COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2791 **Cir. Ct. No. 2003CV478**

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

SERGIO HERNANDEZ,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

ZURICH AMERICAN INSURANCE COMPANY,

INVOLUNTARY PLAINTIFF-CO-APPELLANT-CROSS-RESPONDENT,

V.

WEILER AND COMPANY, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Sergio Hernandez appeals from a judgment entered on the jury's finding that Weiler and Company, Inc. is not liable for injuries Hernandez suffered when his arm got caught in a mixer/grinder manufactured by Weiler. Weiler cross-appeals from the judgment asserting that Hernandez has no right to recovery. We reject Hernandez's claim of evidentiary error and challenge to the form of the verdict and affirm the judgment. We reverse that part of the judgment imposing costs under WIS. STAT. § 814.04 (2005-06),[1] because that version of the statute does not apply in this case. We direct the entry of an amended judgment. We do not address the cross-appeal.

¶2 Hernandez was employed by Omni Facility Resources, Inc. (OSS) and dispatched nightly to clean and sanitize at Fair Oaks Farms, a meat-processing plant. On January 12, 2002, while cleaning a mixer/grinder, Hernandez reached into the machine through the "feed screw opening" to remove a speck of meat. The rotating paddles of the machine were operating at the time and Hernandez's glove got caught by a paddle. Hernandez's arm was pulled into the machine and he sustained serious injury to his arm.

¶3 Weiler manufactured the mixer/grinder that injured Hernandez. It sold the mixer/grinder to Fair Oaks in 1989. The machine had a limit switch so that when the feed screw opening was removed to clean the machine, power to the paddles inside the machine was terminated. This meant that the paddles would not move when the opening was not covered. Fair Oaks had removed the limit switch

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

on the machine. Fair Oaks's practice was to clean the machine with the mixing paddles running.

¶4 The jury was asked whether Weiler was negligent with respect to the design of or the warnings and notices accompanying the mixer/grinder. The jury answered no. The jury also determined that when the mixer/grinder left Weiler's possession in 1989 it was not in such a defective condition as to be unreasonably dangerous. It found the mixer/grinder was in a substantially and materially different condition at the time of Hernandez's accident from its condition when it left Weiler's control. Negligence was apportioned: Weiler, 0%; condition of mixer/grinder when sold, 0%; Fair Oaks Farm, 40%; OSS, 10%; Hernandez, 50%. Hernandez's motion for judgment notwithstanding the verdict and for a new trial was denied.

¶5 At trial Hernandez sought to admit evidence of a June 15, 2000 safety alert, the "first alert" issued by Weiler to owners of pre-1987 mixer/grinders, warning of the dangers of operating the machine during sanitation and identifying a potential pinch point at the same point that Hernandez was injured.[2] Weiler offered those owners a retrofit kit because their machines did not have a safety limit switch at the feed screw opening.[3] Weiler moved in limine to exclude evidence of the first alert and its motion was granted.

[2] In 1987, Weiler began to include a safety limit switch on the mixer/grinder.

[3] After Hernandez's accident in 2002, Weiler sent a product safety alert regarding 1989 manufactured machines indicating a hazardous pinch point when the "mixer unload screw" is removed for sanitation and the paddles are rotated. The notice warned that the interlock system on the machine should be operational. The 2002 safety alert was admitted into evidence before the jury.

¶6 We review the trial court's evidentiary rulings and relevancy determinations to determine if the court properly exercised its discretion. ***General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc.***, 215 Wis. 2d 104, 132, 572 N.W.2d 881 (Ct. App. 1997). We will not find an error in the exercise of discretion if there is a reasonable basis for the trial court's determination. ***Erbstoeszer v. American Cas. Co.***, 169 Wis. 2d 637, 644, 486 N.W.2d 549 (Ct. App. 1992).

¶7 Hernandez argues that the trial court did not set forth adequate reasons for its ruling and urges this court to independently determine the relevancy of the first alert. *See* ***Bittner v. American Honda Motor Co.***, 194 Wis. 2d 122, 147, 533 N.W.2d 476 (1995). We do not agree that independent review is appropriate. The trial court reasoned that evidence of the first alert was irrelevant because that alert was put out for mixer/grinders manufactured prior to 1987. This was sufficient articulation of the trial court's exercise of discretion.

¶8 Hernandez believes that the first alert was not designed just for owners of pre-1987 mixer/grinders but that Weiler intended to send it to all customers. He points to a 2000 Weiler internal memorandum to personnel in Sydney, Australia, indicating that the attached product safety announcement "is being sent out to all Weiler Mixer-Grinder owners."[4] Hernandez argues that the

[4] Weiler's brief points out that the record citation Hernandez provides to the internal memo is incorrect. Hernandez references the memo as record document 72. The document is not found at the cited point in the record. In fact, and this was readily verifiable by Weiler, the memo was marked as exhibit 72 at trial when Hernandez made an offer of proof at the close of his case. Weiler has been less than candid with this court in its claim that it is unable to respond to Hernandez's argument because of the questionable record citation. Hernandez also comes up short by not explaining how the memo was presented to the trial court in his reply brief. The trial exhibits are not included in the record. The memo is found as an attachment to Hernandez's reply brief on his motion for a new trial.

trial court's finding that the first alert was not meant to be sent to owners of post-1987 machines is factually incorrect. The trial court acknowledged that the memo indicated that the first alert was being sent to "all" owners. It adopted Weiler's argument that "all" meant all owners of machines manufactured prior to January 1, 1987. The first alert itself twice indicates its application to machines manufactured prior to January 1, 1987. There was testimony that Weiler sent the first alert only to the owners of pre-1987 machines. The trial court relied on language in the first alert itself. The trial court's finding that the first alert was intended only for pre-1987 machine owners is not clearly erroneous and provides a reasonable basis to determine that the evidence was irrelevant.[5]

¶9 Hernandez contends that evidence of the first alert was relevant to impeach testimony from a Weiler salesman that he had a specific conversation in June 2001 with a Fair Oaks representative explaining the available safety system and safety guard for the mixer/grinder. Hernandez wanted to point out that the salesman testified at his deposition that prior to his meeting with the Fair Oaks representative, he believed the representative had received the first alert. Hernandez sought to rebut the salesman's testimony by arguing that if Fair Oaks had received the detailed first alert, there would have been no reason for the salesman to explain the safety system in detail at his meeting with the Fair Oaks representative. He also wanted to show that the salesman's trial testimony that he believed the Fair Oaks representative knew nothing about the safety guard system prior to their 2001 meeting was a direct contradiction of the salesman's deposition

[5] The trial court's finding disposes of Hernandez's claim that evidence of the first alert was relevant because Fair Oaks had disabled the limit switch and therefore its mixer/grinder was just like pre-1987 machines to which the first alert applied.

testimony. Hernandez claims he was not allowed to impeach the salesman and the jury was deprived of important evidence relevant to the credibility of the salesman versus Fair Oak's representative.[6]

¶10 We do not address the claim that the first alert would have provided impeachment evidence. Hernandez did not establish at trial or make an offer of proof of the contradictory deposition testimony. We will not consider whether evidentiary error occurred absent a proper offer of proof. ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406, 415 (1996); WIS. STAT. § 901.03(1)(b). On appeal Hernandez has not provided a record citation for the alleged contradictory deposition testimony.[7]

¶11 The final basis for admissibility of evidence of the first alert advanced by Hernandez is that Weiler "opened the door" for that evidence by putting into evidence that another meat processing plant, Birchwood Foods, purchased the retrofit safety system after receiving a quote for the system from Weiler. Hernandez suggests that the clear implication of this evidence was that Fair Oaks was negligent for not purchasing the safety system when Birchwood Farms had done so. But Hernandez misrepresents the reason Birchwood Farms was mentioned. It was not for the purpose of suggesting that Fair Oaks was negligent but to explain that after Hernandez was injured, Fair Oaks visited

[6] The Fair Oaks representative testified that he did not recall discussing the safety system or guard with Weiler's salesman in June 2001.

[7] At the conclusion of his argument that evidence of the first alert was relevant for impeachment purposes, Hernandez throws in complaints that the trial court never addressed relevancy based on expert reliance on the first alert and why potential prejudice outweighed the probative value of the evidence. We need not consider arguments broadly stated but not specifically argued. ***State v. Beno***, 99 Wis. 2d 77, 91, 298 N.W.2d 405 (Ct. App. 1980).

Birchwood Foods to see the safety system on the machine and then purchased the system. During Hernandez's cross-examination of Weiler's witness, Hernandez drew attention to Birchwood Foods's purchase by questioning the witness about the amount of information available to each. Hernandez repeatedly asked the witness if Birchwood Foods had more information about the retrofit guard than Fair Oaks. The witness maintained that Birchwood Foods purchased the system after receiving a quote. Hernandez argues he was not allowed to use the first alert to show this was not possible because Birchwood Foods had pre-1987 machines and presumably received the first alert. Weiler did not open the door to evidence of the first alert by simply mentioning Birchwood Foods. It was Hernandez who appeared to be baiting the witness in hopes of gaining access to evidence of the first alert. In conclusion, the exclusion of evidence of the first alert was a proper exercise of discretion.[8]

¶12 Hernandez next argues that the trial court's instructions and the order of questions on the special verdict precluded the jury from finding that the mixer/grinder was defective and unreasonably dangerous when it was delivered to Fair Oaks. Question three of the special verdict asked, "Was the condition of the mixer/grinder, at the time of Mr. Hernandez's accident, substantially and materially different from its condition at the time it left the control of Weiler, in 1989?" Question four asked, "Was the Weiler mixer-grinder, serial number 89-220, when it left the possess of Weiler, the manufacturer, in 1989, in such a defective condition as to be unreasonably dangerous?" Hernandez claims that

[8] We commend the trial judge, Judge Barbara Kluka, for conducting the complex trial in a thorough and careful manner. Repeated attempts to gain admission of evidence subject to the ruling in limine demanded and were met with patience and circumspection.

asking the jury to first determine if the machine was altered, when coupled with the instruction that a seller of a product is not liable if the product has undergone a substantial and material change since leaving the manufacturer, implies to the jury that only an unaltered machine can be considered unreasonably dangerous when it left the manufacturer. Thus, Hernandez explains, when the jury answers "yes" to question three, it has no choice but to answer "No" to question four since it already knows the manufacturer is not liable.

¶13 We first observe that Hernandez does not specifically argue that the jury instructions were improper or misleading. His claim is that the question three should not have been asked separately because whether the product is substantially and materially changed is subsumed in the final element of the strict product liability determination—whether the unreasonably dangerous machine reached the consumer without substantial change in the condition in which it was sold. WIS JI—CIVIL 3260. Suggesting that Fair Oaks's alteration of the mixer/grinder did not absolve Weiler of liability, Hernandez cites ***Klonowski v. International Armament Corp.***, 17 F.3d 992, 998 (7th Cir. 1994), as establishing that a manufacturer may be held strictly liable if a product is defective so as to be unreasonably dangerous when it left the manufacturer's control even if it is subsequently substantially altered.

¶14 In ***Klonowski***, a shotgun caused injury when it discharged with the safety engaged. ***Id.*** at 993. The manufacturer claimed that the shotgun had gone through a substantial alteration because someone had bent the trigger pivot pin by applying excessive force. ***Id.*** at 997. It argued that the special verdict questions and related jury instructions were insufficient because they limited the jury's consideration to a change in condition of the shotgun between manufacture and delivery to the owner but did not permit the jury to consider whether there had

been any change in the shotgun's condition after purchase. ***Id.*** No error was found because the expert's testimony was that the shotgun was defective for using only a soft metal for the trigger pivot pin which could be bent by excessive pressure and there were no outside support arms to secure the pin. ***Id.*** Thus, the owner's alteration of the shotgun did not negate the manufacturer's liability because the alteration, through normal usage, "was only made possible because the product was defectively designed and unreasonably dangerous when the gun left the manufacturer's control." ***Id.*** at 998.

¶15 ***Klonowski*** has no application here because Fair Oaks's alteration of the mixer/grinder by removing the safety limit switch was not an alteration caused by normal usage. There was no testimony that the limit switch was defective because it was possible for the owner to disengage it.[9] This is not a ***Klonowski*** type case. Further, ***Klonowski*** has not been cited by any Wisconsin court as the only acceptable formulation of the special verdict and jury instructions. ***Glassey v. Continental Ins. Co***., 176 Wis. 2d 587, 600, 500 N.W.2d 295 (1993), remains the seminal Wisconsin precedent that "[m]anufacturers or sellers cannot be held strictly liable if the condition of the product substantially changes in a way that is material to the accident after the product leaves their control." ***Glassey*** recognizes that "[i]n some cases, whether a change is substantial and material to the accident may be a question for the jury." ***Id.*** at 605. We conclude that given the evidence in this case, it was not error for the special verdict to ask the jury to determine whether at the time of Hernandez's accident, the condition of the mixer/grinder

[9] It was disputed whether the mixer/grinder paddles had to be running in order to properly sanitize the machine such that the user would be required to by-pass the limit switch in order to sanitize the machine.

was substantially and materially different from its condition at the time if left Weiler's control.[10]

¶16 Regarding the order in which questions three and four were listed on the verdict, we reject Hernandez's claim that it forced a directed verdict on question four. Each question had its own time frame in accordance with products liability law. Question three was based on the condition of the mixer/grinder at the time of Hernandez's accident. Question four asked the jury to consider the condition of the mixer/grinder when it left Weiler's control. The corresponding instruction properly focused on whether the condition was the same when it arrived at Fair Oaks.[11] Given the exact wording of the questions as to the applicable time frame, the jury was not misdirected to answer question four in a certain way simply because question three was answered affirmatively.

¶17 The penultimate issue in Hernandez's appeal is that the apportionment of negligence question in the special verdict was improper because it asked the jury to consider the "condition of the mixer/grinder when sold" as part of the whole. He points out that ***Fuchsgruber v. Custom Accessories, Inc.***, 2001 WI 81, ¶3, 244 Wis. 2d 758, 628 N.W.2d 833, holds that the comparative negligence statute does not apply to strict product liability actions and that the

[10] To the extent Hernandez is claiming that the instruction misstated the law, we summarily reject it. The instruction accompanying question three stated: "A seller of a product is not liable if the product has undergone a substantial and material change from the time when it left the manufacturer or seller. A substantial and material change is a change in the design, function, or character of the product that has a causal link to the accident." The instruction uses the definition set forth in ***Glassey v. Continental Ins. Co***., 176 Wis. 2d 587, 600, 500 N.W.2d 295 (1993).

[11] There was no dispute that the mixer-grinder reached Fair Oaks in the same condition as when it left Weiler's control.

comparison in a product liability action is plaintiff-to-product and defendants-to-defendants for contribution purposes. Assuming without deciding that Hernandez is correct that the special verdict should have had two separate questions regarding the negligence apportionment and products liability apportionment, we consider the issue moot. Before reaching the apportionment question on the verdict, the jury determined that Weiler was not negligent with respect to the design of, or the warnings or notices accompanying the mixer/grinder. It also determined that the mixer/grinder was not defective so as to be unreasonably dangerous when sold by Weiler. Weiler was not liable in any event. When resolution of an issue will have no practical effect on the underlying controversy it is moot and will not be considered on appeal. ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

¶18 The final issue is the taxation of costs against Hernandez. After this action was commenced, WIS. STAT. § 814.04(2) (2001-02), was amended to increase the amount of certain taxable costs and permit the taxation of disbursements for photocopying, electronic communications, facsimile transmissions, and express or overnight delivery. The amendment "first applies to actions commenced or claims made on the effective date of this subsection." 2003 WI Act 138, § 36(1). The effective date of the amendment is July 1, 2004.

¶19 Hernandez objected to Weiler's statement of costs based on the new statute. The trial court ruled that the amendment applied in this case and allowed the taxation of greater expenses.

¶20 The interpretation of a legislative provision regarding the effective date of a statutory amendment is a question of law we determine de novo. *See* ***State v. Gonzales***, 2002 WI 59, ¶10, 253 Wis. 2d 134, 645 N.W.2d 264. We look

to the language of the statute itself and interpret it on the plain meaning of its terms. ***Hamilton v. Hamilton***, 2002 WI App 89, ¶8, 253 Wis. 2d 805, 644 N.W.2d 243, *aff'd*, 2003 WI 50, 261 Wis. 2d 458, 661 N.W.2d 832.

¶21 By its initial applicability provision to the amendment to WIS. STAT. § 814.04, the legislature clearly expressed its intent that the changes be applied prospectively only. *See* ***Snopek v. Lakeland Medical Center***, 223 Wis. 2d 288, 295-96, 588 N.W.2d 19 (1999). The application to "actions commenced or claims made on the effective date" refers to the filing of a summons and complaint to commence an action. This action was commenced prior to the effective date and the amendments increasing the taxable costs do not apply.

¶22 We recognize that in ***Neiman v. American National Property & Casualty Co.***, 2000 WI 83, ¶11, 236 Wis. 2d 411, 613 N.W.2d 160, the applicability language that an amendment "first applies to actions commenced on the effective date of this subsection" was held to be retroactive. However, reliance on ***Neiman*** in this case is misplaced because the ***Neiman*** court was addressing retroactive application of the statutory change on a cause of action accruing before the effective date. In ***Neiman*** the plaintiffs' action was filed after the effective date. ***Schultz v. Natwick***, 2002 WI 125, ¶9, 257 Wis. 2d 19, 653 N.W.2d 266 (footnote omitted), summarizes the effect of the initial applicability language for the amendment increasing the cap on wrongful death as construed in ***Neiman***: "The Act increasing the cap on damages expressly states that it applies to actions 'commenced on the effective date' of the amendment, namely April 28, 1998. This provision results in the increased cap applying retroactively to causes of action that accrued prior to April 28, 1998, if the lawsuit is commenced on or after April 28, 1998." Under the initial applicability language, the lawsuit must be filed after the effective date for the changes to apply.

¶23 We reverse the taxation of costs and remand to the trial court with directions to enter an amended judgment taxing costs in the amount of $7,899.61.[12] We need not address the cross-appeal because Hernandez does not recover against Weiler. No costs to any party.

By the Court.—Judgment affirmed in part, reversed in part, and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[12] Costs were taxed in the amount of $13,737.53. The taxation of costs included $500 rather than $300 for attorney fees, $4,891.91 photocopying expense, two expert witness fees of $300 rather than $100, photographs and video duplication of $165.15 instead of $50, and express mail and delivery of $230.86. Taxable costs should be reduced by $5837.92. Inasmuch as Hernandez does not detail the relief he seeks on this issue, he will not be heard to complain that the reduction is not sufficient. *Cf.* ***State v. Haynes***, 2001 WI App. 266, ¶1 n.2, 248 Wis. 2d 724, 638 N.W.2d 82 (where a party fails to provide record citations whereby the facts set forth in the brief can be corroborated, that party will not be heard on reconsideration to challenge facts that this court properly gleaned from the brief).