STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH FRONTERO,

Plaintiff-Appellant,

v

AVERILL RECYCLING, INC. f/k/a/ AVERILL WASTE, INC., EXIDE CORPORATION and LOAD KING MANUFACTURING COMPANY, INC.,

Defendants-Appellees.

UNPUBLISHED
November 14, 1997

No. 194780
Lapeer Circuit Court
LC No. 93-019408-NP

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

This dispute arose after plaintiff suffered an electrical shock in the course of his employment at Kmart Corporation. Plaintiff brought suit against defendants and, after periods of discovery, the lower court issued separate orders granting summary disposition for each defendant pursuant to MCR 2.116(C)(8) and (10). Plaintiff now appeals as of right. We affirm.

Plaintiff was injured as he was preparing to bale cardboard boxes in a machine manufactured by defendant Load King Manufacturing Company and installed by defendant Averill Recycling, Incorporated. As he was removing baling wires from a plastic pipe, the wires came into contact with a stack of batteries. Plaintiff apparently received a severe electrical shock when the batteries, the baling wires, his body, and a pool of battery acid formed a complete circuit. The batteries were unrelated to the baling operation, and were stored pursuant to a contract between Kmart and defendant Exide Corporation. Under the contract, Kmart stored used batteries turned in by customers until Exide picked them up for recycling.

I

Plaintiff first argues that the trial court erred in denying plaintiff's motion to compel Exide to produce employees who were knowledgeable about dangers posed by unprotected used batteries. We disagree. We review a trial court's decisions regarding the grant or denial of discovery for an abuse of

discretion. *Dorris v Detroit Osteopathic Hosp Corp*, 220 Mich App 248, 250; 559 NW2d 76 (1996).

Here, plaintiff was not entitled to production of such employees under the expert-witness discovery rule set forth in MCR 2.302(B)(4). Pursuant to that rule, plaintiff was only entitled to discovery relating to persons whom defendants expected to call as expert witnesses at trial. While MCR 2.302(B)(1) might authorize the type of discovery plaintiff requested, the grant or denial of such discovery is still a matter within the trail court's discretion. *Michigan Millers Mut Ins Co v Bronson Plating Co*, 197 Mich App 482, 494; 496 NW2d 373 (1992), aff'd on other grounds 445 Mich 558 (1994). After reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's motion to compel production of witnesses.

In addition, even if plaintiff was entitled to depose Exide's employees, the trial court's failure to compel their production would not require us to reverse the court's grant of summary disposition. Plaintiff asserted that the purpose of his discovery request was to establish the scope of Exide's knowledge regarding hazards associated with batteries. We recognize that such discovery would have been relevant to plaintiff's contention that Exide had superior knowledge of the dangers of batteries and was negligent in failing to warn Kmart regarding these dangers. However, plaintiff could not establish Exide's liability for failure to warn unless it could show that the warning would have altered the way in which the batteries were handled. Otherwise, the failure to warn was not a proximate cause of plaintiff's injuries. See *Bordeaux v Celotex Corp*, 203 Mich App 158, 166; 511 NW2d 899 (1993); *Nichols v Clare Community Hosp*, 190 Mich App 679, 684; 476 NW2d 493 (1991). Here, an internal Kmart memorandum revealed that Kmart was already aware of the dangers associated with the storage of used batteries. Because Kmart was already aware of these hazards, plaintiff could not show that a warning from defendant Exide would have altered the way in which the batteries were handled.

Plaintiff also argues that depositions of defendant's employees would have established that used batteries are "hazardous." Plaintiff offers no support for the proposition that he was entitled to rely on Exide's employees to make this showing. Plaintiff was free to hire his own expert to establish that used batteries are hazardous. Under these circumstances, even if the trial court had erred in denying plaintiff's discovery request, we would decline to reverse the trial court's grant of summary disposition.

II

Plaintiff next argues that the lower court erred in finding that defendant Exide owed no legal duty to him. We disagree.

Plaintiff first argues that electricity is inherently dangerous, and that Exide, as owner of the used batteries, had a duty to prevent harm to him. We find no authority for this proposition. Here, Exide was simply the owner of the batteries. It did not manufacture the batteries, and it was not responsible for them while they were stored on Kmart's premises. We find that automobile batteries are not comparable to live, high-voltage electrical wires. Thus, we decline to impose the duties imposed on the owners or operators of such wires on the owners of used automobile batteries. See *Schultz v*

Consumers Power Co, 443 Mich 445, 450; 506 NW2d 175 (1993); *Warren v City Electric R Co*, 141 Mich 298, 301; 104 NW 613 (1905).

Plaintiff next contends that defendant was negligent in failing to warn Kmart of dangers associated with used batteries. Again, plaintiff failed to show that Exide owed him a duty to warn Kmart. In any event, as explained previously, any failure by Exide to warn of such hazards was not a proximate cause of plaintiff's injuries because Kmart was already aware of these hazards.

Plaintiff also contends that Exide was negligent because the storage method for the batteries "did not meet other federal, state, and safe practice environmental and safety regulations with respect to chemical resistance or toxic, fire and explosion hazards." However, the only authority plaintiff cites is a federal regulation which pertains to the packaging of batteries for transport. See 49 CFR 173.159(c)(1), (d), (e), and (f). This regulation does not establish any duty on the part of Exide regarding the packaging of the batteries while they were at Kmart.

Plaintiff also asserts that the likelihood of his contact with the stack of used batteries was increased by Exide's failure to pick up the batteries according to a biweekly schedule. However, plaintiff failed to establish that Exide had any duty to pick up the batteries on a regular schedule. The contract between Exide and Kmart does not establish a schedule for the pickup of the batteries. Indeed, plaintiff does not cite, and we are unable to find, any evidence in the lower court record to establish Exide's duty to pick up the batteries on such a schedule. The contract places the burden of storing the batteries on Kmart. Thus, any improper storage of accumulated batteries is attributable to Kmart, not Exide.

Plaintiff also claims that one of Exide's truck drivers chose the storage area for the batteries because he insisted that the batteries be kept close to the loading dock doors. Plaintiff claims that this choice of location contributed to the accident. However, based on the contract and on Kmart's control of its storage room, it is clear that Kmart was ultimately responsible for storage of the batteries. A suggestion by Exide's truck driver was insufficient to create a duty on the part of Exide regarding storage. Because plaintiff failed to establish that Exide owed him any duty under any of his theories, the trial court properly granted summary disposition for Exide on plaintiff's negligence claim.

Plaintiff also argues that Exide had a contractual duty to pack the used batteries, and that his injury could have been prevented if Exide had properly packed the batteries by posting warnings, changing the collection site of the used batteries, or supplying terminal caps or plastic-lined boxes. The relevant contractual provision states that:

> [u]pon delivery of a Battery to a Kmart store by a member of the public, ownership of the Battery will immediately transfer to Exide, and Exide will be solely responsible for proper store pickup, packing, transportation and disposal of the Battery. Kmart will be solely responsible for storing the Battery at the store until pickup by Exide.

The plain language of the contract indicates that Exide's responsibility to pack the batteries was in conjunction with its duty to transport the batteries, and that, until Exide picked up the batteries for

transport, Kmart was solely responsible for their storage. Therefore, while Exide had a contractual duty to pack the batteries for transport, it did not owe any duty to plaintiff while the batteries were stored at Kmart. Thus, plaintiff's contract argument is without merit, and the trial court properly granted summary disposition for Exide.

Plaintiff next claims that Exide was liable under a theory of nuisance. A "nuisance" generally denotes a non-trespassory interference with the property rights of another. *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995). Plaintiff has failed to show how the storage of the batteries on Kmart's premises, pursuant to the contract between Kmart and Exide, constituted an interference with any property rights.

We note, however, that the term "nuisance" has also been used to describe "a dangerous condition which might result in injury." *Radloff v State*, 116 Mich App 745, 757-758; 323 NW2d 541 (1982), remanded on other grounds 417 Mich 894 (1983). In order to be liable for damage caused by this type of nuisance, defendants must have: "(1) created the nuisance; (2) owned or controlled the property from which the nuisance arose; or (3) employed another to do work which he knows is likely to create a nuisance." *Id.* at 758. Here, we conclude that Exide's ownership of the batteries was insufficient to make it liable on a nuisance theory. The risk posed by the batteries in this case stemmed from the method of storage and from the batteries' proximity to other equipment. In this case, an action for nuisance would only lie against a party that: (1) physically placed the batteries in storage; (2) owned or controlled the area where the batteries were stored; or (3) employed the person who physically placed the batteries in storage. Plaintiff has not even alleged that Exide meets any of these descriptions. Thus, we conclude that the trial court properly granted summary disposition Exide on plaintiff's nuisance claim.

As the trial court noted, plaintiff failed to brief his breach of warranty claim below. On appeal, although plaintiff requests that all of the trial court's grants of summary disposition be reversed, he again fails to provide any argument or authority regarding his breach of warranty claim. We will not search for authority to sustain or reject a party's position. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 14; 527 NW2d 13 (1994).

For the above stated reasons, we affirm the trial court's grant of summary disposition for defendant Exide.

III

Plaintiff also argues that the trial court erred in granting summary disposition for defendant Averill Recycling. We disagree. Plaintiff argues that he presented factual proofs establishing that Averill Recycling breached its duty of care regarding the installation and maintenance of the baling machine and baling wires. In granting summary disposition for Averill Recycling, the lower court observed that Averill Recycling was not a party to the recycling contract between Kmart and Exide. The court concluded that Averill Recycling's duty was limited to using reasonable care in installing and maintaining the baler, and warning of any inherently dangerous features of operating it. The court also noted that

Averill Recycling did not have control over placement of the baler, baling wires, or batteries, and that Kmart did not follow Averill Recycling's advice regarding location of the baling wires.

Plaintiff asserts that the testimony of his expert witness established that Averill Recycling might not have used due care in the installation of the baling machine, because Averill Recycling failed to consider where the baling wires should be located. Plaintiff's expert stated by affidavit that Averill Recycling failed to safely install the baling machine because it did not properly consider space for clearance of the baler and wires away from exposed sources of electricity, and that the location of the PVC pipe holding the baling wires would not have made any difference in reducing the danger presented to plaintiff. However, in his earlier deposition testimony, plaintiff's expert stated: (1) that Kmart did not follow Averill Recycling's suggestion that a PVC tube be mounted on the wall to hold the baling wires; (2) that Kmart instead leaned a PVC tube from the floor against the wall; (3) that if the tube were mounted on the wall, plaintiff could have handled the baling wires in a position that would have avoided contact with the stack of batteries; and (4) that the main problem was that one end of the tube was resting on the ground so that baling wire could not be taken from that end. A party or witness may not create a factual dispute by submitting an affidavit which contradicts his own prior conduct or sworn testimony. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997); *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). Therefore, plaintiff's expert's affidavit did not create a factual question regarding Averill Recycling's use of due care in the installation of the baling machine.

The lower court's grant of summary disposition was also appropriate because the harm that plaintiff suffered was unforeseeable. Under the circumstances of this case, Averill Recycling had no duty to protect plaintiff where the harm encountered by the plaintiff was not foreseeable. *Groncki v Detroit Edison Co*, 453 Mich 644, 657; 557 NW2d 289 (1966) (Brickley, C.J.). Although Kmart's internal memorandum addressed the dangers of used batteries, no evidence in the lower court record indicated that Averill Recycling knew of such dangers. Plaintiff himself contends that his injuries resulted from a circuit created by the baling wires, the stack of used batteries, his body, and a pool of battery acid. We conclude that Averill Recycling should not have been expected to foresee such a combination of circumstances, and we therefore affirm the trial court's grant of summary disposition.

Regarding plaintiff's contention that Averill Recycling failed to provide a warning, "[t]he law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Brown v Drake-Willock Int'l*, 209 Mich App 136, 145; 530 NW2d 510 (1995). There was no contention that Averill Recycling had manufactured the batteries involved in the present case. In addition, as previously noted, Kmart already knew of the dangers posed by used batteries. Finally, Averill Recycling correctly points out that there is no duty to warn regarding the use of a simple tool, in contrast to "a mechanically complicated machine." *Viscogliosi v Montgomery Elevator Co*, 208 Mich App 188, 189; 526 NW2d 599 (1994). We conclude that the baling wire used in this case was a simple tool. Thus, defendant Averill Recycling had no duty to warn and the trial court properly granted summary disposition in its favor.

IV

Plaintiff also argues that the trial court erred in granting summary disposition for defendant Load King Manufacturing. The trial court found that the risk to plaintiff was minimal and not foreseeable, and that it would be speculative to hold defendant liable. The trial court also decided that binding cable was not so inherently dangerous as to impute a broad duty on Load King to protect plaintiff. The court further ruled that Load King was not responsible for the placement of the baling machine near the stack of batteries or for the location of storage of the baling wires, and concluded that there was no proximate cause between Load King's product and plaintiff's injuries. We agree with the trial court's conclusions.

In his deposition, plaintiff admitted that the baling machine was operating correctly at the time of the accident, and that the machine itself -- in contrast with the baling wire -- was not involved in the accident. However, plaintiff contends that defendant should have had a wire holder attached to the baling machine, in order to avoid accidents such as occurred in this case. The panel in *Reeves v Cincinnati, Inc*, 176 Mich App 181; 439 NW2d 326 (1989), described the elements required to support a claim such as plaintiff's:

> a prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product. [*Id*. at 187-188.]

As noted above, we conclude that the risk in this case was not foreseeable. Thus, plaintiff cannot make a prima facie showing under *Reeves*, and the trial court properly granted summary disposition for Load King.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s./ Joel P. Hoekstra