IN THE COURT OF APPEALS OF IOWA

No. 7-768 / 07-0611
Filed January 16, 2008

ROBERT AYERS,
Plaintiff-Appellant,

vs.

FORD MOTOR COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Plaintiff appeals the district court decision granting Ford Motor Company's motion for directed verdict. **AFFIRMED.**

Gene Yagla of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellant.

R. Todd Gaffney of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, and Willie Epps Jr. and Jason M. Zager of Shook, Hardy & Bacon, L.L.P., Kansas City, Missouri, for appellee.

Heard by Huitink, P.J., Vogel, J., and Robinson, S.J.,* but decided by Huitink, P.J., Vogel and Mahan, JJ., and Robinson, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007)

PER CURIAM

Plaintiff appeals the district court decision granting Ford Motor Company's motion for directed verdict. We affirm.

I. Background Facts and Prior Proceedings

In May 2004 Robert Ayers left his home in his Ford F-250 pick-up pulling a trailer and two horses. After traveling a few miles, he saw smoke coming out of his truck. He pulled over and opened the hood to discover a fire. He closed the hood and called the fire department. No person or horse was injured, but the truck was a total loss.

State Farm Insurance (hereinafter the "plaintiff") paid Ayers for the value of the truck. The plaintiff then filed the present subrogation claim in the name of Ayers against Ford Motor Company alleging the truck was damaged because a compression clamp in the engine compartment was defective. The claim was brought under three counts: product liability, breach of express warranty, and negligence.

The plaintiff designated Steven Mikesell as its expert witness. Mikesell was a former mechanic working as an automotive consultant specializing in the cause and origin of vehicle fires. Mikesell has two associate degrees, but no training or education in engineering. Mikesell performed a visual inspection of the vehicle, but did not perform any tests on the vehicle or on any of the components in the vehicle. Mikesell hypothesized that the fire originated from a power-steering hose that came loose from a compression clamp.

On the morning of trial, Ford made a motion to prohibit Mikesell from describing the disputed clamp as "defective." Ford set forth two grounds for its

motion. First, it claimed that any opinion as to whether this particular clamp was defective must come from someone with an expertise in engineering. Because the plaintiff's expert was not an engineer, and had not performed any tests on the clamp, Ford argued he was not an appropriate person to comment on whether the clamp was defective. Second, Ford claimed that whether the clamp was defective was a legal standard that should not be the subject of an expert's testimony.

Plaintiff's counsel responded to this motion by stating

> Well, as I recall Mikesell's deposition transcript, defendant's attorney asked him what caused this, and he said he didn't know. It could have been several things: The hose could have been the wrong size; the tube that the hose was hooked to was the wrong size; or that the clamp that holds it on hadn't been crimped hard enough. He's not going to say what he thinks the cause is. The closest he gets is to say it could be several different causes.

The court then asked plaintiff's counsel whether Mikesel would say it was a defective clamp, and counsel responded, "No. I will tell him not to use that word 'defective.'"

Ford's trial counsel was not satisfied with this result and stated:

> Well, your honor, we're definitely asking for [Mikesell] not to even give these speculative statements like the hose was too small; you know, potentially it wasn't crimped tight enough. That's just speculation. He does not have any background in manufacturing or design or any engineering expertise. It's just his guesses.

The court responded

> I'm not going to let him, at least at this point . . . testify that it was a defective clamp or it was too small, too large, too much pressure, because, frankly, I don't think - - his curriculum vitae is in here, but I don't think he has any hydraulics and engineering training with regard to hydraulics or metal or anything else that's going to allow him to really render an expert opinion that's going to be of assistance to the jury.

> I don't know where that leaves us in the case. When we get into it, we'll see. And obviously, don't ask the question. I've ruled on it. So, I don't want to have it asked and then objected to in front of the jury, because it kind of taints the jury quite a bit if we have it come out in court. But obviously, if you want to make a side-bar record or outside the presence of the jury at the time you want to ask him those questions, we'll make further record on it.

The matter proceeded to trial, and the plaintiff called Ayers and Mikesell as its only two witnesses. Ayers testified that he had purchased the new truck in January 2000 from a Ford dealership. He put approximately 60,000 "ordinary" miles on the truck over the next four years. He performed most of the routine maintenance himself and personally added a fifth wheel to the truck so that he could attach a trailer to transport horses. In the process of adding the fifth wheel, he also installed an electrical wire for the electric trailer brake control.

Mikesell testified that he performed a visual inspection of the burned vehicle. Based on this inspection, he concluded the fire was started when one end of a hose containing power steering fluid came loose and power steering fluid leaked onto the hot surface of the engine. Because there was no hose under the clamp connected to the pump, while there was a small piece of hose remaining under the other clamp, he concluded that the end of the hose connected to the pump came out of its fitting prior to the time the fire started. He described this as a compression clamp failure. When asked to define what constitutes a "compression clamp failure," he stated "The hose comes out of the clamped area."

Mikesell did not consult any treatises or scholarly journals in connection with this investigation. He did not perform any tests on the clamp, measure the dimensions of the clamp, or research how many pounds of pressure was used to

crimp that type of a clamp. He testified that he had once read a NAPA service bulletin about compression clamp failure, but admitted his investigation in this case was only limited to a "visual inspection."

Once the plaintiff rested, Ford made a motion for directed verdict arguing the plaintiff had failed to elicit sufficient evidence to establish a prima facie case. Specifically, Ford claimed the plaintiff had failed to prove each element for its claims that Ford: (1) was strictly liable for a manufacturing defect in the truck, (2) breached its express warranty that the truck was free from defects, and (3) was negligent in selling Ayers a truck with a defective compression clamp.

Plaintiff's counsel resisted the motion, stating, in pertinent part:

> Mikesell qualified as an expert. He's made his living for the last 14 years as a cause and origin man for fires in motor vehicles. And he also testified that in this particular case, we had a compression clamp failure, and that allowed the hose to come off. . . . So, I think you've got everything you need for a negligence claim and a product liability claim.

Plaintiff's counsel went on to insist that Mikesell "established that the compression clamp failed."

The district court disagreed, stating "He said that there was not a hose in there. He's talked about there is some article that he read about compression clamp failures, but he can't say that that clamp failed, because he's not an engineer." The district court granted the motion for directed verdict and entered judgment for Ford, holding that the existing evidence required the jury to speculate that Ford was at fault simply because there was a fire.

On appeal, the plaintiff contends the court erred when it said "[Mikesell] can't say that that clamp failed, because he's not an engineer."[1] Plaintiff also claims the court erred because Mikesell was a qualified expert witness and there was no timely objection to exclude his testimony. [2]

II. Standard of Review

We review the district court's rulings on motions for directed verdict for the correction of errors at law. *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006). In reviewing such rulings, we view the evidence in the light most favorable to the nonmoving party to determine whether the evidence generated a fact question. *Id.* "Where substantial evidence does not exist to support each element of a plaintiff's claim, the court may sustain the motion." *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 251 (Iowa 2000). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). Also, a trial court may commit an abuse of discretion if it unreasonably refuses to allow an expert qualified by experience. *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 886 (Iowa 1994).

III. Merits

While it appears the district court's comments at the motion hearing may have constituted less than a full analysis, upon our review of the arguments made during the motion hearing we find the court's ultimate conclusion that there

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[1] The plaintiff originally argued the court erred when it allowed the jury to hear evidence that State Farm had paid Ayers for the damage to the vehicle, but rescinded this claim during oral arguments.

[2] The plaintiff does not argue the court's pretrial ruling prevented the plaintiff from eliciting any specific testimony from Mikesell.

was insufficient evidence to establish a prima facie case of negligence or product liability was correct.[3]

To prevail on a claim of strict liability in tort in Iowa, a plaintiff must establish the following elements:

> (1) manufacture of a product by defendant; (2) the product was in a defective condition; (3) the defective condition was unreasonably dangerous to the user or consumer when used in a reasonably foreseeable use; (4) the manufacturer was engaged in the business of manufacturing such a product; (5) said product was expected to and did reach the user or consumer without substantial change in condition, i.e. the defect existed at the time of the sale; (6) said defect was the proximate cause of personal injuries or property damage suffered by the user or consumer; (7) damages suffered by the user or consumer.

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901-02 (Iowa 1980). The dispute in this case centers on whether the plaintiff proved the clamp was defective and whether such defective condition was unreasonably dangerous to the consumer when used in a reasonably foreseeable use.

To properly analyze whether the plaintiff met its burden to prove the clamp was defective, we first discuss our prior holding in *Wernimont v. International Harvestor Corp.*, 309 N.W.2d 137 (Iowa Ct. App. 1981). *Wernimont* involved a personal injury action against the manufacturer and retailer of a cab-over truck tractor based on alleged defective design. 309 N.W.2d at 138. Wernimont was injured when he lost control of his vehicle and crashed into an overpass. *Id.* at 139. The front of the vehicle's cab caved-in and the steering wheel pinned

[3] While plaintiff's petition alleged a claim for breach of an express warranty, plaintiff did not present evidence of an express warranty at trial. When resisting the motion for directed verdict, the plaintiff claimed there was "everything you need for a negligence claim and a product liability claim," but neglected to address the express warranty claim. Similarly, on appeal, plaintiff does not address the express warranty claim. Consequently, we will not now address it on appeal.

Wernimont to the seat, crushing the left side of his body. *Id.* Wernimont sought damages under theories of negligence, strict liability in tort, and implied warranties of merchantability and fitness for a particular use. *Id.* He alleged the defendants were negligent in that they, among other things, designed and manufactured the cab without adequate structural strength or safety provisions for the driver. *Id.* The court granted the defendants' motion for directed verdict. *Id.*

On appeal, we noted that circumstantial proof of a defect is sufficient to establish a prima facie case. *Id.* at 141. However, we also stated that if an issue is to be proven by circumstantial evidence, the evidence "must be sufficient to make the theory reasonably probable, and more probable than any other theory based on the evidence." *Id.* (citing *Osborn*, 290 N.W.2d at 901). The evidence in *Wernimont* only established the design of the cab and that competitive lines of the same product were designed somewhat differently. *Id.* at 142. This evidence was supplemented with counsel's argument that the product was unreasonably dangerous. *Id.* We concluded this was insufficient to prove the cab was defective because there was nothing to indicate the cab's design "would or could" have caused unreasonable risk to the operator of the vehicle. *Id.* Therefore, presenting this claim to the jury would have permitted the jury to impose liability "solely upon its personal whim and caprice." *Id.*

We find this analysis applicable to the present case. Instead of producing evidence to prove why the hose came loose, the plaintiff asked the jury to speculate that the hose came loose because the compression clamp was defective. However, even in the pretrial hearing addressing whether Mikesell

could describe the clamp as "defective," plaintiff's trial counsel admitted that Mikesell did not know what caused the hose to come loose. He could speculate that the hose was the wrong size, or that the tube connected to the hose was the wrong size, or that the clamp was not crimped hard enough, but he could do nothing more than list reasons why the hose could have come loose. If Mikesell had concluded the hose came loose because something *was wrong* with the clamp or the hose then the issue of whether he was qualified to give such an opinion would have become a significant issue in this case. However, he did not conclude there was anything wrong with the clamp or the hose. His testimony was limited to his opinion that the hose came loose from the fitting prior to the fire. While he may have labeled this a clamp failure, his definition of "failure" only meant that, for whatever reason, the hose came loose from the clamp. This does not constitute evidence to prove that the hose came out of the clamp because the clamp was designed improperly or because the clamp was somehow defective when it left Ford's control.

At most, the plaintiff asked the fact finder to conclude that Ford must have designed the clamp incorrectly because the hose was loose prior to the fire. While one could infer the hose was loose because the hose or clamp was defective when Ayers purchased the vehicle, one could also infer the hose or clamp was damaged at some point during the four-year life of the vehicle. There was no evidence in this case to suggest that the plaintiff's defective clamp theory was more probable than any other theory. *See id.* at 141 (noting the evidence "must be sufficient to make the theory reasonably probable, *and* more probable than any other theory based on the evidence" (emphasis added)). Similar to our

decision in *Wernimont*, we conclude that presenting this claim to the jury without any other evidence to suggest that the hose or clamp was defective to begin with would invite the jury to impose liability "upon its personal whim and caprice." *Id.* at 142. Accordingly, we agree with the court's ultimate conclusion that there was insufficient evidence to establish a prima facie case of negligence or product liability.

IV. Conclusion

Plaintiff's product liability claim required plaintiff to submit evidence to establish the truck was defective and the defect existed at the time the vehicle left Ford's control. Plaintiff's negligence claim required plaintiff to prove Ford negligently designed or manufactured the disputed clamp, and the negligence caused plaintiff's damages. Because we find the plaintiff failed to establish the necessary elements for both of these claims, we affirm the district court's decision granting Ford's motion for a directed verdict.

AFFIRMED.