

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

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DARYL BRONKEMA, Individually and as Next  
Friend of JACKSON THOMAS BRONKEMA,  
CALEB ANDREW BRONKEMA and  
SAVANNAH JOY BRONKEMA, and MELISSA  
BRONKEMA,

Plaintiffs-Appellees,

v

FERWERDA ENTERPRISES, INC., d/b/a  
HOLIDAY INN EXPRESS LUDINGTON,

Defendant/Cross-Plaintiff-Appellant,

and

SPECIALTY MANUFACTURING COMPANY &  
ITS ROLA-CHEM CORPORATION DIVISION,

Defendant/Cross-Defendant-  
Appellee.

UNPUBLISHED  
April 21, 2009

No. 275528  
Mason Circuit Court  
LC No. 05-000301-NO

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Before: O’Connell, P.J., and Bandstra and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to express my disagreement with substantial portions of the majority’s analysis. In my view, a new trial is required solely because the trial court erred by summarily dismissing Specialty Manufacturing Company & Its Rola-Chem Corporation Division (Rola-Chem). I disagree with the majority’s conclusion that the trial court incorrectly directed a verdict for plaintiffs regarding Ferwerda Enterprises Inc., d/b/a Holiday Inn Express Ludington (Holiday Inn)’s negligence. But for the error involving Rola-Chem, I would affirm the trial court’s grant of a directed verdict.

I. Liability of Rola-Chem

Plaintiffs’ complaint alleged that on April 9, 2004, Holiday Inn negligently permitted “poisonous gases” to enter the swimming pool area where plaintiffs were swimming. The complaint did not describe with specificity the manner in which the “poisonous gases” entered

the pool area. During discovery, the parties determined that on the day plaintiffs sustained their injuries, a leak had developed in the PVC line carrying pool water to and from the pool's filter. Eric Saya, a Holiday Inn maintenance man, repaired the leak. During the repair, Saya turned off the pump that propelled water through the PVC lines. When he shut down power to the pump, Saya neglected to turn off the Rola-Chem "feeder" device, also called a "controller," which injected chlorine and muriatic acid into the pool water. During Saya's repair efforts, chlorine and muriatic acid flowed continuously from the Rola-Chem feeder into the PVC line. Gases generated by these chemicals formed in the line. When Saya successfully repaired the leak and powered the water filtration system back on, a cloud of the gas traveled through the PVC line, entered the pool area, and injured plaintiffs.

Holiday Inn filed a timely notice of nonparty fault pursuant to MCL 600.6304 and MCR 2.112(K)(3), which identified Rola-Chem as a negligent nonparty that caused plaintiffs' injuries. Holiday Inn's original notice maintained that Rola-Chem "could have offered and installed a feature which would have prevented the leak complained of; however, Defendant was not told of this feature and was not given the option of purchasing it." Plaintiffs sought a more definite statement regarding Holiday Inn's notice of nonparty fault. Holiday Inn amended the notice to elaborate that the "feature" that Rola-Chem "could have offered and installed" was a "flow switch," and added, "Rola-Chem had the duty to notify . . . Defendant of the safety device. It breached that duty by not notifying Defendant of it when it knew what . . . Defendant had intended to use the system for."

Plaintiffs filed a first amended complaint adding Rola-Chem as a party defendant, and alleging against Rola-Chem precisely the same claims contained in Holiday Inn's amended notice of nonparty fault. After discovery closed, Rola-Chem filed a motion for summary disposition pursuant to MCR 2.116(C)(10), contending that (1) expert testimony must support design defect claims, and plaintiffs failed to identify an expert witness who would attest to Rola-Chem's liability, (2) the warnings contained in the Rola-Chem's installation and operation manual fulfilled its duty to warn as a matter of law, and (3) because Holiday Inn qualified as a "sophisticated user" of swimming pool equipment, Rola-Chem had no duty to warn of any dangers associated with use of the controller or feeder. Holiday Inn responded that "a triable issue" existed regarding whether Rola-Chem had properly advised Timothy Ferwerda, a Holiday Inn owner, about the availability and benefits of a safety flow switch. Holiday Inn also sought leave to file a cross-claim against Rola-Chem, explaining that plaintiffs' attorney "has decided to allow" the trial court to grant Rola-Chem's request for summary disposition.

The trial court granted summary disposition to Rola-Chem, reasoning as follows:

The Court is persuaded today that the standard of the industry does allow a person to buy a controller without a flow meter being an integral part of the controller. That there are reasons and/or practices that some customers may want

a flow meter or have their own sources or may not even feel they need a flow meter.<sup>[1]</sup>

In this particular case the desire for a controller was to save the effort to have to do it daily; and the controller was able to be turned off independently. So when the system was shut down to fix the pipe, there was nothing that would stop [Holiday Inn] from also shutting down the controller.

And if by turning off the pool pump that also turned off the controller, the wisdom of having a flow switch is violated but the purchaser still has determined that he is shutting down the entire system by having done so.

And if he had read the manual, then he would have been aware that he was creating a problem that caused the eventual discharge of the gas into the pool.

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... I'm saying that the manual fulfilled the duty. The manual sufficiently warned. The manual sufficiently pointed out that there was [sic] additional things that could be purchased. So in that sense any warning duty was fulfilled.<sup>2</sup>

The trial court permitted Holiday Inn to file a cross claim "to create standing for appeal later." The cross claim stated that Rola-Chem "had the duty to notify [Holiday Inn] of the existence" of a flow switch safety device which would have prevented plaintiffs' injuries, and breached that duty by failing to fully advise Holiday Inn regarding the equipment it "needed." The trial court's subsequent order held as follows:

1. Defendant Specialty Mfg. Co. (and its Rola-Chem division) is entitled to summary disposition as to the claims of the Plaintiffs against it (as reflected by the Plaintiffs' Amended Complaint);
2. Defendant Specialty Mfg. Co. (and its Rola-Chem division) is entitled to summary disposition as to the claims of the Defendant Ferwerda against it (as reflected by said Defendant's Notice of Non-Party Fault, and said Defendant's Cross-Claim).

The majority concludes that the trial court erroneously granted summary disposition because (1) "plaintiffs' lack of an expert witness cannot preclude Holiday Inn's ability to assert a design defect claim against Rola-Chem," and (2) "whether the warnings in the manual were adequate in light of Rola-Chem's failure to inform Ferwerda of the existence and necessity of

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<sup>1</sup> The trial court clarified that it meant to say "flow switch" whenever it used the term "flow meter."

<sup>2</sup> The majority correctly observes that the trial court never addressed the design defect claim.

safety flow valves at the time he placed his order for the controller, was an open question for the jury.” *Ante* at 3-4. I address these conclusions separately.

#### A. Design Defect Claim

According to the majority, Holiday Inn “had no claim against Rola-Chem and no duty to find or disclose an expert to testify on that issue.” *Ante* at 3. I disagree with this conclusion. In my view, had expert testimony been required to establish a design defect claim, Holiday Inn would have had a duty to disclose an expert when plaintiffs elected not to pursue their claim. However, under the rather unique circumstances presented, I believe that the law mandated neither party to present expert testimony regarding a design defect.

Holiday Inn’s amended notice of nonparty fault did not articulate a design defect claim. Rather, the notice asserted that Rola-Chem failed to inform Holiday Inn that an optional flow switch was available for purchase. Although this Court must construe Holiday Inn’s claim as sounding in product liability law,<sup>3</sup> neither Holiday Inn nor plaintiffs averred that Rola-Chem should have included a flow switch in all controllers it offered for sale. But even were this a genuine design defect case, under the circumstances of this case a *prima facie* claim could be established in the absence of expert testimony.

Manufacturers have a duty to design their products “so as to eliminate any unreasonable risk of foreseeable injury.” *Prentis v Yale Mfg Co*, 421 Mich 670, 692-693; 365 NW2d 176 (1984). The statute governing claims alleging a design defect provides that a manufacturer has no liability for harm caused by a production defect unless

the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. [MCL 600.2946(2).]

Thus, § 2946(2) requires a party asserting a design defect claim to prove that (1) the product was not reasonably safe when it left the manufacturer’s or seller’s control, and (2) “a practical and technically feasible alternative” design “would have prevented the harm without significantly

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<sup>3</sup> MCL 600.2945(h) provides that a “product liability action” includes “an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.” MCL 600.2945(i) defines “production” as encompassing “manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.”

impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.”

In 1995, our Legislature enacted comprehensive product liability law reforms that did not include a requirement that expert testimony must support all product liability claims.<sup>4</sup> I believe that courts should evaluate the need for expert testimony on a case-by-case basis, consistent with MRE 702, which envisions that “[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” a qualified expert may testify in conformity with the other evidentiary contained in the rules. In certain cases, including this one, a plaintiff may be able to establish the existence of a design defect premised on evidence of the facts of the case, together with information provided by the product manufacturer.

Here, record evidence adequately demonstrates the dangers presented by a controller or feeder installed without a flow switch, and that a practical and feasible alternative design would have prevented the danger without impairing the usefulness of the product or creating greater dangers. The parties, including Rola-Chem, do not dispute that plaintiffs would have sustained no injury if the controller or feeder had been equipped with a flow switch, a safety device that Rola-Chem marketed and sold. The sole contested issue related to a design defect involved whether the controller sold *without* the flow switch qualified as reasonably safe. An affidavit signed by Dennis Johnson, Rola-Chem’s director of engineering, attested that

[a] flow switch is a device that automatically turns off the controller in the event that there is not sufficient water going through the line on which the flow switch is installed. The controller cannot then put the chemicals into the main water line when it does not have water in it to dilute the chemicals. This diminishes the risk that the chemicals will mix and form a gas.

Rola-Chem’s installation and operation manual cautions, “Injury may result if a safety device such as a flow switch is not installed to remove power from the controller in the event of pool pump or circulation failure.” Given this evidence, the risks of operating the controller without a flow switch are obvious, and an alternative design implementing a flow switch clearly feasible. Although expert testimony may often supply a jury valuable assistance in a product liability case, it hardly seems necessary under the circumstances of this case. In my view, a jury could make this “reasonableness” determination without expert assistance.

#### B. Holiday Inn’s Duty to Set Forth a Case Against Rola-Chem

According to the majority, Holiday Inn bore no obligation to establish a *prima facie* case against Rola-Chem because at the time the trial court granted summary disposition, “plaintiffs were the only party asserting a claim against Rola-Chem.” *Ante* at 3. The majority reasons, “It is illogical ... to preclude Holiday Inn from being able to assert its own claim against Rola-Chem

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<sup>4</sup> In contrast, medical malpractice reform statutes enacted in 1994 created specific expert witness requirements. See MCL 600.2912d.

based on their adversaries' failure to pursue their own claim against Rola-Chem." *Id.* I respectfully disagree.

When the Legislature enacted Michigan's nonparty fault scheme, MCL 600.6304, it "generally abolished joint and several liability and replaced it with 'fair share liability' where each tortfeasor only pays the portion of the total damages award that reflects that tortfeasor's percentage of fault." *Bell v Ren-Pharm, Inc*, 269 Mich App 464, 467; 713 NW2d 285 (2006) (internal quotation omitted). With the same public act that created the fair share liability system, our Legislature also enacted a procedure for allocating fault:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action. [MCL 600.2957(1).]

The Legislature further specified that "[t]he person seeking to establish fault 'under sections 2957 to 2959 has the burden of alleging and proving that fault.'" MCL 600.2960(1) (emphasis supplied).

The distributive fault system established by these interrelated statutes refutes the majority's determination that Holiday Inn possessed no obligation to present a prima facie case against Rola-Chem. Pursuant to MCL 600.2960(1), Holiday Inn bore "the burden of alleging and proving" Rola-Chem's fault. Consequently, if this case had required expert testimony, Holiday Inn's failure to name an expert should have resulted in Rola-Chem's summary dismissal. Under that hypothetical set of facts, without expert guidance a jury could not determine whether Rola-Chem defectively designed the controller.

Plaintiffs' decision not to pursue a claim against Rola-Chem should not have altered the statutory requirement that Holiday Inn, as the party seeking to allocate fault to Rola-Chem, bore the burden of proving that fault. Because MCL 600.2960(1) unequivocally assigns Holiday Inn a burden of proof, I remain mystified by the majority's conclusion that plaintiffs' decision not to pursue a claim against Rola-Chem permitted Holiday Inn another chance to muster proof of fault. If plaintiffs elected not to respond to Rola-Chem's summary disposition motion, Holiday Inn became the sole "person seeking to establish fault under section[] 2957." MCL 600.2960(1). If this statute has any meaning, it required Holiday Inn to affirmatively demonstrate the existence of material questions of fact to defeat Rola-Chem's summary disposition arguments, regardless of plaintiffs' position. The evidence here sufficed to establish Rola-Chem's liability under both design defect and failure to warn theories. The trial court's erroneous usurpation of the role of factfinder deprived Holiday Inn of its opportunity to prove Rola-Chem's liability at trial. For that reason alone, I agree with the majority that a new trial must take place.

## II. Directed Verdict

In the majority's estimation, because the trial evidence gave rise to "factual issues upon which reasonable minds could differ" regarding Holiday Inn's negligence, the trial court erred by

directing a verdict in favor of plaintiffs. *Ante* at 9. I agree that factual issues existed tending to support different theories concerning how and when the “poisonous gas” entered the pool area. But viewed in the light most favorable to Holiday Inn, each and every liability theory advanced by plaintiffs implicated Holiday Inn’s negligence.

The majority summarizes as follows:

Given that Melissa Bronkema testified that the incident occurred around 8:00 p.m., to determine if Holiday Inn was negligent, the jury would have to determine which version of events it believed occurred to make the gas develop in the pool area. If it believed Saya’s version, the issue became whether Saya negligently repaired the pipe and/or negligently failed to adequately watch it throughout the evening. If it believed Curtis’ version, the issue became whether Saya actually waited for the pump to prime before turning on the chemical feeders and, even if he did, whether he negligently failed to wait until all the air was out of the system. In either case, the inconsistent testimony as to how the gas was created and when it would have been expelled into the pool area required the jury to determine the various witnesses’ credibility, making a directed verdict inappropriate. [*Ante* at 7-8].

At trial, the theories of liability propounded by plaintiffs involved Holiday Inn’s failure to purchase the optional safety switch, and Saya’s failures to (1) turn off the Rola-Chem feeder when he turned off the filter, (2) properly repair the PVC line, and (3) avoid turning on the Rola-Chem until water flowed through the PVC lines back to the pool. Holiday Inn presented no witnesses on its own behalf, and failed to offer any defense besides attempting to circumvent the trial court’s summary disposition ruling by blaming Rola-Chem for plaintiffs’ injuries. No witness testified that the “poisonous gas” could have entered the pool area absent someone’s negligence. Granting Holiday Inn every reasonable inference from the evidence, and resolving every conflict in the testimony in Holiday Inn’s favor, I cannot discern any explanation for the gas generation and escape apart from negligence attributable to Holiday Inn.

But regardless whether sufficient evidence supported a directed verdict for plaintiffs, this case must be retried. A valid claim existed against Rola-Chem, which the trial court improperly disallowed. Because the jury did not allocate fault among the potentially responsible parties pursuant to MCL 600.2957(1), I agree that remand for a new trial must occur.

/s/ Elizabeth L. Gleicher