COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1581

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

THOMAS STRASSER AND SANDRA R. STRASSER,

PLAINTIFFS-APPELLANTS,

LIBERTY MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

TRANSTECH MOBILE FLEET SERVICE, INC. AND HERITAGE MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

SCHUDSON, J. Thomas Strasser and Sandra R. Strasser[1] appeal from the trial court order granting summary judgment and dismissing their complaint against Transtech Mobile Fleet Service, Inc., and its insurer, Heritage Mutual Insurance Company (collectively, "Transtech"). Strasser argues that the trial court erred in concluding that: (1) Transtech was the "reconditioner" of the ladder from which he fell and that, therefore, under ***Rolph v. EBI Cos.***, 159 Wis.2d 518, 464 N.W.2d 667 (1991), Transtech violated no duty to warn; and (2) in order to defeat Transtech's motion for summary judgment, he was required to present an expert on the safety standard applicable to ladder step treads. Although our reasoning differs somewhat from that of the trial court, we conclude that summary judgment was appropriate and, therefore, we affirm.

The evidence submitted for the trial court's consideration of summary judgment consisted primarily of the depositions of Thomas Strasser and Darryl Frick. Although a careful reading of their depositions reveals some areas of doubt and dispute, the facts essential to resolution of this appeal are clear.

Strasser was employed as a truck driver/crane operator by Recycled Fibers of Wisconsin. In that capacity he traveled to grocery stores and other sites to load and deliver bales of cardboard for recycling. For that purpose, he operated a crane, sitting on a seat that was about thirteen feet above the ground. To get to and from the seat, he climbed ladders attached to the sides of the crane. On June 7, 1994, while on a job to pick up cardboard bales at a Piggly Wiggly store, he was climbing down one of the ladders when he slipped and fell, injuring himself.

[1] Although both Thomas Strasser and his wife, Sandra R. Strasser, are appellants in this case, this opinion will simply refer to "Strasser." As will be clear from the context, sometimes "Strasser" will refer to the appellants and other times "Strasser" will refer to Thomas, whose fall from a ladder led to the litigation at issue.

Approximately two weeks before the accident, Darryl Frick, co-owner of Transtech, a mobile fleet maintenance and repair business that serviced Recycled Fibers' machines on a regular basis, fabricated and installed new ladders on the crane Strasser was using when he fell.

Strasser sued Transtech, claiming that it "negligently designed, manufactured, constructed, assembled and installed the … ladder [from which he fell]." Strasser's complaint alleged that Transtech "failed to provide … reasonable warning of defects and hazards which [Transtech] knew, or should have known, were present in the ladder." The summary judgment submissions and arguments clarified that Strasser's theory, as summarized by his brief on appeal, was that "[t]he failure of Transtech to install safety treads caused [him] to slip off the ladder and injure his knee."[2] Consequently, some of the deposition testimony of both Strasser and Frick focused on whether Strasser specifically ordered safety treads.

At his deposition, Strasser testified, in part:

> A: The day [Frick] built the ladder I told him to put stair tread on.
>
> Q: And what did he say?
>
> A: I don't have any.
>
> Q: And what did you do at that point?
>
> A: There is nothing much I could do.
>
> Q: Well, did you tell him to get some?

[2] At various points in the depositions, reference is made to "stair treads," "extruded metal," "extended metal," or other words indicating a "rough" surface providing "a firm grip on the rung." The distinctions make no difference in the issues on appeal. Further, although Frick maintained that the ladders he fabricated and installed did indeed provide such a rough surface over part of the length of the rungs, our resolution of this appeal does not depend on whether the rungs had a rough surface.

> A: Yes.
>
> Q: And he said he couldn't get any?
>
> A: No, he didn't say that.
>
> Q: What did he say at that point?
>
> A: He said he didn't know where to get it.
>
> Q: Okay. Did you know where to get it?
>
> A: Yes.
>
> Q: Where was that?
>
> A: The power house at Recycled Fibers.
>
> Q: And did you make any–Did you tell Darryl he could get some of this material at Recycled Fibers?
>
> A: No, I didn't.
>
> Q: Did you tell Darryl that the stairs would be acceptable as he had made them?
>
> A: No.
>
> Q: What did you do then?
>
> A: I just had to use it.
>
> Q: So your position is that you told Darryl that the stairs were acceptable or not acceptable or you just took it and said nothing, or what?
>
> A: I told him he had to get stair tread or non-slip and put it on the rungs.

At his deposition, Strasser also testified that during the two weeks preceding his June 7 fall, he slipped on the ladder two times and, as a result, one of Recyled Fibers' employees told him she was going to call Frick "and tell him to make it right." Strasser testified that after his second slip he asked the employee, "Does [Frick] want somebody to get killed before he puts that stuff on [the ladders]," and that "[s]he said they would call [Frick] again and tell him to get that on there." When asked, however, whether he "ever talk[ed] to Darryl about doing something with respect to these rungs," Strasser answered, "I don't remember."

At his deposition, Frick testified that Strasser "did say that he wanted me to put safety steps on [the ladders], but that was after we had discussed and finalized what we were going to do." He elaborated:

> Q: When did that conversation take place though when he said he wanted safety steps put on?
>
> A: From what I recall he was walking with me and he looked at … the other crane, from what I recall, and said, "It would be really nice to have steps like they put on the newer crane."
>
> And I said at that point, "I don't know if I can get that type of material in the time you want this done." And he said, "Well, I'd like to get the steps on there, let me know."[3]

The time line was short. Frick testified that he believed Strasser "was dropping [the crane] off on Friday … and picking it up Sunday night." Frick explained:

> A: I told [Strasser] I would attempt to [obtain the "stuff" for the "safety step"]. And if I may add, at the time he picked [the crane] up I showed them that I did not have the safety step and this is what we used and was that suitable. And they said yes and took the crane as it was.
>
> ….
>
> Q: And after you finished the job did you consider the job complete?
>
> A: Yes.
>
> Q: Did you consider that you were not any longer required to get the safety tread?
>
> A: Yes. Because I asked [Strasser] if that was suitable the way it was and he said yes.

[3] Frick also testified:

> What they had asked as far as the tread, they asked for an expanded metal step if they could. It was more of a request. They said, "if you can get this on there, that's what we'd like." And I explained to them at that point that I normally didn't have a supplier for that type of material, but I would try to in the time frame to get that material.

Frick also testified that after installation of the new ladders, "[n]obody requested … me to do anything further with them steps, that they were happy with what was on there."

Thus, while some facts are disputed, certain critical facts are undisputed: (1) despite knowing that "the power house at Recycled Fibers" had the very tread material that Frick said he might not be able to get in time, Strasser did not provide the material or even tell Frick about it; (2) Strasser accepted the crane, knowing the condition of the newly-fabricated and installed ladders and the extent to which the ladders satisfied his request for treads; (3) Strasser used the crane, and repeatedly slipped on the ladders for two weeks before he fell and injured himself; and (4) Strasser never rejected the ladders or returned them for installation of treads.

"Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and 'to avoid trials where there is nothing to try.'" ***Caulfield v. Caulfield***, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994) (quoted source omitted). Our review of a trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Here, although our reasoning does not exactly correspond to that of the trial court, we conclude that summary judgment was appropriate.

The trial court granted Transtech's motion for summary judgment, concluding: (1) whether in terms of "the basic negligence claim or the claim as a reconditioner, you need expert testimony to verify that the requested ladder treads would have prevented this accident or that the failure to install the ladder tread was a cause of the accident"; and (2) Transtech, as a reconditioner of the ladders,

owed no duty to bring the ladders or crane into compliance with any specific safety standards. The court explained:

> I think ***Rolph*** requires that there be testimony of the current safety standards or current safety rules, what they are, how they were or were not met in this case, how the failure to meet them caused the accident in this case and caused the injuries in this case; so I think under ***Rolph***, Transtech did not sell the ladders. They didn't know of any specific industry or government safety standards. They did not represent that they could bring the trailer in compliance with any standards, and there is no evidence of a request for those standards.
>
> There was a request that safety steps or … ladder treads be installed on the rungs, but there is no evidence that these precautions would comply with any specific industry, government or other standards.
>
> The fact that installing the treads would have ["]made the ladder safe,["] does not impose an additional duty on Transtech.

Strasser effectively challenges these two trial court conclusions. First, as he points out, in all likelihood, an average juror understands that ladder rungs with treads are safer than those without them. Therefore, because the presence or absence of ladder rung treads does not present complex issues beyond the comprehension of average jurors, expert testimony would not be necessary. *See, e.g.*, ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis.2d 147, 151, 172 N.W.2d 427, 429 (1969) ("[I]f the court or jury is able to draw its own conclusions without the assistance of an expert opinion, the admission of such testimony is not only unnecessary but improper."); ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 379, 541 N.W.2d 753, 757 (1995) ("Before expert testimony is required the circuit court must find that the matter involved is '…not within the realm of the ordinary experience of mankind….'"). Second, although, in a sense, Transtech may have been a "reconditioner" of the crane by virtue of its work on the ladders, it was not

a "reconditioner" of the ladders; rather, it built and installed new ones. Thus, the applicability of ***Rolph*** is dubious.[4]

Ultimately, however, we need not resolve the parties' debates over the need for expert testimony or whether Transtech was a reconditioner. Regardless of whether the trial court correctly granted summary judgment on these two bases, it offered a third reason which, we conclude, leads directly to the dispositive rationale. The trial court stated: "I think there is also a basis [for summary judgment] under the open and obvious. There is no duty to warn in a negligence action where the danger is open and obvious."

"When a product fails to operate as warranted or as a consumer expected, the proper avenue for relief is a breach of warranty claim. 'Or, if the customer prefers, it can reject the product or revoke its acceptance and sue for breach of contract.'" ***State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.***, ___ Wis.2d ___, ___, 592 N.W.2d 201, 216 (1999) (citation and quoted source omitted). Strasser offers no authority to support the proposition that he could order new ladders on a very short time-line, learn that his contractor could not obtain ladder treads within that time, withhold information that his company had access to the needed tread material, accept the ladders despite observing that they did not have the treads, use the ladders and slip from them, complain about the ladders but fail to return them, and then claim that the contractor was negligent for failing to install the treads.

[4] In ***Rolph v. EBI Cos.***, 159 Wis.2d 518, 464 N.W.2d 667 (1991), the supreme court addressed two issues: (1) "whether a reconditioner may be strictly liable for unreasonably dangerous defects in the machines it reconditions"; and (2) "whether a reconditioner has a duty under ordinary principles of negligence to ensure that the machines it reconditions are in compliance with safety standards when it returns them to their owners." ***Id.*** at 524, 464 N.W.2d at 668-69 (footnote omitted).

Indeed, the authorities reject such an apparently inequitable scenario. In the vernacular, a buyer "can't have it both ways." At least as early as 1908, our supreme court emphasized that buyers may not gain "any recovery of damages" when they have attempted to "both rescind and affirm in the same breath." ***James Music Co. v. Bridge***, 134 Wis. 510, 513, 114 N.W. 1108, 1109 (1908).[5] *See* § 402.606(1)(a), STATS. ("Acceptance of goods occurs when the buyer: [a]fter a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that the buyer will take or retain them in spite of their nonconformity.").

Strasser obviously knew exactly what he was receiving and whether it provided the safety he desired. Nothing could have been more open and obvious, thus erasing any possible duty Transtech otherwise might have had to warn of any danger. Strasser accepted the crane with the new ladders. He "can't have it both ways." Thus, according to the undisputed facts, Strasser cannot

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[5] *See also* ***Kelsey v. J.W. Ringrose Net Co.***, 152 Wis. 499, 501, 140 N.W. 66, 66 (1913):

> Where [a machine built for a special purpose] is sold without express warranty the purchaser has a reasonable time within which to test it for the purpose of determining whether or not it complies with the warranty which the law implies. If it does not, he has an election of remedies. He may affirm the contract and recover the legitimate damages occasioned by the breach of the warranty or he may rescind the contract and tender back the article and recover the purchase price if it has been paid.

support the allegation in his complaint that Transtech "failed to provide … reasonable warning of defects and hazards … in the ladder." If any such defects and hazards were present, Strasser knew of them; Transtech had no duty to warn.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 98-1581(C)

CURLEY, J *(concurring)*. I concur with the result reached by the majority, but I write separately because I disagree with the analysis of the majority opinion. First, I would note that the majority opinion merges together Strasser's causes of action. The opinion mentions Strasser's allegation that Transtech, as a manufacturer, had a duty to warn. I think it important to the analysis to separate the two causes of action. Strasser sued Transtech, claiming both that Transtech's agents "negligently designed, manufactured, constructed, assembled and installed" the ladders, and that the company "negligently failed to provide … [him] with reasonable warnings of defects and hazards which they knew, or should have known, were present in the ladder …."

Unlike the majority's decision, I would adopt the trial court's determination that ***Rolph*** was dispositive. ***Rolph*** held that "a reconditioner who does not manufacture, distribute, or sell the products it reconditions is not liable in strict products liability for the defects in the machines it reconditions." ***Rolph***, 159 Wis.2d at 524, 464 N.W.2d at 669. Frick's role in replacing the ladders on the crane is similar to that of the machine repairman in ***Rolph*** who disassembled, cleaned, inspected parts for wear and replaced certain parts. The only significant difference in the facts here and the ***Rolph*** scenario is the size of the products fixed by the repairmen—the "bending roll machine" in ***Rolph***, as opposed to Recycled Fibers' crane ladders. The majority opinion claims that Frick was a builder of ladders and, presumably, as a "builder," Frick became a "manufacturer." However, neither Frick nor his employer routinely manufactured, distributed, or sold ladders. The company only repaired/reconstructed the ladders because Strasser's employer hired Transtech to maintain its equipment. Had Transtech

been manufacturing ladders that were sold principally to consumers, it would have been susceptible to a strict liability claim, but Transtech was not placing ladders into the stream of commerce; rather, it was rebuilding and reconstructing an essential component of the crane—ladders which were permanently attached to the crane permitting access to the cab. *See* ***id.*** At 528-32, 464 N.W.2d at 670-72. As a consequence, in my opinion, the holding in ***Rolph*** shields Transtech from the strict liability claim. Moreover, I believe the majority opinion does not contain a proper analysis of a manufacturer's duties under a strict liability claim. Had Transtech been subject to suit under strict liability law, the ultimate question to be answered was whether the ladders were defective and unreasonably dangerous products. *See* ***Dippel v. Sciano***, 37 Wis.2d 443, 460, 155 N.W.2d 55, 63 (1967) (adopting the rule of strict liability as set forth in § 402A RESTATEMENT (SECOND) TORTS). The test is not, as the opinion suggests, whether the ladders with safety treads were safer than the replacement ladders.

The next question to be decided is whether Strasser's ordinary negligence claim survived a summary judgment motion. Again, I find ***Rolph*** instructive. ***Rolph*** held that the repairman was absolved of liability for not correcting a design defect or warning of a defect in the original product. *See* ***id.*** at 537, 464 N.W.2d at 674 (placing obligation on manufacturer to warn owner of defects). Applying the teachings of ***Rolph***, I conclude that Transtech cannot be held responsible for failing to correct a design defect in the original ladders if, indeed, there was one, and Transtech cannot be held responsible for failing to warn of the danger of climbing the ladders when they are wet.

With regard to this cause of action, the majority opinion, having rejected the trial court's rationale for granting the summary judgment motion on the ordinary negligence claim, launches into a discussion of breach of warranty

law to justify its affirmance of the trial court's ruling. However, a discussion of breach of warranty law is irrelevant and offers no support to the conclusion reached by the trial court because Strasser never pled a breach of warranty cause of action, nor could he, since he had no privity of contract with Transtech.

Ultimately, the majority opinion determines that Transtech prevails because the defects in the ladders were open and obvious. The majority opinion scolds Strasser, stating that Strasser "can't have it both ways," concluding that when Strasser accepted the ladders without safety treads, Transtech was relieved of its duty to warn him of a defect or danger.

I believe, under the facts presented here, that to declare the plaintiff more negligent than the defendant because the ladders were an open and obvious defect is improper. True, Strasser may have been negligent for using the repaired ladders, knowing that the ladders were slippery when they were wet, and it is certainly possible that his negligence might have outweighed that of Transtech; but this is a comparative negligence issue and, as such, this question of fact must be resolved by a jury. In an ordinary negligence case, the application of the open and obvious rule that determines whether a plaintiff's negligence is greater than the defendant's negligence is a jury issue. *See* ***Kloes v. Eau Claire Cavalier***, 170 Wis.2d 77, 86-88, 487 N.W.2d 77, 81-82 (Ct. App. 1992) (holding that the open and obvious danger rule requires "a weighing of negligence" which constitutes a jury question); ***Huss v. Yale Materials***, 196 Wis.2d 515, 534-35, 538 N.W.2d 630, 637 (Ct. App. 1995) ("The apportionment of negligence is ordinarily a question for the jury."); *see also* ***Westlund v. Werner Co.***, 971 F. Supp. 1277 (Wis. 1997) (analyzing the open and obvious danger doctrine in Wisconsin and determining that in ordinary negligence cases, "plaintiff's confrontation of an open and obvious danger is merely an element to be considered by the jury in apportioning

negligence under Wisconsin's comparative negligence law, Wis. Stat. § 895.045.").

Thus, while I agree with the outcome of the majority's opinion, I disagree with its analysis.