

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2012

Diane M. Fremgen
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. 2011AP1079

Cir. Ct. No. 2008CV2780

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CNH AMERICA, LLC,

PLAINTIFF-APPELLANT,

V.

AMETEK, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Reversed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 GUNDRUM, J. CNH America, LLC petitioned this court for leave to appeal from an order granting partial summary judgment to Ametek, Inc. The trial court held that CNH would not be allowed to recover consequential damages related to its use of solenoid starter switches it purchased from Ametek and

installed in CNH tractors from February 2006 through October 2007. We granted CNH's petition.¹ Because a genuine issue of fact exists regarding whether Ametek caused the consequential damages at issue in this case, we reverse.

BACKGROUND

¶2 CNH manufactures and sells agricultural equipment, including farm tractors. Ametek manufactures and distributes electronic instruments and electromechanical devices. Ametek supplied CNH and its predecessors with electrical relays known as solenoids since the 1970s. From 2001 through 2007, CNH purchased the Ametek SBC-4201C solenoid starter switch, which CNH installed in tractors it sold. The solenoid provides power for operating the tractors.

¶3 In February 2006, CNH began production of its B-6 line of tractors, part of its Magnum/CCH series tractor line. It installed the SBC-4201C solenoid in the B-6 tractors from inception through October 2007. Prior to beginning production of the B-6 tractors in February 2006, CNH was aware some solenoids had failed in other CNH tractors and during testing,² but viewed the failures as limited in number and primarily cold-weather related. After it began installing the solenoid in its B-6 tractors, CNH became aware of an increased number of solenoid failures and began considering the possibility of a replacement, while working with Ametek to address the cold-weather-related problems. A May 2007 analysis, based on warranty information, showed an "abnormal increase" in solenoid failures beginning in 2005. In June 2008, CNH commenced a worldwide

¹ We granted leave to appeal the order pursuant to WIS. STAT. RULE 809.50(3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Solenoid failures disable a tractor and could occur while the tractor was being operated.

recall campaign to replace the SBC-4201C solenoid with a substitute part in B-6 tractors built between February 2006 and October 2007.

¶4 CNH sued Ametek for breach of warranties and related damages, including costs of the recall. Ametek denied culpability and moved for summary judgment, contending that (1) CNH did not give notice of a breach as required by Section 2-607 of the Uniform Commercial Code and (2) even if notice were given, CNH, as a matter of law, is not entitled to recover damages related to the recall.

¶5 The trial court denied Ametek’s motion as to notice, but granted it on the issue of whether CNH could pursue consequential damages related to costs of the recall.³ The court held, as a matter of law, that “[b]y [CNH] knowingly inserting defective solenoids into the tractors during the period of time that ultimately those tractors would be recalled ... the proximate cause of the damages related to the recall was not the fault of Ametek.” CNH petitioned for leave to appeal the partial grant of summary judgment on the issue of consequential damages, and we granted the petition. Additional facts are set forth as necessary.

DISCUSSION

¶6 We review the grant of a motion for summary judgment de novo, applying the same methodology as the trial court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving

³ In its amended complaint, CNH did not specifically identify the recall costs it seeks to recover as “consequential damages.” The trial court, and both CNH and Ametek on appeal, refer to these costs as consequential damages, a characterization we accept. *See Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 967, 972 n.33 (E.D. Wis. 1999) (characterizing recall costs as consequential damages).

party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). “An issue of fact is genuine if a reasonable jury could find for the nonmoving party. A material fact is such fact that would influence the outcome of the controversy.” *Marine Bank v. Taz’s Trucking, Inc.*, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90 (citation omitted). All facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751. Similarly, any doubts regarding whether a factual issue exists must be resolved against the moving party. *Schmidt v. Northern States Power Co.*, 2006 WI App 201, ¶16, 296 Wis. 2d 813, 724 N.W.2d 354.

¶7 As Ametek points out, “[a] fundamental element of a claim for consequential damages resulting from a breach of warranty is that the damages must be proximately caused by the breach.” See WIS STAT. § 402.715(2)(b)). Causation is a fact, *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 459, 267 N.W.2d 652 (1977), which exists “where the defendant’s actions are a ‘substantial factor’ in producing the harm to the plaintiff,” *Wolnak v. Cardiovascular & Thoracic Surgeons*, 2005 WI App 217, ¶15, 287 Wis. 2d 560, 706 N.W.2d 667 (citation omitted). “Substantial factor ‘denotes that the defendant’s conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.’” *Fischer v. Ganju*, 168 Wis. 2d 834, 857, 485 N.W.2d 10 (1992) (citation omitted). “[T]he existence of causation frequently is an inference to be drawn from the circumstances by the trier of fact.” *Merco Distrib. Corp.*, 84 Wis. 2d at 459.

¶8 CNH contends the evidence does not support the trial court’s conclusion that CNH knew the SBC-4201C solenoid was defective before it first

began installing the solenoid into its B-6 tractors. CNH acknowledges it was aware prior to installing the solenoid in the B-6 tractors that some failures had occurred in other CNH tractors; however, it contends those failures were limited in number and primarily cold-weather related. CNH argues that the extent of the failures only became “known and unacceptable” after it began installing the solenoid in the B-6 tractors.

¶9 Ametek contends that CNH was aware of the increasing problem with this solenoid before it began installing it in the B-6 tractors in February 2006, citing evidence of warranty claims occurring between 2002 and 2005 as proof of this knowledge. Ametek points out that by June 2006, CNH had already hired a consultant to find a replacement for the SBC-4201C solenoid, and emphasizes that even as evidence of solenoid failures in the B-6 tractors mounted, CNH continued to order and install the solenoid in their B-6 tractors through October 2007. Ametek argues that the summary judgment record supports the trial court’s conclusion that the recall costs were not caused by Ametek, “but by CNH’s own continued purchase and use of solenoids on tractors with full knowledge that those solenoids would not perform up to CNH’s standards.”⁴

¶10 Based on our independent review of the record, we conclude that a genuine issue of material fact exists as to whether Ametek’s alleged breach of warranty proximately caused the recall costs or whether, as Ametek argues, CNH’s decision to install the solenoid in the B-6 tractors, in light of the

⁴ Ametek does not concede that the solenoid was in fact defective, but states it will prove at trial “that CNH’s recall corrected a product misapplication caused by CNH, not a product defect attributable to Ametek.”

knowledge CNH had at the time, was the cause. A chronology based on the evidence submitted for summary judgment supports our conclusion.

¶11 CNH began purchasing the SBC-4201C solenoid in 2001. The first report of a solenoid failure identified in CNH's warranty claim database is from 2002. In the years that followed, CNH became aware of additional complaints related to solenoid failures, raising concerns as to the solenoid's effectiveness in cold weather. In 2003, CNH reported the problem to Ametek and sent it a failed solenoid, but Ametek was unable to replicate the failures. In 2004, CNH revised its environmental specifications for the solenoid to address cold-weather concerns and submitted the revisions to Ametek. In his affidavit opposing summary judgment, CNH project manager and engineer Mark Haan averred that, in late 2004, he and Ametek sales manager Kernan Moore communicated regarding Ametek testing the SBC-4201C solenoid to prove that it met these revised standards. It is undisputed this testing never occurred. Ametek contends this testing was not done because it never received a response from CNH as to who would pay for the testing. CNH contends, as Haan averred, that Ametek, through Moore, represented that, "based upon Ametek's use in other applications," the solenoid would "substantially comply" with the new standard. Haan further averred that because of this assurance, as well as CNH's "lengthy history ... using this solenoid on its Magnum/CCH class of tractor," CNH "continued to purchase" the solenoid.

¶12 Ametek identifies multiple solenoid failures in late 2005 that caused CNH concern, with the majority of these failures also related to the solenoid's performance in cold temperatures. Additionally, Ametek points to a December 2005 email report by Joseph Safransky in CNH's warranty department stating "[t]he warranty for the solenoid in 2004 looks good, but not good for tractors built

in 2005,” as well as CNH warranty database information showing that by December 31, 2005, there were 196 reported field failures related to the solenoid. Ametek argues that these facts demonstrate CNH “knew full well” before it began installing the solenoid in the B-6 tractors that the solenoid was “failing prematurely and not performing as warranted on its tractors.”

¶13 Haan averred that he considered the problems experienced with the solenoid between 2003 and 2005 to be “limited and isolated,” noting the relationship between the failures and cold weather. The record shows that in October 2005, CNH sent another failed solenoid to Ametek, along with a corrective action form for Ametek to complete and return after completing a “failure analysis.” CNH was seeking Ametek’s assistance in identifying the “ultimate root cause of the ‘cold’ issue” and to have Ametek “correct it.” The record further shows that in November 2006, Ametek was continuing to work with CNH on the cold-weather issue and considered possible modifications to the manufacturing production process to address the problem.

¶14 Additionally, CNH quality and reliability engineer John Simms averred that, based on increasing reports of solenoid failures in late 2006 and early 2007, CNH directed him to “determin[e] the magnitude of the eventual failure rate.” Before this “timeframe,” Simms averred, CNH was aware of only “isolated and limited failures” associated with the solenoid out of the “thousands” of tractors equipped with it by December 2005. As part of his investigation, in May 2007, Simms performed a “Weibull analysis”⁵ to assess the reliability of the

⁵ Simms averred that the intent of a Weibull analysis is to “project the future failure rate of the part based on: (1) known failures which have occurred and (2) exposure (hours, miles, etc.) on the un-failed population.”

solenoid. He found that, based on the warranty data available at that time, the analysis indicated that the SBC-4201C solenoid had experienced a “significant, marked and abnormal increase in its failure rate” in tractors manufactured as early as April 2005. Simms averred that CNH did not know *in April 2005* of the increased failure rate, but rather, because “[t]here is a necessary lag between the time that a product is produced and time it is purchased by the customer and enters service,” it was only “[a]s the units [were] operated in their natural environment, [that] failures [were] gradually exposed as a function of their usage.” According to Simms, this May 2007 analysis was the first time “[t]he potential severity of the reliability problems associated with the SBC-4201C solenoid ... became known to CNH,” i.e., that “in excess of 90% of all solenoids would fail during the life of the tractors which was well before the SBC-4201C solenoids’ 60,000 cycle lifespan warranted by Ametek.”

¶15 Similarly, Ian McLaren, CNH electrical team engineering leader for the B-6 tractor line, also averred that it was not until “late 2006 and early 2007 [that] CNH became aware of a significant and abnormally high number of field failures” associated with the solenoid. The record also shows that between late 2006 and early 2007, CNH worked with Ametek to identify a superior replacement. Ametek’s proposed replacement solenoid was placed into field testing in early 2007, but ultimately failed.

¶16 Ametek argues that CNH knew of problems with the SBC-4201C solenoid before it began installing it in the B-6 tractors, and that despite becoming increasingly aware of failures after installing the solenoid, CNH nonetheless continued to install it in the tractors CNH eventually ended up recalling. Based on this, Ametek contends no reasonable jury could conclude that Ametek and its solenoid were the cause of CNH’s recall costs related to the B-6 tractors.

¶17 CNH counters that it only had knowledge of limited and isolated solenoid failures prior to installing the solenoid on the B-6 tractors, such that its decision to purchase and install it on the tractors was reasonable. CNH further argues that as its awareness of the problems with the solenoid increased, it took time to identify and substitute a superior replacement and that Ametek's actions caused some of the delay. CNH contends that continuing to use the solenoid while seeking a viable replacement was reasonable because doing so ultimately reduced its damages. CNH argues that a reasonable jury could conclude that Ametek's allegedly defective solenoid was the proximate cause of the recall costs and that CNH's own actions were reasonable and do not warrant shifting responsibility from Ametek to CNH. While CNH characterizes this issue as one of mitigation of damages, in the context of this case, where CNH continued to purchase and install the solenoid while gaining increased awareness of the extent of the problems with it, we view the issue as one of causation of damages.

¶18 We believe a reasonable jury could conclude that the extent of solenoid failures of which CNH was or should have been aware prior to installing the solenoid in the B-6 tractors was sufficiently de minimus, when compared with the "thousands" of CNH tractors utilizing the solenoid, that it was reasonable to install it while continuing to work with Ametek to resolve the problems. On that basis, a jury could find that solenoid deficiencies, if proven, and therefore Ametek, were the proximate cause of the recall costs. A reasonable jury also could conclude that at some time after CNH reasonably began installing the solenoid, the extent of the failures and delay in finding a replacement became such that it was unreasonable for CNH to continue installing it and that from that time on only CNH was the cause of the recall costs. A reasonable jury also could conclude that the extent of the solenoid failures of which CNH was or should have been aware

prior to installing the solenoid was such that solenoid deficiencies were not the cause of the recall costs but that CNH's unreasonable decision to install the solenoid was.

¶19 CNH bears the burden at trial of proving that Ametek breached its warranty and that the breach caused the consequential damages at issue, i.e., the recall costs. *See Fischer*, 168 Wis. 2d at 857. CNH also bears the burden of establishing the amount of damages caused by Ametek's alleged breach. *See Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977). On this record, a reasonable jury could conclude that Ametek caused none, some or all of the recall costs, depending on how the jury views the reasonableness of CNH's actions in light of the knowledge it possessed at different points in time.

CONCLUSION

¶20 Viewing the summary judgment record in the light most favorable to the nonmoving party, as we must, *see Lambrecht*, 241 Wis. 2d 804, ¶23, we conclude that a genuine issue of material fact exists as to whether Ametek's alleged breach proximately caused CNH's consequential damages. Thus, the trial court's partial grant of summary judgment on the issue of consequential damages was improper.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

