

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-1695

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

RICHARD ALVA,

PLAINTIFF-APPELLANT,

SENTRY INSURANCE COMPANY,

PLAINTIFF,

v.

**HERB FITZGERALD COMPANY, INC.,
HERITAGE MUTUAL INSURANCE COMPANY,
FULTON BOILER WORKS, INC. AND
AMERICAN MANUFACTURERS MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County:
JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Richard Alva appeals from summary judgments entered in favor of Herb Fitzgerald Company, Inc, Heritage Mutual Insurance Company, Fulton Boiler Works, Inc., and American Manufacturers Mutual Insurance Company. Alva claims the trial court erred in dismissing his products liability action against the defendants because: (1) the modification of the valve handle by Alva's employer did not constitute a substantial change in the condition of the machine and was not linked to the accident; and (2) there was evidence to support his negligence claim. Because the modification performed was a substantial and material change in the product linked to the accident, the trial court did not err in dismissing the strict liability claim; and because Alva's expert failed to causally connect any of the remaining defects in the product to the injury, we affirm.

I. BACKGROUND

On July 2, 1992, Alva was severely burned while working at Westwood Dry Cleaners. The injury occurred when Alva was attempting to perform a blowdown procedure on a boiler, which was manufactured by Fulton Boiler Works and installed by Herb Fitzgerald. Alva had never performed the blowdown procedure before as his employer, Won Kim, usually performed this task. Kim, however, was in a hurry to make deliveries on the day the accident occurred and had instructed Alva to perform the procedure.

Alva testified by deposition as to how the accident occurred. He pulled the blue-handled valve open, counted to seven and, at that point, he was burned. It is undisputed that, sometime prior to the accident, Kim had replaced the manufacturer's slow-opening wheel valve with the quick-opening, blue-handled valve.

Alva retained an expert witness, John DeRosia, who attested that the boiler was defective. DeRosia rendered a report, indicating the following defects: (1) the type of blowdown valve used invited an oversupply of steam; (2) the boiler room drains and vents were defective in that they allowed the introduction into the confined space of the boiler room a discharge of dangerously high temperature and steam; (3) the blowdown separator vent piping was reduced in size above its connection to the separator, creating back pressure, which would contribute to the escape of steam; and (4) the boiler pressure gauge should have been located in a position where the operator of the boiler could see it.

During his deposition, DeRosia testified that the quick-opening valve was the primary factor in this accident. He did not testify as to a causal connection between the accident and any of the other defective parts.

Fulton Boiler Works and Herb Fitzgerald filed motions for summary judgment, alleging that Kim had substantially changed the blowdown separator by replacing the valve after the separator had left the control of the manufacturer and after the product was installed. The motions alleged that replacing the slow-opening wheel valve with the quick-opening valve changed the character and design of the product, thereby materially altering the product. The motions allege that, as a result, Alva's strict liability theory fails. The trial court agreed and dismissed Alva's strict liability claim.

During the summary judgment hearing, the trial court also ruled that Alva's negligence claim should be dismissed because there was no evidence supporting the causation element. Judgments were entered. Alva now appeals.

II. DISCUSSION

This case comes to us after a grant of summary judgment. The standards governing our review of summary judgments have been repeated often and, therefore, we need not do so here. *See Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis.2d 281, 289, 507 N.W.2d 136, 139 (Ct. App. 1993). Our review is *de novo*. *See id.*

A. *Strict Liability*.

Alva claims the trial court should not have dismissed his strict liability claim because the replacement of the valve was not a substantial change and was not linked to the accident. We reject this claim.

“When the condition of a product at the time of an accident is substantially and materially different from its condition at the time it left the control of the manufacturer or seller, the plaintiff will be unable to prove its *prima facie* case and the strict products liability claim must be dismissed.” *Glassey v. Continental Ins. Co.*, 176 Wis.2d 587, 600, 500 N.W.2d 295, 301 (1993). “A substantial and material change is a change in the design, function or character of the product linked to the accident.” *Id.*

It is undisputed that sometime after installation of the boiler, Alva’s employer replaced the manufacturer’s slow-opening wheel valve with a quick-opening, blue-handled valve. It is also clear from the record that the modification of this valve was linked to the accident. Alva testified that he opened the valve seven seconds before he was burned. Alva’s expert testified that the quick-opening valve was the primary factor in the accident and that a slow-opening

valve would have allowed throttling of the blowdown flow and, therefore, prevented an oversupply of steam to the blowdown separator.

Based on these facts, we conclude that replacement of the slow-opening valve with the quick-opening valve constitutes a substantial and material modification of the product and that the modification was linked to the accident. Accordingly, the trial court did not err in dismissing Alva's strict liability claim. Neither the manufacturer nor the installer can be held responsible when the employer's substantial modifications to the product caused the injury.¹

B. Negligence Claim.

Alva also claims that there is evidence to support his negligence claim. We disagree.

Specifically, he contends that because DeRosia found that the boiler had three defects in addition to the valve, he could maintain his negligence claim against the defendants. The trial court dismissed the negligence claims because, although DeRosia asserted three additional defective parts to the boiler, there was no evidence that these defects were causally linked to the accident. After our review, we reach the same conclusion.

Alva first points to DeRosia's conclusion that the boiler room's drains and vents were defective. However, DeRosia's own deposition testimony disputes this argument. He testified that if Alva had turned on the cold water, as he was instructed, and slowly opened the valve, as he was also instructed, the

¹ Our conclusion is not altered by Alva's claim, made for the first time on appeal, that he never actually opened the valve. Such claim is refuted by the record.

accident would not have occurred. Therefore, any defect in the drains and vents had nothing to do with this accident. DeRosia also admitted that the system was able to function successfully as vented, without any personal injury on all occasions, except when Alva operated the system.

Alva next claims that DeRosia theorized that the vent piping was defective. However, he testified in his deposition that the cause of the accident was Alva's action in opening the quick-valve all the way, not the size of the piping.

Finally, DeRosia's third alternative allegation of a defective part was the location of the pressure gauge; that is, it was not located where the operator of the boiler could see it when turning the valve. However, the record demonstrates that the location of the pressure gauge was not a causal factor because Alva had no idea he was supposed to check the gauge before opening the valve. Alva was not aware of the significance of the pressure and, therefore, the gauge's location cannot be a basis for liability. There is nothing in the record supporting a causal connection between the foregoing alleged defects and the accident.

Moreover, there is no evidence as to improper installation of the boiler by Herb Fitzgerald. The record demonstrates that the installation satisfied code requirements and passed state inspection. Alva fails to submit any evidence to the contrary. Therefore, the trial court did not err in dismissing Alva's negligence claim.

By the Court.—Judgments affirmed.

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

