COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-1607

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

LOUIS J. BRICCO, SAMANTHA BRICCO AND SKYLER J. BRICCO,

PLAINTIFFS-APPELLANTS,

EMPLOYERS MUTUAL CASUALTY INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-APPELLANT,

V.

CAVAGNA GROUP NORTH AMERICA AND WORTHINGTON INDUSTRIES, INC., D/B/A WORTHINGTON CYLINDERS,

DEFENDANTS-RESPONDENTS,

WORTHINGTON INDUSTRIES, INC. AND ITS SUCCESSORS, ASSIGNS AND INDEMNITORS, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY, UNKNOWN HOLDING COMPANY, UNKNOWN JOINT VENTURES, JOHN DOE ENGINEERING, INC. AND GHI INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Louis Bricco, Samantha Bricco, Skyler Bricco and Employers Mutual Casualty Insurance Company appeal a summary judgment dismissing their products liability claim against Cavagna Group North America and Worthington Industries, Inc. The appellants argue that the trial court improperly granted summary judgment because disputed issues of material fact entitle them to a trial. The appellants further contend that the trial court erred by dismissing their claim for failing to establish a prima facie case against the defendants, for failing to preserve evidence, for concluding that the product was subsequently and materially altered after it left the manufacturer's control, for applying the "sophisticated user doctrine" to preclude the defendant's liability, for concluding that the actions of Louis Bricco were at least fifty-one percent causally negligent as a matter of law, and for public policy considerations. Because the record demonstrates that the appellants have established a prima facie case of product liability, that genuine, material issues of fact are in dispute, and that the other grounds for dismissal were erroneous, the judgment is reversed.

Louis Bricco was injured on the job after a propane tank he was filling for a customer exploded. Many of the facts surrounding his injury are not disputed. Bricco was using the "volumetric" method to fill the tank, an accepted method of doing so but one that is less safe than the alternate "weight" method (cb-3-4). Under the volumetric method, the person filling the tank opens a small bleeder valve and fills the tank until a white mist is emitted from the valve (bb-1).

Under the weight method, the person filling the tank simply hooks the tank up to a machine and sets the machine to stop when the tank reaches the appropriate weight. The weight method is preferred because there is virtually no risk of an overfill (cb-7).

Bricco filled the tank inside his employer's fill shed, and noticed that "REGO," the name of a valve manufacturer, was stamped on the bleeder valve. Bricco continued filling the tank until the valve began to emit a liquid stream turning into vapor. By the time Bricco was able to conclude the filling process, he noticed that a steady stream was coming out of the valve. It is not disputed that Bricco, who had about twenty years' experience filling propane tanks, believed that the propane was acting normally and the bleeder valve appeared to be functioning properly during this time.

Bricco then weighed the tank to determine the amount of excess propane and noticed that he had filled the tank to twenty-one and a half pounds, or one and a half pounds over the limit. Bricco then released the excess propane while in the filling shed and, as he did so, the explosion occurred. Bricco was thrown from the shed and suffered multiple injuries and severe burns. He remained in a coma for several weeks.

Bricco's employer extinguished the fire and watched the scene until the fire department arrived. The fire department photographed, inspected and recorded the serial number of a propane tank located in the fill shed that it identified as the source of the explosion. After investigating several possible sources of the propane ignition, the fire department concluded that a static electricity charge created by escaping propane caused the explosion.

When Bricco's counsel became involved in the case they located the tank identified in the fire department's picture by its serial number. The bleeder valve, however, had apparently been removed by Bricco's employer to sell the brass for scrap. Nonetheless, the photographs taken by the fire department revealed that the manufacturer of the valve was Cavagna, not REGO.

Through his testimony and two expert witnesses Bricco hypothesized two causes of the explosion. One expert, Adolf Wolf, believed that the aperture of the bleeder valve was too large. The basis for his view was Bricco's testimony that liquid was emerging from the valve, the fact that a properly sized valve should not emit liquid, and the fact that such an emission would be sufficient to cause the static electricity charge. Bricco's other expert, Allen Bullerdiek, believed that a cracked or otherwise damaged dip tube was the cause. Bullerdiek hypothesized that a damaged tube did not alert Bricco to the overfill quickly enough and caused him to substantially overfill the tank. Bullerdiek claimed that the release of this amount of overfill could generate a sufficient static charge to ignite the gas. Bullerdiek further concluded that such a change in the tube probably would have happened after it left the manufacturer's control. In arriving at his conclusions, Bullerdiek acknowledged but dismissed Bricco's testimony that the gas weighed only twenty-one and a half pounds after he filled the tank.[1] When asked to assume that Bricco was correct, Bullerdiek hypothesized that the only cause of the ignition could be an enlarged aperture on the bleeder valve or an upside-down tank.

[1] Bullerdiek believed that Bricco's testimony indicated only that Bricco could not recall with certainty how much the tank weighed.

The respondents moved for summary judgment, alleging that the expert testimony on both theories was too speculative to establish a prima facie case, that under one theory (Bullerdiek's) the product was materially altered after it left the manufacturer's control and therefore precluded recovery, that the sophisticated user doctrine precluded recovery, that the appellants failed to preserve evidence, that there was no evidence to reasonably support a jury finding that Cavagna manufactured the valve, that no reasonable jury could conclude that Bricco was less than fifty-one percent at fault, and that public policy grounds precluded recovery. The trial court agreed with each of these contentions, and this appeal followed.

In reviewing a grant of summary judgment we apply the same standards as the trial court. ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115, 334 N.W.2d 580, 582 (Ct. App. 1983). After examining the pleadings to determine that a claim and defense are asserted, "the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a prima facie case for summary judgment." ***Id***. at 116, 334 N.W.2d at 583. "To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim." ***Id***.

> If the moving party has made a prima facie case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.

Id. "The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment." ***Id.***

The appellants allege a manufacturing defect with respect to the tank and bleeder valve. The respondents' first argument in support of summary judgment is that the appellants failed to establish a prima facie case. Specifically, the respondents contend that the appellants presented no credible evidence of a defect. In support of their claim, the respondents refer us to several Wisconsin cases holding that juries cannot base a finding upon conjecture, unproved assumptions, and speculation, *see, e.g.*, ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis.2d 455, 460, 267 N.W.2d 652, 655 (1978), and the fact that both the dip tube and valve involved in the explosion are unavailable for inspection.

The appellants have alleged two theories of product liability. Although we conclude that the assertion that a defective dip tube caused the explosion is insufficient to defeat the summary judgment motion because there is no evidence suggesting the alleged defect in the tube was due to the respondents' negligence, we are convinced that there is sufficient evidence to support a finding that the respondents manufactured and sold a defective bleeder valve which caused the explosion. Bricco offered testimony that a stream of liquid was emitted from the valve, and an expert witness offered testimony that this would not be possible unless the aperture of the valve was larger than it should have been. This evidence, if believed, is sufficient to establish a defect in the valve. In light of this factual question, summary judgment was improper.

The respondents claim that the enlarged aperture theory is too speculative because Bricco stated that the valve in this case acted normally, contradicting Wolf's theory. While this argument may be persuasive at trial, it is not helpful for our purposes. Our role is to review the record for sufficient evidence that could support a jury finding that the product was defective, not to

resolve apparent conflicts in the evidence. ***Preloznik***, 113 Wis.2d at 116, 334 N.W.2d at 583. The very fact that there is conflicting evidence on this material issue is a sufficient basis to reverse the summary judgment with respect to a defect in the bleeder valve.

Having rejected the respondents' contention that the appellants failed to make a prima facie case with respect to a defective bleeder valve, we now must turn to the other defenses advanced to defeat the products liability claim. The respondents' next argument is that we should uphold the dismissal based on the appellants' failure to preserve evidence crucial to their defense. Apparently, although it is not entirely clear from the record or judgment, the trial court faulted the appellants for failing to preserve the bleeder valve and sanctioned them by precluding entry of any evidence with respect to that valve. Dismissal logically followed because the appellants could not pursue their claim in the absence of evidence concerning the valve.

Our review of the trial court's decision to sanction the appellants is under an erroneous exercise of discretion standard. ***Sentry Ins. v. Royal Ins. Co.***, 196 Wis.2d 907, 914, 539 N.W.2d 911, 915 (Ct. App. 1995). While it is true that in certain circumstances the failure to preserve evidence can support such discretionary sanctions, *see, e.g.,* ***id.*** at 916, 539 N.W.2d at 914-15, we do not agree that the appellants failed to preserve evidence in this case. We note that the respondents have never alleged that the appellants had possession of the missing valve or were in any way responsible for its disappearance. On the contrary, it is uncontested that after Bricco emerged from his coma his counsel immediately began an investigation to find the evidence. The search resulted in the location of the tank, but at that point the valve was missing because Bricco's employer had

apparently removed it. Under these circumstances we cannot uphold the use of sanctions.

The respondents also claim as a defense the absence of any evidence sufficient to support a jury finding that Cavagna manufactured the valve. The respondents refer us to Bricco's testimony that the valve was marked with the name of another manufacturer and the fact that the owner of the tank could not identify the tank in the photograph as his own.[2] There is, however, contrary evidence sufficient to support a determination that Cavagna manufactured the allegedly defective valve. The fire department identified the tank with the Cavagna valve as the one involved in the explosion, and Bricco's employer, who extinguished the tank, testified that he saw the fire department remove and identify the same tank he extinguished. Because the manufacturer's identity is obviously a disputed material fact, summary judgment on these grounds was improper.

The respondents' next defense is that Bricco was at least fifty-one percent causally negligent as a matter of law in the explosion. "The apportionment of negligence is ordinarily a question for the jury." ***Huss v. Yale Materials Handling Corp.***, 196 Wis.2d 515, 534, 538 N.W.2d 630, 637 (Ct. App. 1995). "The instances in which a court may rule that, as a matter of law, the plaintiff's negligence exceeds that of the defendant are exceedingly rare." ***Id***. Accordingly, summary judgment "should only be used in the rare case where it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary." ***Id***. at 535, 538 N.W.2d at 637.

[2] The owner of the tank could not identify the tank in the photograph because it was missing a plastic plug attachment that existed when he brought the tank in for filling.

Viewing the evidence and reasonable inferences in a light most favorable to the appellants, there is ample evidence on which a jury could conclude that the respondents are more negligent than Bricco. The negligence being compared in this case is the manufacture and sale of a defective valve that releases propane in a volatile state against the conduct of Bricco. The respondents argue that Bricco failed to use the safest method, the "weight" method, of filling the tank during the filling operation, and further that Bricco should not have vented the excess propane within the enclosed structure. The respondents, however, fail to appreciate that the "volume" method is a perfectly acceptable method of filling propane tanks. Not only is it an accepted method in Wisconsin, there is evidence that it is also the *required* method in other states. Further, although we agree that Bricco may have been negligent by not leaving the enclosed structure to vent the tank, we are not in a position to state that as a matter of law his negligence is greater than that of the respondents because it is neither clear nor uncontroverted that this is the case. We therefore conclude that the apportionment of negligence is properly a jury function in this case, and reverse the judgment finding Bricco more than fifty-one percent negligent as a matter of law.

The respondents' final claim[3] is that public policy grounds preclude recovery. Three arguments are raised in support: allowing recovery based entirely on conjecture has no logical stopping point; an injured party should be precluded from recovering when he or she is the major cause of his or her injuries;

[3] We do not address the trial court's claim that the sophisticated user doctrine precludes recovery because the appellants do not appear to raise a defective warnings claim. The respondents appear to concede that this doctrine is inapplicable in manufacturing or design defect cases.

and allowing recovery would be too remote from any negligence on the part of the respondents because of "the actions of [Bricco's employer] and its knowledge of the dangers presented by unsafe filling and venting practices." We disagree with these claims. The respondents' first and second public policy arguments are merely a repeat of their earlier arguments alleging both a lack of evidence to support Bricco's product liability theory and that Bricco was fifty-one percent negligent as a matter of law. We have already rejected these arguments and see no need to further discuss them. We also reject the respondents' final public policy claim because, viewing the evidence in a light most favorable to the appellants, we see nothing in the actions of Bricco's employer sufficient to find the injury to be too remote from the negligence. Further, there is evidence supporting a direct relationship between the alleged wrong, the manufacture and sale of a defective valve, and the explosion causing the injury. We therefore refuse to dismiss this case on public policy grounds.

By the Court.—Judgment reversed.

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