COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP58 **Cir. Ct. No. 2009CV498**

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

DONALD L. FORSYTHE AND GERALDINE FORSYTHE,

PLAINTIFFS-APPELLANTS,

OCEAN SPRAY CRANBERRIES,

INVOLUNTARY-PLAINTIFF,

V.

INDIAN RIVER TRANSPORT COMPANY AND STATE NATIONAL INSURANCE COMPANY, INC.,

DEFENDANTS-RESPONDENTS,

BRENNER TANK, LLC AND CALEDONIA HAULERS, LLC,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Monroe County: J. DAVID RICE, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 BLANCHARD, J. Donald and Geraldine Forsythe appeal a circuit court judgment dismissing their claims for negligence and strict products liability against Indian River Transport Company.[1] The claims arise out of an incident in which Donald Forsythe was injured while attempting to repair a leaking valve on a tanker truck owned and operated by Indian River. The Forsythes argue that the court erred in granting summary judgment to Indian River on their claims. We agree as to the negligence claim but not as to the strict products liability claim. Accordingly, we affirm the judgment in part, reverse it in part, and remand for further proceedings.

BACKGROUND

¶2 Indian River is in the business of hauling freight and food-grade liquid products. It is undisputed that Indian River owns and operates tanker trucks for this purpose.

¶3 The type of tanker involved in Forsythe's injury is equipped with a valve that is used in loading and unloading product. When the tanker is not being loaded or unloaded, the valve is sealed by a plunger. In order to load the truck, a

[1] Both Indian River and its insurer, State National Insurance Company, are defendants below and respondents in this appeal. However, this appeal does not involve any insurance coverage issues. Therefore, we refer only to "Indian River" whether referencing Indian River individually or both Indian River and its insurer collectively.

worker pulls the plunger out by hand and inserts a pin into a hole in the plunger to keep the valve open.

¶4 Forsythe was employed by Ocean Spray on the day he was injured. He was loading liquid product into an Indian River tanker truck through the valve, using a hose-and-pump system. Indian River did not supply a pin for the valve's plunger, so Ocean Spray workers used a pin from the Ocean Spray facility to keep the valve open.

¶5 During the loading process, Forsythe noticed a steady stream of product leaking from the valve area. He also noticed that the plunger was unusually loose and attempted to adjust it. While he did so, the vacuum force of the valve sucked in the plunger and sheared the pin. As a result, Forsythe's left index finger was crushed and the tip of his finger severed off.

¶6 The Forsythes sued Indian River and other defendants for negligence and strict products liability. The circuit court dismissed their claims against Indian River on summary judgment. The court concluded, as a matter of law, that the Forsythes' negligence claim against Indian River failed because harm to Forsythe was not foreseeable, and that the Forsythes' strict products liability claim failed because Indian River is not in the business of supplying to others any product involved in the accident, but instead only uses those products to provide services.

¶7 The Forsythes appeal. We reference additional facts as needed below.

DISCUSSION

¶8 We review summary judgment de novo, applying the same methods as the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d

48 (Ct. App. 1994). Summary judgment should be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). A genuine issue of material fact exists "if a reasonable jury could find for the nonmoving party." *See* ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178.

¶9 Thus, if reasonable but differing inferences can be drawn from undisputed facts, summary judgment is inappropriate. ***Delmore v. American Family Mut. Ins. Co.***, 118 Wis. 2d 510, 516, 348 N.W.2d 151 (1984). "Whether an inference is reasonable is a question of law, as is whether there is more than one reasonable inference." ***Wisconsin Chiropractic Ass'n v. Chiropractic Exam. Bd.***, 2004 WI App 30, ¶33 n.12, 269 Wis. 2d 837, 676 N.W.2d 580.

¶10 Applying the above summary judgment standards, we first address the Forsythes' negligence claim. We then turn to their strict products liability claim.

A. Negligence

¶11 "Negligence is ordinarily an issue for the fact-finder and not for summary judgment." ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶2, 241 Wis. 2d 804, 623 N.W.2d 751. The four elements of negligence are: "(1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury, and (4) actual loss or damage resulting from the injury." ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906.

¶12 The parties' primary dispute regarding the Forsythes' negligence claim is not expressly framed in terms of the negligence elements, but instead in terms of whether Indian River's acts or omissions created a foreseeable risk of harm. As stated above, this was the ground on which the circuit court dismissed the negligence claim, apparently concluding that under no reasonable view of the facts, construed in the light most favorable to Forsythe, could Indian River have foreseen injury to him.

¶13 The issue of foreseeability has been identified as a potentially confusing area of Wisconsin's negligence case law. *See* ***Nichols v. Progressive N. Ins. Co.***, 2008 WI 20, ¶¶34-47, 308 Wis. 2d 17, 746 N.W.2d 220 (identifying and explaining potential confusion as to the role of duty and foreseeability in analyzing negligence). We need not repeat the entire explanation in ***Nichols***; it is enough for our purposes here to note the court's statement in ***Nichols*** that "'[t]he test of negligence is whether the conduct foreseeably creates an unreasonable risk to others.'" *See* ***id.***, ¶13 (citation omitted); *see also* ***Alvarado v. Sersch***, 2003 WI 55, ¶13, 262 Wis. 2d 74, 662 N.W.2d 350 ("[A] duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person.").

¶14 The Forsythes argue that the circuit court erred because a jury could reasonably infer from the summary judgment evidence that Indian River's failure to provide a pin for the valve plunger suitable to the task created a foreseeable risk of harm, in particular a foreseeable risk of harm that a worker using the valve would be injured. Viewing the evidence in a light most favorable to the Forsythes, we agree that this is a reasonable inference from the evidence as discussed in the following paragraphs.

¶15 In reaching this conclusion, we focus in particular on the following evidence: Indian River employee Steve Ferguson's affidavit, Ferguson's deposition testimony, and Donald Forsythe's affidavit.[2]

¶16 Ferguson was Indian River's maintenance director for approximately twenty years, before becoming its human resources manager and acting safety director. He averred that, as maintenance director, he oversaw Indian River's equipment and the maintenance of that equipment. Ferguson also averred that the type of valve at issue on Indian River's tankers is operated by the workers at the facilities where product is being picked up or delivered.

¶17 At his deposition, Ferguson testified that Indian River knew and expected that Ocean Spray workers would attempt to repair by hand excessively leaking valves. He also testified that Indian River does not test its tanker valves for leakage during tanker inspections; instead, valves are repaired when workers bring valve leakage problems to Indian River's attention.

¶18 Ferguson additionally testified that, when workers attach the hose-and-pump system to load or unload the tanker, the valve can become dangerous. He further testified that the hole and pin are the only safety mechanism on the valves. Ferguson also testified that, if the valve that injured Forsythe had been properly pinned, Forsythe's injury would not have occurred.

[2] We need not and do not rely on the affidavit of the Forsythes' expert witness Donald Marty. The affidavit included an opinion that, "[h]ad a correct valve safety pin been provided with the tanker when it arrived at Ocean [S]pray, Mr. Forsythe most likely would not have been injured." Indian River argues that opinions expressed in the affidavit are inadmissible because they are not based on personal knowledge, lack foundation, and are unsupported by facts or data. The Forsythes argue to the contrary. Because we do not rely on the Marty affidavit, we need not address these arguments.

¶19 Forsythe averred in his affidavit that his injury occurred while he was attempting to stop a leak from a valve on an Indian River tanker, and that Indian River failed to supply a pin for the valve. He also averred that newer tanker trucks come with an attached valve pin that provides a safer method for ensuring that an adequate pin is available. Forsythe also averred that, before his injury occurred, Ocean Spray workers reported problems with leaking Indian River truck valves to Indian River.

¶20 When we view the evidence and the reasonable inferences from that evidence in a light most favorable to the Forsythes, we agree with the Forsythes that a jury could reasonably infer that Indian River's acts or omissions created a foreseeable risk of harm. More specifically, a fact finder could reasonably infer that Indian River's failure to provide a pin for the valve plunger created a foreseeable risk of harm that a worker using the valve would be injured, particularly given the evidence that Indian River was aware at the time of the accident that workers' hands come into contact with the valve and that operation of the valve with the hose-and-pump system can, in the words of Indian River's acting safety director, make the valve "dangerous." Stated another way, we cannot say that the only reasonable inference from the evidence, if viewed in a light most favorable to the Forsythes, is that Indian River's conduct did *not* create a foreseeable risk of harm.

¶21 We recognize, of course, that there may be competing reasonable inferences that a fact finder could draw from the evidence discussed, or from conflicting evidence in the record. But that is not the test for whether summary judgment was appropriately granted in Indian River's favor. The question is whether, viewing the evidence in a light most favorable to the Forsythes, there is a

reasonable inference from that evidence that Indian River's conduct created a foreseeable risk of harm. As we have explained, there is.

¶22 Indian River argues that harm was not foreseeable because there is no evidence that Indian River was aware of any prior accidents involving the type of valve that injured Forsythe, or with any other type of valve. This argument is not persuasive because Indian River provides no authority, and we know of none, for the proposition that, as a matter of law, harm is not foreseeable unless there has been a previous accident of the same type. The only case that Indian River cites is a slip-and-fall case from 1926 that does not support Indian River's position. *See* ***Lundgren v. Gimbel Bros, Inc.***, 191 Wis. 521, 523, 210 N.W. 678 (1926) (store was not liable to injured plaintiff when store had no actual or constructive notice that there was a substance on stairs that caused plaintiff in store to slip and fall).

¶23 Apart from its primary argument framed in terms of foreseeability, Indian River makes several other arguments in support of the circuit court's grant of summary judgment to Indian River on the Forsythes' negligence claim. We address and reject each of those arguments below.

¶24 First, Indian River argues that it cannot be found negligent because there is no evidence "that any pin Indian River could have provided was any different from Ocean Spray's pin." It is not clear what Indian River means to argue, because, without explaining further, Indian River follows up this argument with an assertion or concession that the Ocean Spray pin was "defective" and that "this accident was not the type of accident that would have occurred absent a defective pin." Thus, Indian River seems to argue that the pin supplied by Ocean Spray was defective and that Indian River might similarly have supplied a defective pin. We fail to understand how this argument supports summary

judgment in favor of Indian River. Regardless, Indian River does not argue that it was not responsible for providing a sufficiently safe pin or that it was Ocean Spray's responsibility to provide a sufficiently safe pin. Therefore, even if the Ocean Spray pin was defective or otherwise inadequate to the task, that inadequacy does not necessarily preclude negligence on the part of Indian River.

¶25 If what Indian River means to argue is that, based on the record before the court on summary judgment, a jury could not reasonably infer that a pin supplied by Indian River would not have failed, or at least would have been less likely to fail, we disagree. The pertinent evidence in this respect includes evidence that Indian River was in the business of hauling liquid products using tankers with valves like the one that injured Forsythe and that newer tankers came with attached pins, which provide a safer method for ensuring that an adequate pin is available. A jury could reasonably infer that Indian River was in a superior position to: (1) understand the risks posed to workers when it did not attach pins to tankers and (2) supply pins less likely to fail while liquid product was being loaded and unloaded through its tanker valves.

¶26 Second, Indian River argues that there is no evidence that anyone ever told the driver of the tanker truck involved in the accident at issue here that a pin was missing or that anyone asked the driver for a pin. However, even if there is no such evidence, we see no reason, and Indian River provides us with no reason, why we should conclude that the lack of such evidence precludes a negligence finding against Indian River, particularly when Indian River points to no evidence that the Indian River driver could or would have supplied a safe pin if asked to produce one.

¶27 Third, Indian River seems to argue, based on evidence in the record, that the valve leak to which Forsythe was responding at the time the pin sheared was due to the negligence of another defendant, a company that Indian River apparently uses to disassemble, clean, reassemble, and inspect valves, including the valve that injured Forsythe. This argument fails because, even if that company was solely to blame for the leak, a jury could reasonably find, based on the evidence already discussed, that Indian River knew or should have known that leaks in its valves occur in the usual course of operations; that workers such as Forsythe would or might likely attempt to stop the leaks; and that Indian River's failure to provide a pin suitable to the task would create or contribute to a foreseeable risk of harm from the valves when leaking occurred.[3]

[3] In response to Indian River's argument that the company that cleaned and inspected the valve was at fault, the Forsythes rely on a contract between Indian River and Ocean Spray. That contract includes a provision that Indian River "shall only use and provide equipment that is … in good operating condition and repair … and is suitable and properly configured to safely load, transport, and unload the shipments tendered by Ocean Spray." We decline to rely on this contract because the Forsythes do not cite authority explaining whether or how we may consider Indian River's contractual obligation to Ocean Spray in addressing the Forsythes' tort claim for negligence. The answer is far from apparent, as demonstrated by the following except from ***Atkinson v. Everbrite, Inc.***, 224 Wis. 2d 724, 592 N.W.2d 299 (Ct. App. 1999):

> A party's deficient performance of a contract does not give rise to a tort claim. "[T]he negligent performance of a duty created by contract … cannot, without more, create a separate cause of action [in tort]." ***Madison Newspapers, Inc. v. Pinkerton's, Inc.***, 200 Wis. 2d 468, 474, 545 N.W.2d 843, 846 (Ct. App. 1996) (citing ***McDonald v. Century 21 Real Estate Corp.***, 132 Wis. 2d 1, 9, 390 N.W.2d 68 (Ct. App. 1986)). "[T]here must be a duty existing independently of the performance of the contract for a cause of action in tort to exist." ***Landwehr v. Citizens Trust Co.***, 110 Wis. 2d 716, 723, 329 N.W.2d 411 (1983).

Atkinson, 224 Wis. 2d at 729.

¶28 Fourth, Indian River argues that, even if it was negligent, its negligence was not causal in Forsythe's injury. Indian River acknowledges that an injury may have more than one cause, but asserts that Forsythe's own conduct was an intervening cause that broke the "sequence of events" and rendered any negligence by Indian River "inoperative." In a related argument, Indian River asserts that Forsythe's own negligence exceeded any negligence of Indian River.

¶29 We conclude that this fourth set of arguments relates to the question of Indian River's and Forsythe's comparative causal negligence. As with negligence more generally, the question of comparative causal negligence is rarely appropriate for resolution on summary judgment. *See* ***Hansen v. New Holland N. America, Inc.***, 215 Wis. 2d 655, 669, 574 N.W.2d 250 (Ct. App. 1997) ("[T]he instances in which a court may rule that, as a matter of law, the plaintiff's negligence exceeds that of defendant are extremely rare."); *see also* ***Phelps v. Physicians Ins. Co.***, 2005 WI 85, ¶45, 282 Wis. 2d 69, 698 N.W.2d 643 ("The apportionment of comparative negligence is a matter left to the trier of fact.").

¶30 Indian River fails to persuade us that we are presented here with the "extremely rare" case in which deciding comparative causal negligence on summary judgment is appropriate. The two cases that Indian River discusses in which this court decided causal or comparative causal negligence as a matter of law are not factually analogous, and therefore do not persuade us that the question of comparative causal negligence should be removed from the fact finder here. *See* ***Cefalu v. Continental W. Ins. Co.***, 2005 WI App 187, ¶¶2, 5-6, 16-19, 285 Wis. 2d 766, 703 N.W.2d 743 (the defendant's negligence was not a cause of a subsequent vehicle accident that occurred near the scene of a previous vehicle accident the defendant caused, because the previous accident occurred thirty minutes earlier, the scene was secured by emergency personnel by the time of the

subsequent accident, and the plaintiff had driven by the scene, making her aware of the previous accident and emergency personnel); ***Johnson v. Grzadzielewski***, 159 Wis. 2d 601, 605-09, 465 N.W.2d 503 (Ct. App. 1990) (a plaintiff injured while joy riding on an elevator was more causally negligent than defendants, because he deliberately tampered with elevator safety mechanisms and climbed into a narrow space between elevator car and shaft instead of using clearly available safe means of exit).

¶31 Finally, Indian River argues that the Forsythes' negligence claim should be barred by at least two of six public policy factors that courts may apply to bar liability when negligence has occurred.[4] In particular, Indian River argues that the Forsythes' negligence claim should be barred because Forsythe's injury is too remote from the alleged negligence and because allowing recovery in this case would enter into a field that has no sensible or just stopping point. Mindful that the "better practice" is usually "to submit the case to the jury before determining whether the public policy considerations preclude liability," ***Alvarado***, 262 Wis. 2d 74, ¶18, we are not persuaded by Indian River's public policy factor argument. Its specific arguments on this topic essentially rehash its causation and

[4] The six public policy factors that may bar liability even when there has been negligence are:

> (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor's culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm; (4) allowing recovery would place too unreasonable a burden on the tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; [or] (6) allowing recovery would enter a field that has no sensible or just stopping point.

Alvarado v. Sersch, 2003 WI 55, ¶17, 262 Wis. 2d 74, 662 N.W.2d 350 (quoting ***Gritzner v. Michael R.***, 2000 WI 68, ¶27, 235 Wis. 2d 781, 611 N.W.2d 906).

comparative negligence arguments that we have already rejected. We need not repeat our reasons for rejecting those arguments. Indian River's framing of those arguments in terms of public policy factors adds nothing.

B. Strict Products Liability

¶32 We turn to the Forsythes' argument that the circuit court erred in granting summary judgment to Indian River on their strict products liability claim.[5] For purposes of this claim, we perceive no dispute as to the material facts or reasonable inferences from those facts. Rather, the dispute focuses purely on legal standards as applied to undisputed facts. As indicated above, the circuit court concluded that the Forsythes' strict products liability claim fails because Indian River does not supply products.

¶33 Our supreme court has adopted the RESTATEMENT (SECOND) OF TORTS § 402A for strict products liability claims. *See* ***Kemp v. Miller***, 154 Wis. 2d 538, 549, 453 N.W.2d 872 (1990). The court has interpreted § 402A to require proof of five elements: (1) the product was in defective condition when it left the possession or control of the seller; (2) the product was unreasonably dangerous to the user or consumer; (3) the defect was a cause of the plaintiff's injuries or damages; (4) the seller engaged in the business of selling such product, and (5) the product was one which the seller expected to and did reach the user or

[5] We note that the Forsythes filed their strict products liability claim before the effective date of changes to Wisconsin's products liability law enacted by the legislature in January 2011. *See* 2011 Wis. Act 2, §§ 29-31 (creating WIS. STAT. §§ 895.045(3), 895.046, and 895.047); 2011 Wis. Act 2, § 45(5) (providing that §§ 895.045(3), 895.046, and 895.047 "first apply to actions or special proceedings that are commenced on the effective date of this subsection," February 1, 2011). Thus, we are not faced with the question of whether our analysis would be different under current Wisconsin products liability law.

consumer without substantial change in the condition it was in when sold. ***Estate of Cook v. Gran-Aire, Inc.***, 182 Wis. 2d 330, 335, 513 N.W.2d 652 (Ct. App. 1994) (citing ***Dippel v. Sciano***, 37 Wis. 2d 443, 460, 155 N.W.2d 55 (1967)).[6]

¶34 Our focus here is on the fourth element, whether the seller engaged in the business of selling such product, because the Forsythes' argument appears primarily directed at that element. In particular, their argument pertains to what it means to "engage in the business" of "selling" a product for purposes of § 402A.

¶35 The Forsythes do not argue that Indian River was "engaged in the business" of "selling" tankers or valves in any ordinary sense of those terms. Rather, the Forsythes argue that the terms "sell" and "selling" should be interpreted broadly for purposes of § 402A to include product "suppliers" or any other company that "places" products in the "stream of commerce." The Forsythes' position, as we understand it, is that the circuit court applied the wrong

[6] The RESTATEMENT (SECOND) OF TORTS § 402A, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

legal standard by concluding that Indian River does not "supply" any products. In the Forsythes' view, Indian River engages in the business of supplying valves, or, put another way, places tankers with valves into the stream of commerce.

¶36 We are not persuaded by the Forsythes' position that Indian River is a supplier of tankers or valves. This would stretch the meaning of "supplier" and of "placing" products in the "stream of commerce" beyond any reasonable interpretation of those terms in the context of strict products liability. Under the Forsythes' argument, any company that owns and uses a given type of product to carry out its business activities (here, owning and using tanker trucks and valves to carry out the business of hauling liquids) would be strictly liable for harm that the product causes.

¶37 In support of their position, the Forsythes rely on essentially three authorities. As we explain below, we do not find any of these authorities persuasive.

¶38 First, the Forsythes rely on WIS JI—CIVIL 3262. While it is true that this pattern jury instruction references a duty of a "manufacturer (supplier)" to warn in the context of § 402A strict products liability, the instruction contains nothing suggesting that the term "supplier" for purpose of § 402A is defined as broadly as the Forsythes define it.

¶39 Second, the Forsythes cite ***Mulhern v. Outboard Marine Corp.***, 146 Wis. 2d 604, 432 N.W.2d 130 (Ct. App. 1988). In that case, however, the primary issue was whether a business that does in fact sell a product could be strictly liable if that business had not charged the plaintiff consumer for the particular product that caused the plaintiff's injury. The court characterized the issue as "[w]hether the doctrine of strict liability can be applied in a nonsale context" or as "whether a

technical sale must occur before the doctrine of strict liability can apply." ***Id.*** at 610, 612. The court held that "the sale of the product is not important *as long as the defendant is in the business of selling such a product* and [the defendant] placed the product in the 'stream of commerce.'" ***Id.*** at 614 (emphasis added). Thus, the point of ***Mulhern*** is that, as long as the defendant is in the business of actually selling a given type of product, it does not matter that the defendant happened not to charge for the particular product that caused injury. We see nothing in ***Mulhern*** to suggest that the court was extending § 402A to apply to companies, like Indian River, that do not sell the type of product in question.

¶40 Third, the Forsythes rely on ***Kemp***. In ***Kemp***, the court held that a commercial lessor of vehicles could be held strictly liable as a seller under § 402A, essentially as if the commercial lessor of vehicles were an actual seller of vehicles. *See* ***Kemp***, 154 Wis. 2d at 549, 558. The court reasoned that the policy considerations that support strict liability for sellers of products apply to commercial lessors of products. More specifically, the court explained as follows:

> We are mindful of the rapid growth of the commercial leasing industry in recent years. We … are persuaded that the policy considerations which justify the imposition of strict liability on sellers and manufacturers apply to those who are engaged in the business of leasing products to the consuming public.
>
> Like manufacturers and sellers, persons in the business of leasing continually introduce potentially dangerous instrumentalities into the stream of commerce. A commercial lessor is in a far better position than the lessee to distribute the cost of compensating product-related injuries by purchasing liability insurance and by adjusting the rent paid for the leased product to reflect this cost. In addition, the commercial lessor has the physical facilities and the technical competence and expertise to prevent the circulation of defective products by assuring that his or her products are constantly maintained in a safe condition. Further, by placing products in the stream of commerce and by advertising, the commercial lessor

> impliedly represents to the lessee that those products are safe for use during the term of the lease.

Id. at 554.

¶41 The Forsythes do not argue that there is any evidence that Indian River is a lessor of tanker trucks or valves. They assert, however, that the policy considerations discussed in ***Kemp*** apply with equal force to Indian River. They point to evidence that Indian River has a fleet of approximately 700 tankers with valves, and they argue that Indian River is in the best position to maintain the valves properly and to spread the risk among its many customers.

¶42 We acknowledge that the Forsythes may have a persuasive point with respect to at least some of the policies discussed in ***Kemp***. However, we are not persuaded that ***Kemp***'s holding or reasoning contemplates that companies like Indian River "introduce" products into the "stream of commerce" in the way that a commercial lessor does. As we have suggested above, to hold otherwise would seem to unreasonably extend strict liability for a product to any company that owns and uses that type of product in the course of its business activities.

¶43 Moreover, after the supreme court decided ***Kemp***, this court indicated that ***Kemp***'s holding is limited to commercial lessors. In ***Estate of Cook***, we stated that, "[b]asically, all ***Kemp*** does is allow the insertion of the word 'lessor' in the place of the word 'seller' …." ***Estate of Cook***, 182 Wis. 2d at 335. Here, as we have already indicated, the Forsythes do not argue, or point to any evidence that, Indian River is a lessor of tanker trucks or valves.

CONCLUSION

¶44 In sum, we conclude that the circuit court incorrectly granted summary judgment on the Forsythes' negligence claim but correctly granted summary judgment on their strict products liability claim. Accordingly, we affirm the judgment in part, reverse it in part, and remand for further proceedings.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.