

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2896

Cir. Ct. No. 2009CV526

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WAUSAU-STETTIN MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

DEERE AND COMPANY AND CENTRAL WISCONSIN COOPERATIVE,

DEFENDANTS-RESPONDENTS,

**PHILLIPS & TEMRO INDUSTRIES, ABC INSURANCE COMPANY, DEF
INSURANCE COMPANY AND GHI INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY E. GRAU, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Wausau-Stettin Mutual Insurance Company (Wausau) appeals a summary judgment dismissing its products liability claims of negligence and strict liability. We affirm.

BACKGROUND

¶2 The following facts are undisputed. Wausau's insured suffered a fire to a pole barn containing tractors and farm implements. Wausau retained Peter Dahl and Matthew Dubbin to serve as expert witnesses regarding the origin and cause of the fire. At a joint inspection, Dahl and Dubbin determined that the fire originated at a particular John Deere tractor.¹ They concluded the fire was caused by a failure of the power cord on a factory-installed engine coolant heater on the tractor.

¶3 The engine heater essentially consists of an electric power cord affixed to a heater unit, which attaches to the engine. The point where the electric cord meets the heater unit is protected by a strain relief section. The power cord failed within the strain relief section. According to Dubbin, because of broken strands of wire, "the heat produced by the electrical current flowing to the engine heater increased until sufficient heat was produced to ignite nearby combustibles."

¶4 The engine heater was not defective when it left the control of its original manufacturer. Deere and Company designed and manufactured the suspect tractor, which incorporated the engine heater as part of a cold weather package. Deere and Central Wisconsin Cooperative (collectively, Deere) placed the tractor in the stream of commerce. Wausau sued, alleging strict products

¹ Dahl and Dubbin were the only persons deposed by any party in this case.

liability and negligence. Wausau's theory was that Deere failed to properly secure the engine heater's power cord to the tractor, resulting in a defective, unreasonably dangerous tractor. The circuit court granted Deere's summary judgment motion, dismissing all claims. Wausau now appeals.

DISCUSSION

¶5 Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08.² Wausau's strict liability claim required it to prove that the alleged defect was a cause of its injuries or damages. See *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55 (1967). Wausau's negligence claim similarly required proof that Deere's conduct was a cause of the injury. See *Morden v. Continental AG*, 2000 WI 51, ¶45, 235 Wis. 2d 325, 611 N.W.2d 659.

¶6 Wausau's case rests on its claim that Deere failed to secure the engine heater's power cord in accordance with the heater manufacturer's instructions. The heater manufacturer's instruction manual stated: “Route cord to location for easy connection to properly grounded outlet. Fasten cord where necessary to prevent contact with hot engine surfaces and moving parts. Allow slack for engine vibration.” Deere did not fasten the heater's power cord.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶7 Based on the heater manual's instruction, Dubbin attributed the power cord's damage to Deere's failure to secure the cord. However, Dubbin had no opinion as to how or where the line cord should have been secured. He did not know what force or what mechanism caused damage to occur within the strain relief, but he believed it was caused by repeated manipulation during use. However, Dubbin conceded the power cord was not damaged by plugging and unplugging it in the intended manner, as opposed to possibly driving the tractor away with the heater still plugged in or by unplugging the cord by yanking it with only one hand.

¶8 Additionally, Dubbin did not assess or know the stresses applied to the line cord, what amount of force would be necessary to break a strand of conductor, or whether it would be possible to break strands by simply plugging and unplugging the line cord. Dubbin never evaluated the strength of any portion of the power cord or compared its strength at the strain relief portion to the remainder of the cord. He explained, "I haven't looked at any of that." Dubbin agreed that if the power cord had instead been secured in some fashion, he had "no idea whether that cord would have suffered the same or even more damage." Dubbin acknowledged that even if Deere had secured the power cord, the fire might have still occurred because the stresses would have been applied to another portion of the cord.

¶9 The only concrete opinion that Dubbin could give on the matter was that the heater's power cord would not have failed *in the same location* if it had been secured. He stated, "[M]y opinion is where the damaged conductors are. ... [H]ad the cord been secured as they instructed, I don't think that same damage would occur at the location it was found." Dubbin further explained:

[Dubbin:] So if the cord had been mounted as per the instruction, there wouldn't be the force being put on the strain relief.

Q. Would the force be applied elsewhere?

A. Yes.

Q. Do you know whether the damage to the cord would have occurred so as to cause a fire, in your opinion, if the cord would have been fastened in some fashion?

A. Not where this occurred. Not where the evidence indicates that the fire occurred.

Q. It may have occurred, but it would have occurred in a different location?

A. It's possible.

¶10 We agree with the circuit court's assessment of Dubbin's opinions: "His testimony leaves [Wausau] unable to prove causation with respect to both of its theories, strict liability and negligence." If accepted, Dubbin's opinions merely establish that Deere's failure to fasten the heater's power cord was a substantial factor in the *location* of the damage, and fire's origin, on the cord. Dubbin's opinions cannot, however, establish that the unfastened condition was a factor that contributed to the cord's failure generally. To prevail on its claims, Wausau would have to demonstrate that the strain relief section of the cord was somehow more susceptible to damage than the remainder of the cord. Under the state of the evidence presented at summary judgment, this would require unrestrained speculation.

¶11 Further, the heater manufacturer's instruction manual provides no support for Wausau's claims. The manual instructed only that Deere should "[f]asten cord where necessary to prevent contact with hot engine surfaces and moving parts." Wausau's theory was not that the cord was damaged by either hot

surfaces or moving parts on the tractor. Moreover, the instruction suggests that fastening the cord may not even be necessary. Nothing in the instruction—the basis of Dubbin’s conclusion—permits a reasonable inference that failing to secure the heater’s power cord would cause broken strands of conductor wire through operator use.

By the Court.—Judgment affirmed.

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

