COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1408

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

NANCY E. RUNNINGEN AND DAVID RUNNINGEN, TRUSTEES FOR THE HEIRS OF KELSEY ANNA RUNNINGEN,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY AND SCHWINN BICYCLE COMPANY,

DEFENDANTS,

STATE FARM GENERAL INSURANCE CO. AND SMITH'S BICYCLE SHOP, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

SCHWINN SALES MIDWEST, INC.,

THIRD-PARTY DEFENDANT.

APPEAL from judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

DYKMAN, P.J. Nancy and David Runningen appeal from a judgment and order dismissing several of their claims regarding Smith's Bicycle Shop's alleged liability for the death of their daughter, Kelsey Runningen. First, the Runningens argue that the trial court erred in dismissing their claims that: (1) the bicycle shop was negligent in failing to warn them about the risks associated with bicycle handlebar end caps; and (2) the bicycle shop violated the Consumer Product Safety Act and the Federal Hazardous Substances Act when it sold the bicycle in question. Second, the Runningens contend that the trial court erred in not submitting special verdict questions and instructions to the jury regarding the bicycle shop's alleged negligence and violations of these federal statutes. Finally, the Runningens argue that the trial court erred in limiting their cross-examination of the bicycle shop's expert witness. We reject these contentions and affirm.

BACKGROUND

On June 11, 1992, Kelsey Anna Runningen was riding her Schwinn bicycle when she tipped over and fell to the ground. As she fell, the right end of her handlebar impaled her left leg, lacerating her left femoral vein. Kelsey was eventually taken to a hospital where she later died.

Kelsey's parents, Nancy and David Runningen, purchased the Schwinn bicycle from Smith's Bicycle Shop approximately two years prior to the accident. The bicycle did not have hard rubber grips on the handlebars; instead, it

had end safety caps made of plastic, which were covered by foam rubber hand grips. The bicycle shop did not advise the Runningens about any defects or problems that might arise with the end caps or hand grips. Nor did the shop inform them about how the handlebars were manufactured, what purpose the end caps served, and if and when the end caps would need to be replaced. The bicycle shop did provide the Runningens with a Schwinn manual, but the manual said nothing about the end caps.

The Runningens sued the bicycle shop and its insurer, State Farm General Insurance Company, the Schwinn Bicycle Company, and its insurer for: negligence, strict products liability, and violations of the Consumer Products Safety Act and the Federal Hazardous Substances Act.[1] At trial, after the Runningens rested, the bicycle shop moved to dismiss their negligence claim, arguing that the Runningens failed to establish how the shop had breached its duty of care when it had no actual or constructive knowledge of a risk associated with the end caps. The bicycle shop also moved to dismiss the federal statutory claims. The trial court granted these motions. As a result, the jury was only asked to decide the strict products liability claim, which it decided in favor of the bicycle shop.

The Runningens' motions after verdict asserted that the trial court erred by: (1) granting a directed verdict that the bicycle shop was not negligent and did not violate the Consumer Product Safety Act and/or the Federal Hazardous Substances Act; (2) refusing to submit special verdict questions and jury instructions as to the alleged violations of the Consumer Product Safety Act and/or

[1] The Runningens settled with Schwinn, and Schwinn was not a participant in the litigation.

the Federal Hazardous Substances Act; (3) limiting their cross-examination of the bicycle shop's expert witness, Gerald Bretting; and (4) not giving their requested verdict form and instructions to the jury. The trial court denied these motions. The Runningens appeal.

DISCUSSION

1. *Motions to Dismiss*

a. Negligence

The Runningens first contend that the trial court erred by dismissing their common law negligence claim against the bicycle shop for failing to warn them about the risks associated with handlebar end caps. The trial court dismissed the negligence claim after concluding that the Runningens had not established what duty the shop owed to them, and how the bicycle shop breached that duty:

> I am satisfied that the record fails to give any evidence upon which the jury can find that Smith's Bicycle Shop … had actual knowledge or constructive knowledge of the dangers of the product and in order to give rise to warn as to that product.
>
> I cannot find that, based upon what the Plaintiff has presented, every bicycle shop has to tell every purchaser of every bike that they have to be concerned about the problem with their bikes and the handlebars. If that were true, then … all of this language would mean nothing. This language that they have to have actual or constructive knowledge would have no meaning whatsoever in the law…. There has to be some level of evidence.

In ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995), the supreme court set out the standard of review we are to apply when reviewing the trial court's decision to dismiss a claim based on evidence insufficiency:

> A motion challenging the sufficiency of the evidence may not be granted "unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." This standard applies both to a motion to dismiss at the close of a plaintiff's case and to a motion for a directed verdict or dismissal at the close of all the evidence when the motion challenges the sufficiency of the evidence. It also applies both to the circuit court and to "an appellate court on review of the trial court's determination of the motion."
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> ….
>
> Because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court "must give substantial deference to the trial court's better ability to assess the evidence." An appellate court should not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong."

Id. (citations omitted).

In order to maintain a cause of action for negligence in Wisconsin, there must exist: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and injury; and (4) an actual loss or damage as a result of the injury. *See* ***Miller v. Wal-Mart Stores, Inc.***, 219 N.W.2d 250, 260, 580 N.W.2d 233, 238 (1998). A duty of care arises when the defendant has actual or constructive notice of a foreseeable risk of harm. *See* ***Wallow v. Zupan***, 35 Wis.2d 195, 200, 150 N.W.2d 329, 331 (1967); *see also* ***Vogt v. S.M. Bryne Constr. Co.***, 17 Wis.2d 96, 99, 115 N.W.2d 485, 486 (1962) (standard to apply when negligence claim is based on a product).[2]

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[2] In ***Vogt v. S.M. Byrne Constr. Co.***, 17 Wis.2d 96, 99, 115 N.W.2d 485, 486 (1962), the supreme court adopted the Restatement's standard regarding negligence based on the sale of a product. That standard, as adopted by the court, is as follows:

> One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom

(continued)

The trial court dismissed the Runningens' negligence claim because they had not established that the bicycle shop had actual or constructive notice of the risks or dangers associated with the hand grips and end safety caps. The concept of duty is dependent upon foreseeability. ***Miller***, 219 Wis.2d at 260, 580 N.W.2d at 238. "[N]otice, actual or constructive, is required to trigger the duty involved." ***Nelson v. L. & J. Press Corp.,*** 65 Wis.2d 770, 780, 223 N.W.2d 607, 612 (1974) (footnote omitted). Thus, a danger is not foreseeable if one does not have either actual or constructive notice that an injury might result from an act or a failure to act.

The Runningens argue that they offered several witnesses who testified that the end caps presented a serious and unreasonable risk of harm, and that the bicycle shop was aware of these risks.[3] One of those witnesses, David D. Daubert, an accident reconstruction engineer, testified that plastic safety caps are placed at the end of handlebars to prevent injury. Daubert opined that foam rubber hand grips are not as protective as the traditional hard rubber handle grips because

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> the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
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> (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;
>
> (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
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> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.

[3] The Runningens appear to allege that the bicycle shop was negligent both in failing to warn them that these plastic end caps may not provide adequate protection from injury and in failing to warn them that these end caps may break and, therefore, would need to be replaced.

they do not stay on and/or remain in good condition for any appreciable period of time. He also stated that unless the owner of the bicycle is told of the safety concern associated with the end safety cap, he or she would not know to look under the foam grip to see if the end cap is properly in place.

Daubert then testified that one cannot race a bicycle in the United States without an end cap, and that people who sell these bicycles know the importance of having end caps on the handlebars. When asked to state his opinion of the biking community's knowledge about end safety caps, Daubert responded:

> Well, I can speak from experience. The only reason I know that they are supposed to be there is because the rules say, if you go out and get on a bike and go to a race, I have to have an end safety cap. I can't race in the United States without an end safety cap…. But, I never put it together that that was a hazard.
>
> But the people that are on the shop side—They know it is a hazard. That's why I say it depends on who you talk to. If you talk to the end users, … [we] don't know why it's got to be there. All we know is that it's got to be there. But the people that are putting the bikes together, the shops—They know why they have to be there. It's a hazard.

The Runningens contend that Daubert's testimony proves that the bicycle shop had actual or constructive notice that end caps presented a risk of harm if they were not properly installed and/or replaced.[4] They argue that, as a

[4] The parties appear to agree that Dennis Hayek, the owner of the bicycle shop, did not have actual knowledge of the risks and dangers associated with the end caps. The only relevant evidence presented on this issue was Hayek's statement that when he repaired bicycles that did not have end caps on the handlebars, he would ask the customer if he or she wanted them replaced. He did not state that he did so because he knew that the lack of end caps presented a risk of harm, though he agreed that end caps were a safety item "to a point." No one pursued this statement to see what Hayek meant by it. Indeed, another witness testified that out of a million bicycle injuries per year which involved between 900 and 1000 fatalities, Kelsey's death was the only one caused by the end of a handlebar. We conclude there is no credible evidence of actual notice of danger posed by handlebar ends.

bicycle shop owner, Hayek had constructive notice of the potential risk.[5] We disagree.

Daubert testified only that racing bicycles are required to have end caps, and that bicycle shops know it is a hazard to race without end caps; therefore, they know that end caps have to be installed when they put these racing bicycles together. This statement is evidence as to what shops that put racing bicycles together might know, not necessarily what all bicycle shops know. And whether this generalization is true, there was no evidence that the bicycle shop assembled racing bicycles or was aware of the rules regarding racing bicycles. Moreover, Kelsey's bicycle was not a racing bicycle. In light of these facts and the context of the statement, we conclude that the trial court was not "clearly wrong" in finding that there was no credible evidence that Hayek had constructive notice of the risk. And insofar as a conclusion regarding constructive notice is a question of sound public policy, the Runningens have not identified the policy factors they believe should apply here, from which they believe we should conclude that though Hayek did not have notice of the handlebar risk, we should treat him as if he did. Indeed, they have not developed an argument based on public policy.

Giving substantial deference to the trial court's assessment of the evidence, we agree that there was insufficient evidence to establish that the bicycle

[5] Constructive notice is "neither notice nor knowledge but is a policy determination that under certain circumstances a person should be treated as if he had actual notice." ***Thompson v. Dairyland Mut. Ins. Co.***, 30 Wis.2d 187, 192, 140 N.W.2d 200, 202-03 (1965). The supreme court has noted that, "[w]e say a person has constructive notice of something when for the promotion of sound policy or purpose he is to be treated as if he had actual notice, whether or not he had it in fact." ***Wallow v. Zappen***, 35 Wis.2d 195, 201, 150 N.W.2d 329, 331-32 (1967) (citations omitted).

shop breached its duty of care in not warning the Runningens that the end caps may break and/or may need to be replaced, because there is no evidence that the shop had notice of the risk.[6] We therefore conclude that the trial court was not "clearly wrong" in dismissing the Runningens' common law negligence claim.

b. Consumer Product Safety Act

In their statement of issues, the Runningens identify this issue and the next issue as whether the trial court erred in granting a directed verdict. The motion resulting in the dismissal of the Runningens' claims under the Consumer Products Safety Act and the Federal Hazardous Substances Act was an oral motion to dismiss made at the end of the Runningens' case. *See* § 805.14(3), STATS., (motions challenging sufficiency of the evidence.) We will therefore use the deferential standard of review set out in ***Weiss***, 197 Wis.2d at 388-89, 541 N.W.2d at 761, which we have previously discussed.

The Runningens assert that the trial court erred by dismissing their claim that the bicycle shop violated the Consumer Product Safety Act, 15 U.S.C. § 2051. They contend that they presented expert testimony that the bicycle shop

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[6] To establish that a duty existed in this case, the Runningens also point to WIS J I–CIVIL 3246, which reads as follows:

> When a manufacturer (seller) undertakes, by printed instructions or otherwise, to advise the user of the machine (product) of the proper methods of its use, such manufacturer (seller), in the exercise of ordinary care, has the duty to give accurate and adequate information with respect to the use thereof and possible dangers involved with respect to the use of such machine (product).

The Runningens contend that this instruction imposes a duty on the bicycle shop to warn customers of the risks associated with the end caps. But this is a negligence instruction, and the bicycle shop may only be found negligent if it had actual or constructive notice of the danger which caused the damage. We have already discussed the issue of notice.

committed two violations of the Act. First, they argue that they presented evidence that the bicycle shop violated 16 C.F.R. § 1512.4(b). That section reads as follows:

> There shall be no unfinished sheared metal edges or other sharp parts on bicycles that are, or may be, exposed to hands or legs; sheared metal edges that are not rolled shall be finished so as to remove any feathering of edges, or any burrs or spurs caused during the shearing process.

Second, they argue that they presented evidence that the bicycle shop violated 16 C.F.R. § 1512.6(d), which deals specifically with handlebars. Section 1512.6(d) reads as follows:

> The ends of the handlebars shall be capped or otherwise covered. Handgrips, end plugs, control shifters or other end-mounted devices shall be secure against a removal force of no less than [15 foot pounds] in accordance with the protective cap and end-mounting devices test ….

We will analyze these in reverse order. The Runningens claim that one of their witnesses testified that the end cap, which presumably was on the bicycle when it was sold, was defective and in violation of the federal bicycle safety regulations. But those regulations required end caps to withstand a pull of fifteen pounds, and the witness who thought the end cap was in violation of the federal bicycle safety act never tested end caps on Kelsey's bicycle to determine whether they could withstand a fifteen-pound pull.

The Runningens analogize the consumer safety regulations governing the manufacture of handlebar end caps to the regulations governing the manufacture of bicycle control cable ends, and cite to ***Forester v. Consumer Prod. Safety Comm'n***, 559 F.2d 774, 791 (D.C. Cir. 1977). In ***Forester***, the court discussed the commission's requirement in 16 C.F.R. § 1512.4(i) that bicycle

manufacturers cap or treat control cable ends so as to prevent the cables from unraveling over time. The commission stated that the purpose of the requirement was to protect people from being punctured by frayed cable ends during bicycle maintenance.

The Runningens argue that based on this logic, it is reasonable to infer that the commission intended for bicycle manufacturers and vendors to take steps to make sure that the bicycles remain safe over their lifetime, and by following this chain of logic a bit further, it is reasonable to infer that the commission wanted both the control cable ends and the handlebar end caps to remain safe over the lifetime of the bicycle.

We disagree with this reading of ***Forester***. First of all, ***Forester*** involves an attack on federal regulations governing the manufacture and sale of bicycles; it is not a negligence case. Second, there is nothing in the case or in the regulation that states that control end cables must remain covered for the life of the bicycle. The regulation merely states these cables should be covered when they are manufactured to avoid injuries that may occur while the bicycle is being maintained.

The regulation at issue in this case only requires that handlebar end caps be able to resist a fifteen-pound pull, presumably at the time they are manufactured and sold. There is nothing that requires the end caps to remain in place for the life of the bicycle. If the Consumer Product Safety Commission wanted to require bicycle end caps to last the lifetime of the bicycle, it could easily have provided for that. Furthermore, there is nothing in ***Forester*** requiring trial courts to submit an asserted violation of the Consumer Product Safety Act to the

jury, and we conclude that the trial court's decision in this case not to do so was not "clearly wrong."

The trial court also concluded that the Runningens failed to establish a violation of 16 C.F.R. § 1512.4, which prohibits the sale of a bicycle that has sheared or sharp metal edges that could injure the user's hands or legs. The trial court stated while looking at the bicycle, "I don't see that as a sheared, unfinished metal piece, gentlemen. Clearly it's finished. It's painted. It's got a beveled edge to it. You will admit that. It is not just a jagged, unfinished, [sheared] metal edge."[7] Based on this finding, the trial court dismissed this federal statutory claim. Deferring to this finding, as we must, we cannot say that the trial court was "clearly wrong" in dismissing the Runningens' claim based on 16 C.F.R. § 1512.4.

c. Federal Hazardous Substances Act

The Runningens next assert that the trial court erred by dismissing their claim that the bicycle shop violated the Federal Hazardous Substances Act, 15 U.S.C. § 1261. This Act prohibits the introduction or distribution for sale of a hazardous substance. *See* 15 U.S.C. § 1263. According to 16 C.F.R. § 1500.3(17) and (17)(iii), an article "may be determined to present a mechanical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness … [f]rom points or other protrusions, surfaces, edges, openings, or closures."

The trial court dismissed this claim because this case involved a new bicycle, which apparently was sold with end caps in place. The trial court noted:

[7] The plaintiffs did not make the handlebars a part of their appellate record.

> There is a definition of mechanical hazard. My problem is that, in order for it to be a violation of the statute, there has to be something that was not done.
>
> Now, you have defined a mechanical hazard. A mechanical hazard exists when it's sitting there without anything on the end.
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> ….
>
> When that thing walks out of Smith's, it has the end cap. It it's [sic] a brand new bike, and has the end cap and it goes. It's complied with the safety statute, unless you can find me someplace in the statutes that says the caps have to last the lifetime of the bike.

The trial court determined that there was no credible evidence to establish a violation of the statute; therefore, it granted the motion to dismiss. Deferring to the trial court, we cannot find this reasoning to be "clearly wrong."

2. *Special Verdict and Jury Questions*

The Runningens next argue that the trial court erred by not including on the special verdict any questions regarding negligence, the Consumer Product Safety Act and Federal Hazardous Substances Act. However, at the instructions and verdict conference, the Runningens failed to object to the trial court's decision to omit these matters from the special verdict.[8] We have no power to reach unobjected to proposed special verdicts. ***State v. Schumacher***, 144 Wis.2d 388, 406-08, 424 N.W.2d 672, 679 (1988).[9] Nor do we see a reason to include questions on a special verdict relating to claims the court previously dismissed.

[8] The Runningens did object to including questions in the special verdict regarding their own negligence, but they did not object to the trial court's decision not to include these other issues in verdict form.

[9] While we have discretion to reverse these and other matters under § 752.35, STATS., the Runningens' have not asked that we do so and we decline to do so sua sponte.

The Runningens also contend that the trial court erred when it failed to instruct the jury on the negligence, Consumer Product Safety Act and Federal Hazardous Substances Act claims.[10] We conclude that if the trial court erred, the error is undoubtedly harmless. There were no questions on the special verdict regarding these causes of action; therefore, instructions about them would be meaningless, and the Runningens could not be harmed by their omission.[11]

3. *Cross-Examination of Expert*

The Runningens also assert that the trial court erred by limiting the scope of their cross-examination of the bicycle shop's expert witness, Gerald Bretting. They contend that they sought to impeach Bretting by pointing out inconsistencies in his testimony at trial and statements he made at his deposition, but the trial court "severely limited" their ability to question him when it made a statement regarding its view of using depositions to impeach witnesses. The trial court said:

> Now, in case you didn't notice I am not a big fan of trying to impeach witnesses with deposition testimony unless there is a clear, a clear contradiction between the two manners of testimony. I find that that is, in all reality, boring to the jury. It is a point that lawyers understand and we accept, but they get lost.

[10] The Runningens do not assert that the instructions on these claims somehow also applied to their products liability claim.

[11] The Runningens were asked if they had any objections to the jury instructions proposed by the court. They did, but none of those are material to this appeal. At the end of the verdict an instruction conference, the court asked the Runningens' attorney whether he wanted any other changes, and he replied: "other than the deviation from our proposed jury instruction, Your Honor, we have no other comments to you at this time." This is insufficient. Objections concerning jury instructions are waived if the objection is not stated with particularity on the record. ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 454, 523 N.W.2d 274, 279 (Ct. App. 1994). This is another reason why the Runningens cannot prevail on this issue.

We do not agree with the Runningens that this comment limited Bretting's cross-examination. The comment was made outside the presence of the jury, and after the Runningens had an opportunity to fully question Bretting about his prior statement. There is no evidence that the trial court limited the use of Bretting's testimony for the purposes of impeachment. What might have been but was not, is not a ground for reversal.

CONCLUSION

We are satisfied that the trial court was not "clearly wrong" in dismissing the Runningens' negligence claim or their claim that the bicycle shop violated various federal statutes. We also conclude that we cannot address the Runningens' assertions of special verdict error because the Runningens did not object to the verdict given, except as to a matter not relevant to this appeal. Therefore, there is no reason to consider the Runningens' claims of instructional error. Finally, the court did not unfairly or improperly limit the Runningens' cross-examination of the bicycle shops' expert witness, Mr. Bretting.

By the Court.—Judgment and order affirmed

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