STATE OF MICHIGAN

COURT OF APPEALS

CURTIS TWYMON and RENEE TWYMON,

Plaintiffs-Appellants,

v

CHEMSERVE CORPORATION, ABELL CORPORATION, POLY PROCESSING COMPANY, INC., and WAGNER ENTERPRISES, INC.,

Defendants-Appellees,

and

SPEARS MANUFACTURING CO.,

Defendant,

and

MELMAC COMPANY and P.T. COUPLING,

Not Participating.

UNPUBLISHED
July 15, 1997

No. 189269
Wayne Circuit Court
LC No. 94-415162-NP

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

This is a products liability action. Plaintiffs appeal as of right from the trial court's orders granting summary disposition pursuant to MCR 2.116(C)(10) to defendants Chemserve Corporation, Abell Corporation, and Wagner Enterprises, Inc. We affirm.

Plaintiff Curtis Twymon (plaintiff) was injured at work while attempting to transfer sulfuric acid from a delivery tote to a tank. The transfer process typically involved attaching a hose to the tote's

discharge port valve after unfastening a "quick-connect" dust cap, and then turning the handle on the valve to start the flow of acid into the hose. In this case, however, plaintiff alleged that the tote's valve was open or defective, causing acid to spew out when he unfastened the cap. The tote containing the acid was filled and sold to plaintiff's employer, Ano-Tech, by defendant Chemserve. Chemserve ordered the empty tote from defendant Wagner; it was manufactured by defendant Abell.

Plaintiff's complaint alleged that Chemserve breached its duty of care by not properly filling, inspecting, or shipping the tote because the discharge port valve was not closed when the tote was delivered to Ano-Tech. The complaint also alleged that Abell and Wagner negligently designed the tote. As noted above, the trial court ultimately granted summary disposition in favor of defendants.

Plaintiffs contend that the trial court erred in granting summary disposition in favor of Abell and Wagner on the design defect claim. First, plaintiffs assert that the trial court erred in granting summary disposition to Abell and Wagner because Abell's manufacture and Wagner's distribution of a defective product to Chemserve, and ultimately to plaintiff's employer, was not protected by the sophisticated user doctrine. Further, plaintiffs assert, the trial court erred in finding that the discharge port valve on the tote was a simple tool whose dangers should have been obvious to plaintiff. We disagree.

Although Michigan courts have generally applied the sophisticated user doctrine to cases involving a manufacturer's duty to warn of dangers regarding the intended uses of the product, see *Gregory v Cincinnati, Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995), we conclude that the doctrine had some relevance to the facts of this case. The sophisticated user doctrine is based on the theory that a seller or manufacturer should be able to presume mastery of basic operations by experts or skilled professionals in an industry, and should not owe a duty to warn or instruct such persons on how to perform basic operations in their industry. *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 147; 530 NW2d 510 (1995), citing *Ross v Jaybird Automation, Inc*, 172 Mich App 603, 607; 432 NW2d 374 (1988). In a design defect case such as this one, a manufacturer has a duty to design its product so as to eliminate any unreasonable risk of foreseeable injury. *Mallard v Hoffinger Industries, Inc (On Remand)*, 222 Mich App 137, 140; ___ NW2d ___ (1997), citing *Prentis v Yale Mfg Co*, 421 Mich 670, 693; 365 NW2d 176 (1984). In assessing the risk of foreseeable injury to the product user, it is reasonable to take into consideration the sophistication of that user.

Further, we conclude that plaintiffs failed to establish that a genuine issue of material fact existed as to whether Chemserve, Ano-Tech, and plaintiff were sophisticated users of the tote. *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 547; 509 NW2d 520 (1993); *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 247-248; 492 NW2d 512 (1992). Chemserve was a chemical supply company that sold its products only to industrial users. Its president had almost twenty-five years of experience in the chemical supply industry and had used totes of all kinds for shipping chemicals for many years. He knew that warning labels and "quick connect" caps like the one plaintiff removed were not only standard in the industry, they were also required for the protection of his customers. Ano-Tech was a longtime and large-scale user of many chemicals, including sulfuric acid, of which it used about two hundred to three hundred gallons a month at the time of plaintiff's accident. Ano-Tech bought this acid only from Chemserve. All of Ano-Tech's employees

responsible for placing chemicals in the anodizing vats followed the same procedure. Plaintiff himself performed this task at least five times, and possibly as many as ten times, before his accident in the one-year time that Ano-Tech had been using the totes from Chemserve, and presumably was familiar with the operation of the discharge port valve.

We also conclude that plaintiffs failed to establish that a genuine issue of material fact existed as to whether the discharge port valve was a simple tool posing an obvious risk unreasonable in light of the foreseeable injuries. *Mallard, supra; Owens v Allis-Chalmers Corp,* 414 Mich 413, 425; 326 NW2d 372 (1982); *Adams v Perry Furniture Co (On Remand),* 198 Mich App 1, 10-11; 497 NW2d 514 (1993). Plaintiffs have not shown that Abell adopted a design that did not safely and feasibly guard against foreseeable misuse, or that an alternative design could have reduced the risk of harm at a cost and in a manner that maintained the tote's utility. *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379, 394; 491 NW2d 208 (1992).

Plaintiffs contend that the tote was defective because it could not be determined simply by looking at the discharge port valve handle whether the discharge port valve was closed, and because the valve did not have a "lockout" device to prevent unauthorized or accidental opening. The argument is without merit. Plaintiff stated that although he knew the positions of the valve handle that indicated the valve's open and closed positions, he did not look at the tote before preparing to drain it to see the handle's position. The Chemserve worker who filled the tote, on the other hand, stated that he always checked the discharge port valve on a filled tote before shipment to make sure it was closed. The worker also stated that he always filled the totes with the "quick connect" caps off so he could check the discharge port valves for leaks. Plaintiffs also offered no proof that placing a lockout device such as a shear pin, which would have to be broken and replaced with each use of the tote, or a lock would have been feasible for Abell or Wagner. Moreover, Chemserve reused the totes once they left Wagner's control. It would have been up to Chemserve to ensure that the lockout devices were used, not Abell or Wagner. Plaintiffs never established that Chemserve would use such devices. On this record, therefore, we conclude that the trial court did not err in granting Abell's and Wagner's motions for summary disposition because plaintiffs failed to establish that a genuine issue of material fact existed that the tote was a simple tool posing an obvious and avoidable danger, or that Chemserve, Ano-Tech and Curtis were not sophisticated enough to recognize and avoid the danger. *Radtke v Everett,* 442 Mich 368, 374; 501 NW2d 155 (1993).

Plaintiffs also argue that the trial court erred in granting Chemserve's motion for summary disposition because a genuine issue of material fact existed as to whether Chemserve negligently shipped the chemical delivery tote with the discharge port valve open. Again, we disagree.

While plaintiffs asserted that the discharge port valve was open when plaintiff took the "quick connect" cap off on the day of his accident and that the subject tote had not been previously used, it was also established that the tote had been on Ano-Tech's property for about a month before the accident. Further, the tote had been kept in a warehouse separate from the building housing the anodizing tanks, where presumably any of Ano-Tech's workers could have had access to it. Additionally, the Chemserve worker who filled the tote stated that he always filled the totes with the

"quick connect" cap off and the discharge port valve closed so he could check the valve for leaks, and that he always checked the discharge port valve before a filled tote was shipped to ensure that the valve was closed. The worker also stated that he would never have filled a tote with just the "quick connect" cap in place because "[i]t don't look like it's that strong to hold that much material." Under these circumstances, we conclude that the trial court did not err in granting Chemserve's motion for summary disposition because plaintiffs failed to establish that a genuine issue of material fact existed as to whether Chemserve's negligence caused Curtis' injuries. *Radtke, supra* at 374; *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 483; 531 NW2d 715 (1994).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie

I concur in result only.

/s/ William B. Murphy