COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-0405

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

MATTHEW DAMM,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
AND
DEAN HEALTH PLAN, INC.,

DEFENDANTS-RESPONDENTS,

DEERE & COMPANY,

DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT,

V.

DAMM FARMS, INC.,

THIRD-PARTY DEFENDANT-
RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL L. LAROCQUE, Judge. *Affirmed*.

Before Eich, Roggensack and Deininger, JJ.

DEININGER, J. Matthew Damm appeals a judgment dismissing his complaint against Deere & Company and others, in which he sought damages for personal injuries he sustained in a farm accident involving a grinder-mixer Deere had manufactured. The judgment was entered following a jury verdict which found Damm more negligent than either Deere or Damm Farms, Inc., his employer at the time of the accident. Damm claims the trial court erred in refusing to admit evidence of a design change to the Deere grinder-mixer, and in refusing to grant his motion for a new trial. We conclude that the trial court did not erroneously exercise its discretion in excluding evidence of the design change. Thus, we affirm the judgment entered on the jury's verdict.

BACKGROUND

Damm's tort claims were tried to a jury over five days. We summarize only the facts relevant to the evidentiary issue before us on appeal.

In the course of his employment with Damm Farms, Damm was called upon to operate a John Deere Model 400 Grinder-Mixer, which is used to grind feed corn. Corn enters the device via a loading auger, passes through a grinder and enters a mixing tank. Ground corn then drops through a discharge door into an unguarded unloading auger at the rear of the machine. The flow of corn leaving the grinder is regulated by adjusting the discharge door, which is a piece of sheet metal that can be raised or lowered to control the size of the opening through which the ground corn passes on its way to the unloading auger. The door

is designed to be operated with a handle or lever at its base which permits adjustment of the door opening while standing on the ground, but the handle was missing from the grinder on which Damm was injured. The unloading auger is about four and one-half feet off the ground, and the door is almost seven feet off the ground when fully open. A ladder is permanently affixed to the grinder to permit access to a hatch at the top of the machine. On the grinder involved in Damm's accident, the ladder was situated adjacent to the discharge door and unloading auger.

The grinder in question was manufactured by Deere in approximately 1968. It was purchased second-hand in 1982 by Damm's father, who did not receive an operator's or parts manual with the machine. No one connected with Damm Farms obtained an operator's manual prior to the accident. When placed in operation by Damm Farms, the grinder had no handle or lever to operate the discharge door, and farm personnel assumed the door was to be adjusted by manually grabbing a curled lip on the top of the sheet metal door. This was accomplished, when necessary, by stepping up on the ladder adjacent to the door and unloading auger.

In November 1993, Damm was operating the grinder. He testified that he climbed the ladder to adjust the position of the discharge door. When he reached over to raise the door, he slipped and his left leg went into the operating auger below.[1] Damm's leg was crushed and his foot severed. He sued Deere under both strict liability and negligence theories, claiming that the grinder was

[1] Deere maintained at trial that the accident happened after Damm placed his left foot on the auger trough to reach the door, from which position it slipped into the auger trough. The discrepancy is not material to the issue on appeal.

defective and that Deere negligently designed and manufactured it. He also named American Family Mutual Insurance Company, claiming that its insured, Damm Farms, Inc., was negligent in maintaining the grinder and in failing to properly train Damm in its operation. Deer impleaded Damm Farms as a third-party defendant, alleging that Damm or Damm Farms was contributorily negligent.

Prior to trial, the court granted Deere's motion in limine to exclude evidence of a design change, whereby, among other modifications to the grinders Deere manufactured after June 1969, the ladder was relocated to the front of the unit. The court concluded that § 904.07, STATS., relating to "subsequent remedial measures," was not applicable to the evidentiary dispute in this case because the design change at issue occurred prior to this, or apparently any other, accident involving the ladder on the mixer in question. The court also determined that, while evidence of the 1969 design change was possibly relevant to issues in the case, its relevance was outweighed by the potential for confusion of the jury, unfair prejudice, and waste of time, the last because Deere would then necessarily introduce "considerable evidence" as to why the ladder was moved in 1969.

Later, during the trial, Deere introduced a copy of an edition of the operator's manual that it claimed Damm Farms would have received had it requested a manual from the manufacturer after its purchase of the grinder in 1982. It did so in order to show that the manual included a picture depicting operation of the discharge door with the lever which was missing from Damm Farms' grinder. Damm then sought to introduce other portions of the manual which showed that the ladder on the grinder was now on its front, arguing that this was necessary in order to defend against Deere's allegations of contributory

negligence.[2] The trial court denied Damm's request to show other portions of the manual to the jury, concluding again that, under § 904.03, STATS., "whatever value discussing [other portions of the manual] has … [i]s outweighed, in my opinion, by the confusion that that's going to create for all the reasons I excluded any reference to the change in the ladder in the first place."

Finally, a Deere design engineer, in response to questions from Damm's counsel, stated that it would be "feasible" to relocate the ladder from the rear to the front of the grinder. He also said, however, that the presence of the rapidly rotating power take-off from the tractor, especially if its shield was damaged or removed, would raise safety concerns in moving the ladder to the front. Damm then moved the court to permit him to introduce evidence that the ladder had in fact been moved to the front of grinders manufactured after June 1969. The court initially agreed that the engineer's responses had opened the door to the previously excluded testimony, but later opted to give a curative instruction instead. Upon the jury's return, the court informed jurors as follows:

> Members of the jury, Deere and Company acknowledges that it has previously stipulated that it was feasible, that is, functional, practical and safe, if the machine is properly maintained, to move the ladder to the front of the 400 Deere grinder-mixer. Any inference to the contrary from the testimony of [Deere's design engineer] is stricken and should be disregarded.

[2] Deere's contributory negligence theory was that Damm or his employer should have acquired an operator's manual, and after reviewing it, would have concluded that the grinder was missing the discharge door lever, which should then have been obtained and installed to ensure safe operation of the discharge door. Damm claimed that the portions of the manual showing the new location for the ladder should have been admitted to show that an equally plausible conclusion from the manual would have been that Deere had re-designed the grinder by both moving the ladder and installing a discharge door lever, and thus, the door on the Damm Farms grinder was to have been operated in the fashion Damm had done—by climbing the ladder and manually gripping the curled lip on the sheet metal door.

The jury found that the grinder, as manufactured, was not "unreasonably dangerous to a prospective user," but that Deere was causally negligent in its design and manufacture; that Damm Farms, Inc., was causally negligent; and that Matthew Damm was also causally negligent. The jury apportioned causal negligence as follows: Deere, 13%; Damm Farms, 27%; Damm, 60%.[3] Damm moved for a new trial on the grounds that there were errors in the trial and in the interest of justice. The trial court denied the motion and entered judgment dismissing Damm's complaint and awarding Deere and American Family costs. Damm appeals.[4]

ANALYSIS

In reviewing the present evidentiary issue, the question is not whether this court would have permitted the evidence, but whether the trial court appropriately exercised its discretion in excluding it. *See* ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). A trial court's decision to admit or exclude evidence is "a discretionary determination that will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990) (citation omitted).

[3] Given this apportionment, Damm was not entitled to recover any part of the $740,000 in damages awarded by the jury for his injuries from either defendant. *See* § 895.045(1), STATS. ("Contributory negligence does not bar recovery … if that negligence was not greater than the negligence of the person against whom recovery is sought.").

[4] Deere & Company filed a respondent's brief in this appeal, as did American Family Mutual Insurance Company on behalf of itself and its insured, Damm Farms, Inc. We will refer to respondents collectively as "Deere" inasmuch as the issue appealed deals primarily with the trial court's granting of Deere's motion in limine. (The remaining party, Dean Health Plan, is a subrogated insurer which, while named as a defendant-respondent in the caption, did not take an active part in the trial and has not filed a brief in this appeal.)

Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than without the evidence. *See* § 904.01, STATS. Even relevant evidence, however, is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Section 904.03, STATS.

We first dispose of an issue which finds the parties to this appeal rather curiously positioned. Section 904.07, STATS., renders inadmissible evidence of "subsequent remedial measures" (the rule's title) to prove "negligence or culpable conduct." The rule provides as follows:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11.

The trial court concluded that "event," as used in the rule, refers to the injury-producing accident or occurrence at issue in the litigation—in this case, the 1993 farm accident in which Damm suffered injuries to his left leg. Thus, the court reasoned that, since the design change in which the grinder ladder was moved to the front of the machine occurred in 1969, it did not occur "after the event," and § 904.07, STATS., was thus not applicable.

Even though the section states a rule requiring the exclusion of certain evidence, Damm, the proponent of the evidence currently at issue, argues that the trial court erred in concluding that § 904.07, STATS., does not apply on the

present facts. He would have us conclude that "event" means the date of manufacture of the grinder, thereby rendering the 1969 design change a "subsequent remedial measure." Once we conclude the rule applies, however, Damm contends that we must also conclude that exceptions to the rule also apply. According to Damm, evidence of the 1969 design change was admissible both on his defective product/strict liability claim, *cf.* ***D.L. v. Huebner***, 110 Wis.2d 581, 609, 329 N.W.2d 890, 903 (1983), and because he wished to use the evidence for the purpose of impeaching the testimony of Deere's design engineer, who allegedly placed the "feasibility" of moving the ladder in dispute.

In response, Deere, the party who moved the trial court to exclude the design change evidence, argues that the trial court correctly concluded that the rule excluding evidence of subsequent remedial measures does *not* apply to its 1969 design change. Deere contends that "event" means the harm or injury at issue in the litigation.[5]

We conclude that it is not necessary for us to resolve the disputed meaning of "event" in § 904.07, STATS., in order to decide this appeal. Regardless of whether the section does not apply on the present facts, as the trial court concluded and Deere argues, or whether it does apply but an exception governs, as

[5] It appears that the strange positioning of the parties on the issue of whether § 904.07, STATS., applies on the present facts may stem from a misunderstanding of the purpose of the rule. Damm argues that "the design change, a subsequent remedial measure[,] should have been *admitted under § 904.07 exclusions*, namely feasibility and impeachment" (emphasis added). Deere, in turn, employs the following heading in its argument on the issue: "Evidence of the 1969 Cost Reduction Design Change Was Properly Excluded Because It Is *Not* a Subsequent Remedial Measure" (emphasis added). Section 904.07 does not require the admission of any evidence; if an exception to the rule applies to certain evidence, this only means that exclusion of the evidence is not required under the rule. By the same token, the rule only requires the exclusion of evidence of "subsequent remedial measures" for certain purposes, and it says nothing about the exclusion or admissibility of evidence relating to acts which are deemed not to be subsequent remedial measures.

Damm contends, we arrive at the same place—the admissibility of the design change evidence ultimately depends on its relevance and whether its probative value is outweighed by one or more of the factors identified in § 904.03, STATS. *See* ***Huebner***, 110 Wis.2d at 615, 329 N.W.2d at 905; ***Huss v. Yale Materials Handling Corp.***, 196 Wis.2d 515, 528, 538 N.W.2d 630, 634 (Ct. App. 1995).

Thus, our inquiry begins with a consideration of whether evidence that, in 1969, Deere changed the design of its grinders by relocating the ladder from the back of the machines to the front, has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. Damm argues that the design change evidence is relevant to the issue of whether the grinder in question was unreasonably dangerous, because it establishes the feasibility of putting the ladder on the front of the grinder, away from the unguarded discharge auger in which Damm injured his leg. Deere responds that the evidence is not relevant because the record shows that the design change was done for reasons of cost-reduction, and that any safety enhancement was incidental at best. Deere further notes that it conceded the feasibility of moving the ladder to the front, a concession it claims was not diminished by the testimony of its design engineer.

The trial court concluded that the design change evidence was relevant, but only marginally so. We agree with the trial court and Damm that the proffered evidence was relevant to a disputed issue of material fact. Wisconsin courts apply a broad definition of relevance. *See* ***State v. Richardson***, 210 Wis.2d 694, 563 N.W.2d 899 (1997) (holding that if proffered evidence has "some tendency, however small" to make a consequential fact more or less probable, it is relevant). The fact that Deere conceded the feasibility of relocating the ladder

does not necessarily render the evidence Damm proffered irrelevant to all disputed issues of material fact. *Cf.* ***State v. Wallerman***, 203 Wis.2d 158, 167, 552 N.W.2d 128, 132 (Ct. App. 1996) (noting that even when an element of a crime is conceded, "other acts" evidence may be relevant to other elements). Even though Deere may have had several reasons for making the design change in 1969 which included the relocation of the ladder,[6] the fact that the ladder was moved away from the uncovered discharge auger has "some tendency" to make an inference that the 1968-model grinder was unreasonably dangerous more probable than it would be absent evidence of the design change.

Thus, we turn now to the trial court's decision to exclude evidence of the 1969 design change, notwithstanding its relevance. The trial court granted Deere's motion to exclude the design change evidence after it concluded that its probative value was outweighed by the potential for confusion of the jury, unfair prejudice, and waste of time. In denying Damm's motion for a new trial grounded on the allegedly erroneous exclusion of the evidence, the court described its rationale for granting the motion in limine as follows:

> [I]n my view, at least, [Damm]'s claims in this case were that [Deere] was liable for the unguarded auger, for inadequate warnings, for defective design of the cone auger door, and for a defective design of the ladder location. I don't think that--at least, it was my considered opinion--that none of these contentions required proof one way or

[6] In a document dated February 12, 1969, entitled "Redesign 400 Grinder Mixer for Cost Reduction," Deere design engineers stated the following with respect to the rationale for the 1969 design change: "In addition to the changes made for cost reduction, the following design changes were made to improve safety, function, or strength: 1) The ladder was moved from the rear to the front of the machine …." The document does not specify, however, which of the listed modifications were safety-related, as opposed to improvements in "function or strength." A former Deere design engineer who had been involved in the 1969 design change testified in a deposition that the design change was primarily for cost reduction, and that the safety aspects of moving the ladder stemmed primarily from lowering the height of its first rung and the ability of a tractor operator to see someone riding on the ladder while towing the grinder.

> the other of the fact that the ladder was relocated. As [Damm's counsel] points out, that does not mean that relocation of the ladder is totally irrelevant, but there certainly is some balancing that has to go on there, especially when you consider some of the other evidence at trial which disclosed that it was no accident that preceded the relocation. More importantly, [Deere]'s reasons for relocating the ladder, while they may have been described in terms of safety, as [Damm] has pointed out, those considerations were not related to the unguarded auger. The reasons that were in the record, such as they are, are limited because we're talking about events some 30 years before the accident here, those reasons were never challenged in the evidence. [Deere] did admit to feasibility to move the ladder…. [T]here was other evidence, and other manufacturers put the ladder in front and similar machines….
>
> …I think the extraneous consideration that the jury would have been asked to consider, had the court allowed evidence of the relocation of the ladder, was the potential inference that the manufacturer moved the ladder for purposes other than that which the only evidence in the record suggested otherwise. In other words … the inference that Deere & Company was actually aware that there was a hazard with the auger when they moved the ladder. I don't think there was any evidence to support that inference in the record. I think that the confusion in the jury's mind, if there were to be confusion had that evidence been admitted, would be that the jury would have heard, [Damm's counsel]'s part, he indicated the evidence would be very brief, and it wouldn't have been any waste of time, but I don't know what kind of evidence that Deere & Company would have had then to introduce and the jury I think could be confused by the significance of the move of the ladder, unfairly confused. And so I made the ruling that I did.

While Deere's concession regarding the feasibility of relocating the ladder did not necessarily render evidence of the design change irrelevant to all matters in dispute, the concession did serve to diminish the probative value of the proffered evidence. In ***State v. Sullivan***, 216 Wis.2d 768, 786, 576 N.W.2d 30, 38 (1998), the supreme court noted that an assessment of the "probative value" of proffered evidence is in reality a further consideration of one aspect of its relevance, that is, the tendency of the evidence to make a consequential fact more or less probable than it would be without the evidence. If a fact is conceded, the

tendency of proffered evidence to render that fact "more probable" is virtually eliminated. We conclude, therefore, that the trial court did not erroneously exercise its discretion when it assessed the probative value of the design change evidence principally with respect to its tendency to make Damm's claim that the grinder in question was unreasonably dangerous more probable than without the evidence. The trial court applied the correct law by weighing the considerations set forth in § 904.03, STATS. Our review of the record satisfies us that the court considered the relevant facts, and did so in a rational way, reaching a reasonable conclusion which a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Thus, we conclude that the trial court did not erroneously exercise its discretion in granting the motion to exclude evidence regarding the 1969 design change. What remains is for us to consider whether anything occurred at trial which would require the evidence to be admitted. Damm points to two happenings: Deere's introduction of the operator's manual for the grinder, and the responses of Deere's design engineer to questions regarding the feasibility of relocating the ladder.

Deere introduced the edition of the manual which it established would have been received had someone requested a manual from Deere after Damm Farms acquired the grinder in 1982. Deere's purpose in introducing the manual was to establish negligence on the part of Damm Farms, or Damm himself, for not requesting and reviewing the operating manual. The manual includes a photograph of a man operating the discharge door by means of its lever. The inference Deere urged upon the jury is that, had someone from Damm Farms acquired the manual and reviewed it, he or she would have concluded that the

grinder was missing an important part—the operating lever—thereby prompting the acquisition and installation of the missing lever.

The manual introduced by Deere also contains several pictures which show the repositioned ladder on the post-1969 grinder. Damm was not permitted to call the jury's attention to those portions of the manual. Thus, the jury was able to see the page of the manual Deere wished it to, but not the pages which Damm wanted to point out. Damm acknowledges that Deere's purpose in introducing the manual was to support its cross- and counter-claims of negligence. Thus, Damm argues that his purpose in wanting the additional pages shown to the jury was not to demonstrate the unreasonable dangerousness of the grinder or the feasibility of relocating the ladder, but to show that an equally reasonable conclusion by someone reviewing the manual would be that Deere had both moved the ladder and added the discharge door lever in newer models of the grinder. It would then follow that on older grinders, such as the one acquired by Damm Farms, operators were expected to climb the adjacent ladder in order to operate the discharge door, as Damm had done when he was injured.

The trial court ruled as follows on Deere's objection to Damm's request to allow the jury to view the pages of the manual in question:

> I'm going to sustain the objection … and … I believe that to the extent that you are attempting to defend the contributory negligence charge against [Damm], whatever value discussing page 13 has, insofar as 904.03 is concerned, it's outweighed, in my opinion, by the confusion that that's going to create for all the reasons I excluded any reference to the change in the ladder in the first place.

We again conclude that the trial court did not erroneously exercise its discretion. The main point being made by Deere was that an operator's manual would have been available to Damm Farms and its employees and that it was

negligent of those who acquired, operated and maintained the second-hand grinder not to obtain one. What a person may or may not have concluded by reviewing various portions of the manual is speculative at best, and of marginal relevance since it was undisputed that neither Damm nor anyone else from Damm Farms had acquired or reviewed the operator's manual prior to Damm's accident. Thus, we see no error in the trial court's exclusion of the pages proffered by Damm in order to preserve the substance of its prior ruling on the design change evidence.

The second event that Damm contends should have prompted the trial court to reconsider its ruling was the following interchange during the cross-examination of Deere's design engineer by Damm's counsel:

> Q The ladder could have been moved to somewhere else on that grinder-mixer?
>
> A Yes.
>
> Q That would have been feasible?
>
> A Yes.
>
> Q That would have been functional?
>
> A We'd have to look at all the considerations, but yes, we can make a functional ladder in most cases.
>
> ….
>
> Q …[F]rom your perspective, as an engineer, trying to figure out why that ladder was placed at the rear of that mixer-grinder, you can't think of a reason, can you?
>
> A Well, actually I could. As a safety engineer, I can think of reasons why this ladder is in a good position there as opposed to other positions on the machine.

The witness, in response to further questions, went on to explain that the ladder could not have been placed on the sides of the grinder because of the presence of other equipment features, and that a placement in the front would be adjacent to the power take-off, which would present hazards if its shield were removed, as

sometimes occurs on older machinery. He summarized by saying that there were risks in either location, and that "[Damm's counsel] has suggested [the front] is a safer location. Those things have to be thought through to determine whether it really is a safer location."

Damm claims that the foregoing responses "opened the door" for Damm to impeach the expert with evidence of the 1969 design change, which included relocation of the ladder to the front of the grinder. Damm also maintains that the testimony repudiated, or at least undermined, Deere's prior concession that the relocation was feasible. Although the trial court initially agreed and was inclined to permit Damm to use the previously excluded evidence for impeachment purposes, the court reconsidered and instead instructed the jury as quoted in the Background section of this opinion. We again conclude that this was not an erroneous exercise of discretion. In commenting on its decision during post-verdict proceedings, the trial court stated:

> [Deere] did admit to feasibility to move the ladder…. [T]here was other evidence, and other manufacturers put the ladder in front and similar machines. The fact is that the Trial Court's ruling in limine that there was no issue about feasibility, and at the time the issue arose at trial, as [Deere] has pointed out, it was due to [Damm's counsel]'s skillful, nearly successful attempt to avoid the Court's ruling…. And unfortunately the witness I think walked into it. And to some degree, and on reflection, I don't think that was to the degree I was concerned about at trial, but to some degree [Deere's engineer] never made remarks to the jury that conceivably could be construed to mean there was a problem with feasibility. On reflection, after looking at the transcript, I don't think it was nearly as direct or problematic as I thought at the time.

We concur in the trial court's final assessment of the testimony. Deere's witness never denied the feasibility of moving the ladder to the front, but only pointed out that there would be competing safety considerations in doing so. We emphasize that it was not Deere who elicited the testimony that Damm claims

to have "opened the door" to his use of the excluded evidence for impeachment purposes. The responses were to questions from Damm's counsel, which counsel never challenged as not being responsive to the questions he put to the witness. Moreover, those responses were consistent with one of the court's reasons for excluding the design change evidence in the first instance: that there was no indication in the record that the ladder was moved due to safety concerns regarding its adjacency to the unloading auger. The court did not erroneously exercise its discretion by again refusing to allow the design change evidence, and instead electing to inform the jurors of Deere's concession that it was feasible to move the ladder to the front of the grinder and instructing them to disregard any inferences to the contrary from the engineer's testimony.

CONCLUSION

For the reasons discussed above, we conclude that the trial court did not erroneously exercise its discretion in excluding the evidence regarding the 1969 design change. Accordingly, we affirm the judgment dismissing Damm's complaint.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.