

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT DAVID, SR., and DONNA DAVID,

Plaintiffs-Appellants,

v

MACHINERY DISTRIBUTION, INC.,  
MITSUBISHI CATERPILLAR FORKLIFT  
AMERICA, INC., MDI, and MCFA,

Defendants-Appellees,

and

GB SALES & SERVICE, INC., a/k/a G & B LIFT  
TRUCK SALES & SERVICE,

Defendant.

UNPUBLISHED

August 12, 2003

No. 239231

Oakland Circuit Court

LC No. 1999-015054-NP

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Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

In this product liability action, plaintiffs Robert David, Sr., and Donna David appeal as of right the trial court's grant of summary disposition in favor of defendants Machinery Distribution, Inc., and Mitsubishi Caterpillar Forklift America, Inc. We affirm.

On or about September 27, 1996, plaintiff Robert David, Sr., sustained severe injuries to his right leg, ultimately requiring amputation, when a coworker operating a forklift truck backed over plaintiff.<sup>1</sup> According to plaintiff, at the time of the incident, he and his coworker were working outdoors for their employer, O.L. Bolyard Lumber, on a dark and rainy day. When plaintiff bent down to pick up wood corner protectors with his back facing the forklift, plaintiff's coworker, who was operating the forklift, unintentionally backed the forklift into him. The

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<sup>1</sup> Hereinafter use of the term "plaintiff" in the singular refers to plaintiff Robert David, Sr. The other plaintiff, his wife Donna David, made a loss of consortium claim.

forklift knocked plaintiff down, crushed plaintiff's leg, and then dragged plaintiff as plaintiff's coworker drove the forklift forward again. In a two-count first-amended complaint, plaintiffs alleged negligence and breach of warranties concerning the design and manufacture of the forklift. Specifically, plaintiffs claimed that the forklift had inadequate back-up warning features.

On February 14, 2001, defendants Machinery Distribution, Inc. (MDI), and Mitsubishi Caterpillar Forklift America, Inc. (MCFA), filed four separate motions for summary disposition on plaintiffs' claims. Both of these defendants moved for "summary disposition of plaintiffs' failure to warn and failure to instruct claims," "summary disposition based on alterations, misuse, lack of express warranties, and superceding causes," and "summary disposition based on plaintiffs' failure to make a prima facie design or manufacturing defect claim." MCFA further moved for summary disposition on the basis that it "did not design, manufacture, distribute, sell or maintain the lift truck at issue." All these motions requested summary disposition pursuant to "MCR 2.116(C)(8) and/or (C)(10)." The trial court heard oral argument on the motions and later issued a written opinion and order granting summary disposition in favor of defendants. The trial court denied plaintiffs' motion for reconsideration and this appeal ensued.

We review a trial court's grant of summary disposition de novo. *Siek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion under MCR 2.16(C)(8), a court considers only the pleadings and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is appropriate under this subsection "only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden, supra* at 120. If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

On appeal, plaintiffs argue, in essence, that the trial court erred in granting summary disposition in favor of defendants on plaintiffs' failure to warn and design and manufacturing defects claims. We disagree.

Plaintiffs argue that the trial court erred in finding as a matter of law that plaintiff's employer was a sophisticated user because this determination is a question of fact for the jury and because plaintiff's employer was not "a sophisticated user or designer of forklifts."

MCL 600.2947(4) provides that "[e]xcept to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user." MCL 600.2945(j) defines the phrase "sophisticated user":

“Sophisticated user” means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

Recently, in *Mills v Curioni, Inc*, 238 F Supp 2d 876 (ED Mich, 2002), a federal district court in Michigan granted summary disposition in favor of a defendant-manufacturer on the plaintiff's failure to warn claim on the basis of the “sophisticated user” doctrine. The court noted that “[t]he issue of whether a defendant owes a plaintiff an actionable duty is a question of law to be decided by the court.” *Id.* at 892, citing *Antcliff v State Employees Credit Union*, 414 Mich 624; 327 NW2d 814 (1982); *Moning v Alfonso*, 400 Mich 425; 254 NW2d 759 (1977). The federal district court further noted that in *Portelli v IR Constr Products Co*, 218 Mich App 591; 554 NW2d 591 (1996), this Court explained the rationale behind absolving manufacturers of the duty to warn in this context:

The cases suggest that a duty to warn a purchaser of the inherent dangers of a product does not arise in a situation where the purchase[r] is a sophisticated user because a sophisticated user is charged with knowledge of the product. The rationale behind the sophisticated-user doctrine is that the manufacturer markets a particular product to a class of professionals that are presumed to be experienced in using and handling the product. Because of this special knowledge, the sophisticated user will be relied upon by the manufacturer to disseminate information to the ultimate users regarding the dangers associated with the product. Hence, the manufacturer is relieved of a duty to warn. [*Mills, supra* at 894-895, quoting *Portelli, supra* at 601.]

The *Mills* court entered summary judgment in the defendant-manufacturer's favor because the purchaser was an experienced producer of cardboard boxes and had for a number of years used a machine very similar to the one that a worker was operating when his hand was crushed.

Here, similar to *Mills*, the record before the trial court reveals that the purchaser of the forklift, in this case plaintiff's employer, was experienced in using and handling the product. The general manager at plaintiff's employer, who has been working for lumber companies since the early 1970s and has operated forklifts at every one of those jobs, testified that he did not think that back-up warning devices are necessary in a lumber yard setting because there are not people such as retail shoppers or customers walking around. He also testified that in monthly meetings safety issues are addressed, including “[j]ust watch the other fellow” when working with lift trucks. Accordingly, plaintiff's employer was in the best position to warn its employees of the dangers associated with the operation of a forklift. Thus, defendants owed no duty to plaintiff to warn him of the risks and dangers associated with the use of a forklift.<sup>2</sup>

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<sup>2</sup> To the extent that plaintiffs suggest that the fact that plaintiff's employer was not an expert in  
(continued...)

Plaintiffs also argue that they “presented evidence which should have caused denial of [defendants’] motion[s] for summary disposition.” Within this argument, plaintiffs contend that they presented sufficient evidence concerning the reasonableness of the proposed alternative design and concerning the magnitude of the risks involved; however, plaintiffs fail to cite any law, provide any analysis, or to explain their theory of recovery; rather, they only give cursory treatment with no citation to authority. Plaintiffs briefing is insufficient to properly present this argument to this Court, MCR 7.212(C)(7); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001), and it is not this Court’s responsibility “to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Nonetheless, plaintiffs failed to establish a prima facie case of a design defect or a manufacturing defect. “A product 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); *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 757; 593 NW2d 219 (1999). “This definition of 'defective' is not limited to manufacturing defects, but also includes design defects.” *Ghrist v Chrysler Corp*, 451 Mich 242, 249; 547 NW2d 272 (1996). This Court has explained that

"[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." [*Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001), quoting *Bazinau, supra* at 757-758, quoting *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989) (emphasis added in *Bazinau*).]

See also *Owens v Allis-Chalmers Corp*, 414 Mich 413, 429-432; 326 NW2d 372 (1982); *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 435-436; 542 NW2d 612 (1995). Further, "[i]n the case of a 'manufacturing defect,' the product may be evaluated against the manufacturer's own production standards, as manifested by that manufacturer's other like products." *Gregory v Cincinnati*, 450 Mich 1, 13 n 10; 538 NW2d 325 (1995), quoting *Prentis v Yale Mfg Co*, 421 Mich 670, 683; 365 NW2d 176 (1984).

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(...continued)

purchasing, designing or manufacturing forklifts, we find this argument inapposite. The plain language of the statute refers to a “sophisticated user,” not a “sophisticated purchaser, designer or manufacturer” of a product.

Here, we agree with defendants' analysis, and the trial court's conclusion, that plaintiffs failed to make a prima facie design or manufacturing defect claim. The information in the two affidavits on which plaintiffs rely in support of their argument is insufficient to establish a prima facie case of design or manufacturing defect. Plaintiffs failed to present the type of statistical analysis necessary to demonstrate how likely such an accident, which occurred when the forklift moved in reverse, might be, or to present evidence concerning the severity of injuries sustainable. Plaintiffs failed to demonstrate that the risk was unreasonable in light of the foreseeable injuries, or that the manufacturer, as opposed to the employer, was in a better position to conclude that back-up warning devices should be installed as standard equipment, especially in light of the nature of the work conducted, the driver's responsibilities, and the existence of other warning mechanisms, such as honking to indicate lack of clear view of the driving area. *Owens, supra* at 430-432; *Cacevic, supra*. "Manufacturers are not insurers that 'in every instance and under all circumstances no injury will result from the use' of their products." *Owens, supra* at 432 (citation omitted). Further, plaintiff presented no evidence that the forklift did not operate according to manufacturer specifications. *Gregory, supra*.

Having determined that defendants were entitled to summary disposition on plaintiffs' failure to warn and design and manufacturing defect claims, we need not reach the other issues plaintiffs raise on appeal. In sum, the trial court did not err in granting summary disposition in favor of defendants.

Affirmed.

/s/ Joel P. Hoekstra

/s/ E. Thomas Fitzgerald