a published opinion of the court of appeals. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Our only recourse is to adhere to that decision and express disfavor with the published decision. *See* ***id.*** at 190, 560 N.W.2d at 256. Thus, it remains for the supreme court to resolve whether the borrowing statute is eviscerated with respect to foreign statutes of repose.

Case argues that even if the Oregon statute of repose does not apply to bar Sharp's action, Sharp's noneconomic damages must be capped at $500,000 and his parents' cause of action for the loss of society and companionship dismissed under Oregon law.[4] A court must use a two-part test to determine which state's law should be applied in an action where a choice-of-law question arises. The court must first "consider whether the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state's law constitutes officious intermeddling." ***American Standard Ins. Co. v. Cleveland***, 124 Wis.2d 258, 263, 369 N.W.2d 168, 171 (Ct. App. 1985). Next, "if no officious intermeddling would result, then [the court must] apply the choice-influencing considerations adopted in ***Heath v. Zellmer***, 35 Wis.2d 578, 596, 151 N.W.2d 664, 672 (1967)." ***American Standard***, 124 Wis.2d at 263, 369 N.W.2d at 171. Those factors are: "(1) predictability of results; (2) maintenance of

[4] The jury awarded Sharp $6 million for past and future pain, suffering, disability and disfigurement. A $33,000 award was made to Sharp's parents for loss of society and companionship.

interstate order; (3) simplification of the judicial task; (4) advancement of the forum state's governmental interest; [and] (5) application of the better rule of law." ***Id.*** at 263, 369 N.W.2d at 171-72.

We summarily adopt the trial court's application of the presumption that the forum law applies and its analysis of the choice-influencing factors as embodied in the trial court's decision and order on motions after verdict.[5] *See* WIS. CT. APP. IOP VI(5)(a) (1994) (court of appeals may adopt trial court opinion). The law of the forum presumptively applies. *See* ***Hunker v. Royal Indem. Co.***, 57 Wis.2d 588, 599, 204 N.W.2d 897, 902-03 (1973). As ***American Standard***, 124 Wis.2d at 265, 369 N.W.2d at 172, summarizes: "The primary factor favoring the choice of Wisconsin's law relates to the advancement of this state's governmental interests. The policy of Wisconsin's tort law is to provide full compensation to persons who are injured by negligent conduct and to deter such conduct by imposing the full monetary consequences on the tortfeasor." If Oregon law applied, these policies would not be fulfilled.

Case argues that under the specific interrogatories on the jury verdict and their related instructions, the jury's verdict is fatally inconsistent. An inconsistent verdict is one containing "jury answers which are logically repugnant to one another." ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 228, 270 N.W.2d 205, 210 (1978). Here, the jury found that the tractor was not in "such a defective condition so as to be unreasonably dangerous to a user," but found that Case was negligent in its design of or warnings accompanying the tractor and that Case

[5] We do not separately address whether Oregon's cap on noneconomic damages should be applied because the cap was struck down as a violation of the Oregon state constitution. *See* ***Lakin v. Senco Prods., Inc.***, 925 P.2d 107, 122-23 (Or. Ct. App. 1996) (review allowed June 17, 1997).

breached its duty to issue post-sale warnings. A verdict is not inconsistent merely because the jury exonerates a manufacturer on the strict product liability claim but finds that there was a lack of ordinary care in the design of the equipment. *See* ***Fischer v. Cleveland Punch and Shear Works Co.***, 91 Wis.2d 85, 98-99, 280 N.W.2d 280, 286 (1979) (quoting with approval ***Greiten v. La Dow***, 70 Wis.2d 589, 603-04, 235 N.W.2d 677, 685-86 (1975) (Heffernan, J., concurring)).

Case acknowledges that ***Greiten*** and its progeny permit recovery for negligence even when a product is not unreasonably dangerous.[6] It argues that under the particular jury questions and specific instructions used in this case, the jury's answers are inconsistent. We are not persuaded by Case's attempt to render the verdict fatally inconsistent by its selective redaction of the pattern jury instructions and speculation on the basis for the jury's answers. The liability theories are not inconsistent and neither is the verdict.

Case mounts two challenges to the jury's verdict that Case breached a post-sale duty to warn. It first claims that as a matter of law, Case had no post-sale duty to warn of the potential hazard—self-starts by the PTO—which caused Sharp's injuries.[7] The determination of a manufacturer's duty to give a post-sale warning depends on "the nature of the industry, warnings given, the intended life of the machine, safety improvements, the number of units sold and reasonable marketing practices, combined with the consumer expectations inherent therein."

---

[6] Case reserves a challenge to the holding in ***Greiten v. La Dow***, 70 Wis.2d 589, 603-04, 235 N.W.2d 677, 685-86 (1975), for potential consideration by the supreme court.

[7] Case raises but does not specifically argue that whether a post-sale duty to warn exists is a question of law for the trial court, not the jury. Rather than address this issue, we look to whether the evidence is sufficient to sustain the jury's findings that a duty existed and was breached.

Kozlowski v. John E. Smith's Sons Co., 87 Wis.2d 882, 901, 275 N.W.2d 915, 924 (1979).

Case argues that because it sold "87,000 plus" tractors, it is absolved of any duty to give a post-sale warning. Under ***Kozlowski***, the size of the market is only one factor in determining the manufacturer's duty. ***Kozlowski*** held that it would be unreasonable for manufacturers of mass produced and marketed household goods, i.e., fans, snowblowers or lawn mowers, to have a duty to annually warn of safety hazards. *See* ***id.*** at 901, 275 N.W.2d at 923-24. Certainly the Case tractor cannot be equated with a household good. The tractor is a sizable piece of equipment with a long expectancy of usage. There was evidence of the means available to Case to reach tractor purchasers. The absence of a limited market does not dictate the result that Case had no post-sale duty to warn.

Case claims that it did not have sufficient notice of the defect on which it should have issued a post-sale warning.[8] There was evidence that after the sale of the tractor Sharp used, a safety improvement was made to the feature of the tractor which caused Sharp's injury. Also, a Case representative, the "block man," received complaints from a farmer in 1973. Case received other information about "self-starts" which constitute sufficient notice to trigger a post-sale duty to warn.

Case's second challenge to the post-sale duty to warn finding is that it is based on improper evidence. It argues that the trial court erred in admitting

[8] Case attempts to resurrect its claim that the jury's rejection of strict liability is inconsistent with a finding that Case breached a post-sale duty to warn. We reject this contention.

evidence from other users of the tractor about "self-start" incidents. Case suggests that the other incidents were too dissimilar to be admissible.

The admission of other incidents is within the discretion of the trial court. *See* ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 76, 443 N.W.2d 50, 61 (Ct. App. 1989). "The evidence may only be admitted where the accidents occurred under conditions and circumstances similar to those of the accident which injured the plaintiff." ***Id.*** We review whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. *See* ***id.***

The factual difference Case cites as rendering the other evidence inadmissible is that the PTO lever was in a different position than Sharp's PTO at the time of his accident.[9] The incidents were similar in that one would not have expected a "self-start" with the PTO in a nonoperable position. Thus, the difference was not such that the evidence was completely inadmissible. The difference in position was a matter for the jury to consider in weighing the evidence.

Moreover, the record reflects that the trial court considered the circumstances of the additional incidents Sharp sought to put into evidence and excluded several other similar occurrences, one of which involved gruesome injuries. That the trial court excluded other evidence reflects a true exercise of discretion. In doing so, the trial court excluded the highly prejudicial evidence in favor of some evidence which was relevant and probative but perhaps not

[9] The PTO was in the neutral position at the time of Sharp's accident. The other incidents involved "self-starts" when the PTO was in the off, or fully disengaged, position.

completely identical in circumstances. We conclude that the trial court properly exercised its discretion.

The final issue is whether the award of $2 million as punitive damages is sustainable on the record. Punitive damages are proper if the plaintiff proves by clear and convincing evidence that the manufacturer has acted in reckless disregard of the plaintiff's rights. *See* ***Brown v. Maxey***, 124 Wis.2d 426, 433, 369 N.W.2d 677, 681 (1985). The award must be upheld if there is any evidence from which the jury could have reasonably concluded that the plaintiff met the burden of proof. *See* ***id.*** In determining whether there was sufficient evidence to support the jury's award of punitive damages, we are required to search for evidence to sustain the verdict and draw those reasonable inferences that were presumably drawn by the jury in reaching its verdict. *See* ***Weiss v. United Fire & Cas. Co.,*** 197 Wis.2d 365, 398, 541 N.W.2d 753, 765 (1995).

Reckless disregard is defined as "'[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them.'" ***Walter v. Cessna Aircraft Co.***, 121 Wis.2d 221, 226, 358 N.W.2d 816, 819 (Ct. App. 1984) (quoted source omitted; emphasis omitted). There must be proof that the manufacturer had specific knowledge of a product's defect and its potential for harm. *See* ***id.*** at 227, 358 N.W.2d at 820.

We reject Case's final attempt to vitiate the entire verdict because the jury, in rejecting the strict liability claim, concluded that there was no product defect at the time of the original sale in 1972. In its decision and order on motions after verdict, the trial court analyzed the evidence in support of the jury's award of punitive damages. We summarily adopt that analysis and conclude that the award is supported by sufficient evidence. *See* WIS. CT. APP. IOP VI(5)(a). While the

sufficiency of the proof may be a close question, we cannot substitute our view of the evidence for that of the jury and we must accept the reasonable inferences that the jury drew from the evidence. *See* ***Weiss***, 197 Wis.2d at 398, 541 N.W.2d at 765.

Case also argues that the punitive damages award is excessive and therefore violates due process. "A jury's punitive damage award will not be disturbed unless the verdict is so clearly excessive as to indicate passion and prejudice." ***Jacque v. Steenberg Homes, Inc.***, 209 Wis.2d 605, 626, 563 N.W.2d 154, 163 (1997). The three factors to consider when determining whether a punitive damages award violates due process are: "(1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases." ***Id.*** at 627, 563 N.W.2d at 164. The wealth of the wrongdoer is also an appropriate consideration. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 157, 193, 557 N.W.2d 67, 82 (1996).

We look at the factors in inverse order. The third factor has no relevance to our analysis because Case is not subjected to other civil or criminal penalties for its conduct. The award of compensatory damages was over $6 million, reduced by Sharp's thirty-five percent contributory negligence. The $2 million punitive damages award is less than the compensatory damages award and reasonable in light of the actual damage caused by Case's conduct. Additionally, Case's financial wealth was established. The award is not shocking in light of that wealth. The reprehensibility factor is satisfied by the evidence the jury chose to believe in awarding punitive damages. Not only was Case aware of potential

problems with "self-starts," but it chose to attribute those problems to maintenance and did not issue warnings about the potential dangers. Alternative designs were available and at little cost. Warnings could have been disseminated by methods Case had employed before. In summary, the punitive damages award was not excessive. The amount reflected a proper measurement of punishment and deterrence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.