STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY GROSTIC, Personal Representative of the Estate of Gerald F. Grostic, and BEVERLY GROSTIC, GERALD GROSTIC, JR., and JASON GROSTIC, Individually,

Plaintiffs-Appellees,

v

AGCO CORPORATION, a Delaware Corporation,

Defendant/Cross-Defendant-Appellant,

and

S+L+H, S.P.A., a foreign partnership,

Defendant/Cross-Defendant,

and

DIUBLE EQUIPMENT, INC.,

Defendant/Cross-Plaintiff.

UNPUBLISHED
January 14, 2003

No. 218848
Livingston Circuit Court
LC No. 96-014968-NP

ON REMAND

BEVERLY GROSTIC, Personal Representative of the Estate of Gerald F. Grostic, and BEVERLY GROSTIC, GERALD GROSTIC, JR., and JASON GROSTIC, Individually,,

Plaintiffs-Appellees,

v

AGCO CORPORATION, a Delaware Corporation,

Defendant/Cross-Defendant,

No. 218849
Livingston Circuit Court
LC No. 96-014968-NP

---

and

S+L+H, S.P.A., a foreign partnership,

Defendant/Cross-Plaintiff-
Appellant,

and

DIUBLE EQUIPMENT, INC.,

Defendant/Cross-Plaintiff. ON REMAND

Before: Holbrook, Jr., P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

These consolidated appeals are back before us on remand from our Supreme Court. In our earlier opinion, in a split decision, we affirmed the verdict and damage award on plaintiffs' products liability claim, and vacated the verdict and damage awards to decedent's sons on their claims of negligent infliction of emotional distress. *Grostic v AGCO Corp*, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2001 (Docket Nos. 218848 & 218849) (hereinafter *Grostic I*), vacated ___ Mich ___; 639 NW2d 807 (2002). The dissenting judge agreed that decedent's sons failed to establish their case of negligent infliction of emotional distress, but disagreed with the majority's conclusion that plaintiffs had established the causal element of their product liability claim. *Grostic I, supra* at slip op p 2 (ZAHRA, J., dissenting). The dissent asserted that the majority analysis had erred by, in the view of the dissent, focusing improperly on defendants' inability to prove their theory of causation. *Id.* at slip op p 3.

In lieu of granting leave to appeal, the Supreme Court vacated our earlier decision and remanded the matter to this Court for reconsideration. ___ Mich ___; 639 NW2d 807 (2002). The Supreme Court agreed with our dissenting colleague that the "majority inverted the burden of proof by relying in part on an alleged lack of evidence to support the *defense* theory of causation. The majority should have confined its analysis to whether *plaintiffs'* evidence was sufficient." *Id.* (emphasis in original). In all other respects, the Supreme Court denied defendants' application for leave. Plaintiffs' application for leave to appeal was also denied. *Id.*

The underlying facts are set forth in our earlier opinion:

> The lawsuit underlying this appeal stems from the accidental death of Gerald F. Grostic at decedent's dairy farm. Decedent was killed when he became lodged inside a haybine . . . . The haybine was attached to an AGCO-Allis 7600 farm tractor, which was manufactured by S+L+H, S.p.A., a foreign partnership, and distributed in the United States by AGCO. Decedent purchased the tractor new in 1992 from Diuble Equipment, Inc. [Diuble and plaintiffs settled prior to

> trial, and Diuble is not a party to this appeal.] The hydraulically operated haybine was connected to, and powered by, the tractor's hydraulic system through the tractor's rear mounted power take-off (PTO).
>
> Although there were no eyewitnesses to the accident, decedent's son, Jason Grostic, testified that a few minutes before the accident, decedent had disengaged the haybine and stopped the forward motion of the tractor. The tractor's engine, however, remained idling. Jason saw his father dismount the tractor, go to the toolbox on the haybine and remove something, and then move in front of the tractor, as if to work on the implement's cutting knives. Both Jason and his brother, Gerald Grostic, Jr., testified that while they did not see what their father was doing to the haybine, they believed he was changing the knives.
>
> When Jason returned to the field about ten or fifteen minutes after dumping a load of hay, he saw his father lodged between the haybine's yellow tine reel and the knives. Jason rushed to the tractor and moved the PTO control lever from a position midway between the "on" and "off" notches to the "off" notch, thereby shutting off the haybine. Decedent was pronounced dead shortly thereafter at McPherson Hospital. [*Grostic I, supra* at slip op pp 2-3 (footnote omitted).]

AGCO and S+L+H, S.p.A. argue that the trial court erred in denying defendants' motion for JNOV because plaintiffs did not raise a legally cognizable products liability claim. We disagree. A motion for JNOV should be granted only when there was insufficient evidence presented at trial to create an issue for the jury. *Wilson v General Motors Corp*, 183 Mich App 21, 36; 454 NW2d 405 (1990).

> When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. [*Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997) (citation omitted).]

Plaintiffs' products liability claim was premised on two theories: failure to warn and defective design. The jury concluded that both AGCO and S+L+H, S.p.A. had negligently failed to warn decedent of the dangers reasonably associated with the tractor's intended use or foreseeable misuse. The jury also found that S+L+H, S.p.A. had negligently designed the PTO control lever.

In Michigan, the manufacturer and the distributor of machinery such as a farm tractor have a duty to warn about dangers associated with the intended uses and foreseeable misuses of the machinery. See *Antcliff v State Employees Credit Union*, 414 Mich 624, 637-638, 327 NW2d 814 (1982). As in all claims of negligence, the plaintiff in a failure to warn case must establish that the defendant's negligence was the proximate cause of the injuries sustained. This entails a showing that an adequate warning would have prevented the harm. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 250-251; 492 NW2d 512 (1992). "In most failure-to-

warn cases, proximate cause is not established absent a showing that the plaintiff would have altered his behavior in response to a warning." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 406-407; 571 NW2d 530 (1997). However, when the user of the product is dead, a rebutable presumption arises that the deceased would have heeded an adequate warning. *Id.* at 407; *Adams v Iron Cliff* Co, 78 Mich 271, 277; 44 NW 270 (1889). This is in keeping with the notion that those who release a product in the stream of commerce are better able than the consumer to evaluate the risks associated with its use.

While there can be some overlap between a failure to warn claim and a claim of defective design, the efficacy and legitimacy of the former does not necessarily rest on the latter. See *Gregory v Cincinnati, Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). We do not believe that plaintiffs' two theories of liability are invariably intertwined in the case at bar. We believe that based on the evidence presented at trial and the court's instruction on the law, a jury could have reasonably concluded that the tractor performed as anticipated for the use intended, but that the warnings provided did not adequately account for decedent's foreseeable misuse of the PTO. The verdict form question addressing plaintiffs' failure to warn claim presented the jury with the following alternative: "Did [AGCO and S+L+H, S.p.A.], negligently fail to warn Gerald Grostic, Sr., about how to avoid the dangers reasonably associated with the AGCO Allis 7600's intended use *or* foreseeable misuse?" (Emphasis added.) This inclusive disjunctive allows for a finding of liability if either disjunct is true. Therefore, the jury was instructed that liability could attach if the jury found that while decedent had been adequately warned about the dangers associated with the intended use of the tractor, he had not been adequately warned about dangers reasonably associated with foreseeable misuse of the tractor.

Richard Job, chief engineer for tractors at AGCO, testified via a videotaped *de bene esse* deposition, that the PTO of an AGCO-Allis 7600 tractor gradually engages as the lever is moved from the "off" position to the "on" position. Job testified that the point of engagement/disengagement is just below the notched "on" position on the PTO control panel. On a photograph of the panel, Job marked the point as being approximately one-half inch below the notched "on" position. This is in keeping with the testimony of Piero Sacco, who examined the Grostic tractor on defendants' behalf. Sacco identified the engagement point of the PTO as being approximately three quarters of an inch below the "on" notch. According to Sacco, the internal mechanics of the PTO drive gradually change as the control lever is moved across the control panel. At the identified point, those mechanics have changed enough that the PTO drive is initiated.

We believe that a reasonable jury could infer from the evidence regarding the engagement/disengagement point that an experienced farmer like decedent, who had owned this particular tractor since 1992, would learn that the PTO would disengage even though the control lever was not pulled all the way to the "off" notch. We believe it is also reasonably inferable, as well as foreseeable, that equipped with this knowledge, decedent would routinely disengage the PTO by moving the lever to the perceived point of disengagement, and rely on the discountenance of motion in an attached implement as confirmation that he had disengaged the PTO. We do not believe that operating the PTO in such a manner evidences a lack of ordinary care and caution on the part of decedent. We simply reject the idea that it is necessarily careless to operate the PTO in a manner in which, by design, it operates.

Despite the actual way in which the PTO operated, none of the tractor's warnings and operating instructions included a warning that an operator should always move the PTO lever to the "off" notch when disengaging the drive, and not rely on the lack of motion in the PTO as indicating that the PTO had been disengaged.

Additionally, we conclude that under either plaintiffs' or defendants' theory of how the haybine began to operate, sufficient evidence was presented to create a triable issue for the jury on whether such a warning would have prevented this tragic accident. Plaintiffs argued at trial that the PTO had spontaneously reengaged while decedent was working on the haybine knives. Defendants argued that the haybine engaged while decedent was attempting to manually remove a hay clog. Under either scenario, the evidence still established that the PTO would disengage at some point well before the "off" notch, and that the PTO control lever was midway between the "on" and "off" notches when decedent was discovered by his son.[1] Under either theory—or even a theory not postulated by either party—it is reasonable to infer that had a warning such as we gave outlined been given, it may have prevented this fatal accident.

We note that a warning placed just below the PTO control on the tractor indicated that the tractor engine should be turned off before servicing an attached implement. It can be argued that if this instruction had been followed, it would not matter that decedent was not given the warning we have outlined. However, we believe that despite the instruction to shut off the tractor engine, plaintiffs presented sufficient evidence that it was reasonably foreseeable that while out in the field, a farmer would work on an attached implement, like a haybine, while the tractor engine was still idling, and that there were good reasons for so doing. Jerry Snow, a dairy farmer and neighbor of decedent, testified that he would typically not turn off his tractor when changing knives on a haybine while out in the field. Snow explained that

> when we run [the tractor] when we are cutting hay, we're running a machine that is wide open, running hard, long hours, and we are trained—I don't know if its trained or habit or whatever, we don't shut diesels down during the day time. If they are running long hard hours, its hard on the cooling system to cool the engines down and so to fix it we just let it idle, fix the part and go back on our way.

Even if plaintiffs' failure to warn claim was invariably linked to its design defect claim, we believe that the court properly denied defendants' motion for JNOV. "A manufacturer has a duty to design its product so as to eliminate any unreasonable risk of foreseeable injury." *Prentis v Yale Mfg Co*, 421 Mich 670, 692-693, 365 NW2d 176 (1984). A product's design is "defective if it is not reasonably safe for its foreseeable uses." *Fredericks v General Motors Corp*, 411 Mich 712, 720; 311 NW2d 725 (1981).

Whether plaintiffs' argument is perceived as asserting a straightforward claim of defective design (i.e., that a safer alternative design existed for the PTO control) or as asserting that the tractor was defective because it did not include a reasonable safety feature, we believe

---

[1] Indeed, implicit in defendants' theory was the notion that decedent believed the PTO was disengaged before he entered the haybine.

that sufficient evidence was adduced to present the case to the jury. In a products liability action premised on a theory of defective design, Michigan courts apply a risk-utility balancing test in determining whether the design chosen renders the product defective. *Prentis, supra* at 691. A risk-utility balancing test "considers alternative safer designs and the accompanying risk pared against the risk and utility of the design chosen." *Gregory, supra* at 13; accord *Prentis, supra* at 688-689; *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989).

After reviewing the record, we believe that plaintiffs did present sufficient evidence to create a jury question on whether the foreseeable risks of harm posed by the PTO control could have been reduced or perhaps even avoided by the adoption of a reasonable alternative design. See 3 Restatement Torts, Products Liability, § 2. This is not a case where the question of negligence is for the court because "the facts are such that *all* reasonable men must draw the same conclusion from them." *Barnebee v Spense Bros*, 367 Mich 46, 50-51; 116 NW2d 49 (1962) (emphasis in original).

Testifying for plaintiffs as an expert witness, John Severt stated that

> prior to 1990 it was recognized by engineers . . . that to have inadvertent start up of the [PTO] on an agricultural tractor could cause serious injury or death and, in fact, such accidents have been reported and various steps have been taken by design engineers to try and prevent such occurrences by providing positive control.

Sevart opined that the lack of "positive control" in the PTO lever of decedent's AGCO-Allis 7600 tractor was a design defect. Severt described the concept of "positive control" as follows:

> [F]or a [PTO] of this type . . . . there's only . . . two control positions. That's on and off. And for positive control, there would be no other positions in which the control lever would voluntarily remain. You could hold it there or tie it there, but just on its own, should only for positive control, the control should only be able to rest either in the off position or the on position. Also, in order to have positive control, . . . this [PTO] should only rotate and be under power when it is in the on position . . . .
>
> For this particular design, the [PTO] shaft can actually be under power with the lever in an infinity of positions between the on and off positions. As testified to by [Job] . . . , that position can vary—from tractor to tractor. It can vary with the condition of the oil, cleanliness as well as viscosity.

Sevart also testified about three alternative PTO control designs that he believed to be superior to the one in decedent's tractor. Each, he opined, was "reasonably available" to defendants at the time decedent's tractor was built and sold.

> [Considering] tractors that are basically identical in design of the PTO to this one, the most basic devise was a spring that was biased to the off position, so that any time that the control lever was not in the on position, it would automatically return to the off position by a spring. Now, the second type of design . . . was to incorporate a hydraulic spring, so that there was a hydraulic pressure applied to

> the control which would keep the control in the on position and if you lost pressure by turning the tractor off or for whatever reason, this combination of mechanical spring, hydraulic spring would return the lever to the off position. Lastly, and by far the most common devise in the 90s, is to control the PTO electrically. You use what is known as a cellanoid valve and you don't have all this linkage. You simply have and on and off switch.

When viewed in a light most favorable to plaintiffs, *Pontiac School Dist, supra*, we conclude that plaintiffs submitted substantial evidence from which a jury could infer that defendants knew or should have known of the control lever's propensity for harm, and that there were at least three alternative safer designs that were available and relatively simple to implement at the time decedent's tractor was built. Whether the cost of each of these three alternative designs is considered independently or compared to the cost of an AGCO-Allis 7600 tractor, it is not unreasonable to infer that the cost of an alternative design was not prohibitive. Indeed, the alternative designs seem eminently affordable, especially when considered in light of the potential injuries that could result due to the lack of positive control. As evidenced by the fatal injuries sustained by decedent, such injuries can be substantial.

Defendants assert that plaintiffs' cause of action fails because their proofs did not establish a genuine issue regarding causation. Defendants argue that plaintiffs' theory of causation is based on mere conjecture and speculation. We disagree. Proving probable cause in a products liability case "entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Defendants challenge is to the cause in fact element of plaintiffs' prima facie case.

There are some conspicuous similarities between the case at bar and *Skinner*. For example, both cases involve unwitnessed accidents and an allegation that a machine's faulty power control device led to the injury of the operator. While these similarities provide a opening for comparison of the two situations, there are instructive and significant differences between the two cases that are helpful in resolving this issue.

In *Skinner*, the plaintiffs' decedent was electrocuted by a tumbling machine he had built. The tumbler was used to clean and finish metal parts. The motor that powered the machine's rotating drum was controlled by a switch manufactured by the defendant company. The decedent had used three wires with attached alligator clips to connect the switch to the drum's motor. In order to eject metal parts from the machine, the rotation of the drum had to be reversed. To accomplish this, the machine's operator would manually disconnect and then reverse the positions of two of the clips. "'For obvious reasons, it was important for the operator to make sure that the . . . switch was in the off position before disconnecting the wires.'" *Id.* at 157-158 (quoting *Skinner v Square D Co,* 195 Mich App 664, 666; 491 NW2d 648 (1992).

At the time of the decedent's accident, he was working alone with the tumbler. At some point, he cried out, and three women in a nearby room came running to his aid. The women found him holding two of the clips, one in each hand. Electric current was surging through his body. Freeing one of his hands, the decedent managed to turn off the switch. He then fell over dead. *Skinner, supra*, 445 Mich at 158. The *Skinner* plaintiffs claimed that the "switch was defectively designed because it had a large 'phantom zone' that sometimes made the switch

appear to be 'off' when it was actually 'on.'" *Id*. The plaintiffs asserted that this identifiable defect "caused the decedent to be confused about whether the machine was on or off" when he touched the wires. *Id.* at 171.

As this Court had previously observed, the Supreme Court concluded that the *Skinner* plaintiffs' theory was flawed, in part, because the decedent could not have been misled into believing that the tumbler was off: "The decedent could not have been confused regarding the power's status because either the noise or the visual appearance of movement would have affirmatively cued him regarding whether the power was on or off."[2] *Id.* The exact opposite situation is presented in the case at bar. Jason Grostic testified that his father had disengaged the haybine before he began working on it. Jason's conclusion was based on the lack of motion in the haybine. Indeed, defendants' own expert acknowledged, "nobody, including [decedent], would enter a [haybine] with the reel running." Therefore, unlike in *Skinner*, the evidence here established that decedent had no visual or audible cues indicating that the haybine was still powered.

Alternatively, the *Skinner* plaintiffs theorized that the decedent had approached the dormant tumbler, was misled by the switch into believing that the power was off, and then was electrocuted when he picked up the live clips. *Id.* at 172. The *Skinner* Court concluded that this theory was flawed in two ways:

> First, the plaintiffs failed to produce any evidence from which a jury could reasonably conclude that the wires were unhooked when Mr. Skinner began using the machine just before the accident. In fact, the only record evidence pertaining to how the wires and clips were maintained indicated that they would probably have been connected. Second, the plaintiffs did not offer any proof from which it rationally could be inferred how the machine would have been turned back on after the wires had been unhooked. [*Id.* (footnote omitted).]

In short, the *Skinner* Court concluded that the plaintiffs had not provided sufficient evidence from which a jury could infer that the switch played any role in the accident. In the case at bar, plaintiffs' claim does not suffer from a similar flaw. Unlike *Skinner*, there is no hypothetical contention advanced in the case at bar that the PTO control lever was moved from one position to another just prior to the engagement of the haybine knives and rollers. Further, unlike *Skinner*, there is also question about who had operated the lever. There is no assertion that decedent had come across the tractor and was misled by the position that the lever was left in by another actor. To the contrary, the evidence clearly establishes that decedent had moved the lever to the position in which it was found. Rather than having to postulate a role for the PTO control lever, plaintiffs' causal theory rested on the issue of whether this accident could have happened had the lever been designed so that it could not remain in the position in which it was found, i.e., given that it is reasonable to conclude that decedent did place the lever in a position below the "on" notch, would the PTO have been disengaged if the lever was designed differently.

---

[2] This assumes that the alligator clips were in place.

This is also not a situation where decedent could have been injured by an agency other than the haybine, nor that the haybine could have been powered by a source other than the PTO. Cf. *Jordan v Whiting Corp*, 396 Mich 145; 240 NW2d 468 (1976); *Kaminski v Grand Trunk W R Co*, 347 Mich 417; 79 NW2d 899 (1956). Nor is this a situation where the trier of fact must determine whether a design defect or the actions of an injured party were the cause of an accident. See *Parsonson v Construction Equipment Co*, 386 Mich 61; 191 NW2d 465 (1971).

We conclude that the evidence produced was sufficient to allow a reasonable jury to determine that but for the alleged defect in the PTO control, the accident would not have happened. It is not conjecture that decedent was fatally injured when the haybine began to operate; it is not conjecture that when decedent was discovered by his son, the PTO control lever was positioned between the "on" and "off" notches of the control panel; it is not conjecture that the PTO drive will engage and disengage at some point between the "on" and "off" notches of the control panel; and it is not conjecture that there were alternative safer designs for the PTO control. We also believe that a reasonable jury could infer from the evidence that decedent believed the PTO had been disengaged before he entered the haybine. Affording plaintiffs the "full measure of favorable view to which they [are] . . . entitled," *Schedlbauer v Chris-Craft Corp*, 381 Mich 217, 221; 160 NW2d 889 (1968), if either of the spring designs mentioned by Sevart had been used, then the lever would have been compelled into the "off" position when decedent removed it from the "on" position and, arguably, the accident would not have occurred. If the electric switch alternative had been in place, then if the haybine's operation was not otherwise impeded, absent a failure of the switch, the only way that decedent could have begun any activity on the haybine that caused him to reach into the machines' moving parts would be to switch off the PTO. If the machine's operation was impeded, for example by a hay clog, then arguably decedent could forget to flip the switch and then be entrapped when the clog was cleared. Such a failure, however, would clearly fall on the shoulder's of the operator.

Again, the question of whether the haybine began to turn by means of spontaneous reengagement or the clearing of a hay clog need not be answered before defendants can be found liable. We note, however, that Sevart testified that accidents caused by "inadvertent start up[s]" of PTO's on agricultural tractors had been reported. The fact that defendants' expert could not coax the PTO on decedent's tractor to inadvertently engage in a controlled, non-field test of the machine does not mean that the jury was compelled to disregard Sevart's testimony. Sevart's testimony also linked such accidents to the subsequent decision "by design engineers to try and prevent such occurrences by providing positive control." The obvious implication of the statement is that the lack of positive control had been identified as a factor in the occurrence of such accidents. Thus, it is reasonable to infer from Sevart's testimony that design engineers had determined that the prospect of such an occurrence inheres in a PTO that has not been designed with positive control. The relative risk of this potentiality, and how such risk is to be measured given the results of the controlled tests of decedent's tractor and the evidence of other witnesses, are matters for the jury.[3]

---

[3] Job also testified that he was aware of disengaged PTO's engaging due to the presence of dirt in the system, overheating of hydraulic fluid, and burnt-out clutches. There is no evidence that any of these situations occurred in this case. However, Job's testimony does confirm the fact that this PTO had to potential to reengage even without human intervention.

(continued…)

We also concluded that the evidence presents a jury question on the issue of the foreseeablity of this accident and whether defendants "should be held legally responsible for such consequences." *Skinner, supra* at 163. Again, on the evidence adduced below, a jury could reasonably conclude that an operator of this tractor would learn that the PTO engaged and disengaged at some point other than the notched "on" and "off" positions. The jury could also conclude that a careful operator would habitually place the PTO control lever at this point, and would rely on the lack of motion in an attached implement to signal that the PTO was disengaged.

The fact that decedent may have contributed to the accident by his actions (a conclusion the jury clearly reached),[4] does not serve as an absolute bar to recovery. Rather, decedent's use or misuse of the PTO is a factor that the jury could consider in allocating responsibility for this accident. Further, whether decedent's use of the PTO served as an intervening, superceding cause is a question that should be left for the jury to resolve. *Barnebee, supra* at 51-52.

As our Supreme Court observed in *Barnebee*:

> "In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening cause, the question is for the jury, subject of course to suitable instructions from the court as to the legal conclusion to be drawn as the issue is determined either way. By far the greater number of the cases which have arisen have been of this description; and to this extent it may properly be said that 'proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.'" [*Id.* at 52, quoting Prosser, Torts (2nd ed), § 50, p 282.]

We believe this case at bar is one more of the "great number of cases which have arisen" where the issue of causation was properly left for the jury to decide. We see nothing in this record that justifies the usurpation of this jury's exercise of its own "good common sense in the consideration of the evidence presented." This is not a case where a jury must throw up its hands and declare the accident inexplicable. Therefore, we see no reason that either the trial court or

---

(…continued)

Additionally, Job's testimony indicates that the engagement/disengagement of the PTO can be affected by a variety of factors that would not be readably detectable to someone using the tractor. It is reasonable to infer from this that the point of engagement/disengagement on the control panel might shift depending, for example, on whether the hydraulic fluid was dirty or overheating. Thus, the tractor's operator could conceivably put the lever in the position where the PTO habitually disengages, only to find that the PTO was not operating as expected. Such an eventuality could be provided for if the PTO control was designed in the ways identified by plaintiffs.

[4] As the jury's verdict clearly indicates, acceptance of the claim that the PTO control was defectively designed does not necessarily absolve decedent of his own negligence. Similarly, however negligent decedent was (80%, in the eyes of the jury), this does not preclude a finding that the design of the control was defective and contributed to this terrible accident.

this court should encroach upon the jury's prerogative and upset the verdict. Plaintiffs have presented a submissible products liability case against both AGCO and S+L+H, S.p.A.

While the Supreme Court only expressed concern with our handling of the issue of causation in plaintiffs' products liability claim, the remand order indicates that the entire decision was vacated. We were not, however, specifically ordered to reconsider our handling of any of the other issues raised on appeal. After revisiting these matters, we reaffirm our reasoning on the issues of irreconcilability of the verdicts, plaintiffs' claims of negligent infliction of emotional distress, and the denial of ACGO's motion for remittitur.

Contrary to ACGO's assertion, the jury's finding of negligence on a failure to warn theory of defective design is not necessarily inconsistent with the jury's rejection of plaintiffs' claim of breach of implied warranty of fitness. Considering the evidence adduced and the jury instructions given, we believe that "'there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000), quoting *Granger v Fruehauf Corp*, 428 Mich 1, 7; 412 NW2d 199 (1987). The jury could have logically concluded that decedent's tractor performed as anticipated, but that the warnings supplied did not adequately address a foreseeable misuse of the PTO drive.

We also reject ACGO's assertion that the trial court abused its discretion in denying its motion for remittitur. *A S Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000). "When deciding a motion for remittitur, the trial court must determine whether the jury verdict was for an amount greater than the evidence supports. This Court must afford due deference to the trial court's unique ability to evaluate the jury's reaction to the evidence." *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 683; 607 NW2d 123 (1999) (citations omitted).

AGCO's argument is focused on the jury award for future economic damages. After reviewing the evidence, we conclude that the evidence supported the jury's award of $1,180,000 in future economic damages. Robert Rasche, Ph.D., testified for plaintiffs' that the present actuarial value of lost future income was approximately $1,800,000. Rasche based his estimates on decedent's income derived from farming in the years 1988 through 1994.[5] Finding no discernable trend in the yearly figures, Rasche averaged the totals and arrived at an estimated real income of $125,000 per year. Assuming that decedent would retire at age 65, Rasche then took this figure and adjusted it by a declining probability of survival up through decedent's 64th year. Rasche also assumed that decedent would have paid no federal income tax during this time period, given that decedent's federal income tax forms for the years 1988 through 1994 indicated that the tax bill was either zero or "a very small amount." Rasche then took the actuarial real income and discounted it by three percent to arrive at the present value of lost income.

There is no indication in the record that Rasche improperly discounted or disregarded any of the information he was provided. The factors relied upon by Rasche in determining value of

[5] Rasche considered the following factors in making this estimate: gross farm income, farm expenses, capital gains on property sold, rents and royalties, changes in book value of intermediate farm assets and liabilities, and the annual consumer price index.

lost income were conservative, objective, and inclusive. We believe that this evidence amply supports the jury verdict.[6] Accordingly, we find no abuse of discretion in the trial court's denial of remittitur. *A S Leavitt, supra*.

We agree, however, with AGCO that both Gerald Grostic, Jr., and Jason Grostic failed to establish a prima facie case of negligent infliction of emotional distress. The "flashbulb memories" both men experienced since their father's death are not compensable under a claim of negligent infliction of emotional distress. See *Daley v La Croix*, 384 Mich 4, 15; 179 NW2d 390 (1970). While these memories can be intense, they are transient. There is simply no evidence that either plaintiff suffered the type of actual physical harm or symptoms necessary to sustain their claims. See *Toms v McConnell*, 45 Mich App 647; 207 MW2d 140 (1973).

We affirm the verdict and damage award on plaintiffs' negligent design claim, vacate the verdict and damage awards to Gerald Grostic, Jr., and Jason Grostic on their claims of negligent infliction of emotional distress, and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ David H. Sawyer

---

[6] We also believe that the jury could have rationally discounted the testimony of defendants' financial expert, who indicated that decedent's future lost earnings was zero. Defendants' expert placed a great deal of emphasis on the last nine months of decedent's life. It is not an unreasonable to reject this approach as being too narrow.