IN THE COURT OF APPEALS OF IOWA

No. 9-911 / 09-0117
Filed February 10, 2010

**TIMOTHY L. MERRIAM, An Individual;
JUSTINE MERRIAN, Both Individually
and as Next Best Friend of
CHRISTOPHER MERRIAM, A Minor,
KAYLA MERRIAM, A Minor and
COLLIN MERRIAM, A Minor,**
Plaintiffs-Appellants,

vs.

**SAMUELSON FARMS, INC.,
A Corporation; and MICHAEL
SAMUELSON, An Individual,**
Defendants-Appellees.

Appeal from the Iowa District Court for Boone County, William C. Ostlund, Judge.

The plaintiffs appeal from the district court's grant of summary judgment in favor of the defendants. **AFFIRMED.**

Tyler C. Patrick and Marc A. Humphrey, Des Moines, and Alan O. Olson, Des Moines, for appellants.

Amy R. Teas and Janice M. Thomas of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Heard by Eisenhauer, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

This is an appeal from a summary judgment granted to the defendants in a personal injury case. In 2005, plaintiff Timothy Merriam was seriously injured while operating a used dump truck he had purchased from the defendants approximately seven or eight years earlier. On appeal Merriam contends the district court erred in granting summary judgment on his failure-to-warn claim because there was a genuine issue of material fact as to whether the defendants, when they sold the truck, knew or had reason to know of its dangerous condition that led to his injuries. Merriam also contends the district court erred in holding as a matter of law that his claim based on the implied warranty of fitness for a particular purpose was barred by the statute of limitations. For the reasons set forth in this opinion, we affirm the judgment below.

I. Background Facts and Proceedings.

Because this is an appeal from a summary judgment in favor of the defendants, we recite the facts in the light most favorable to the plaintiffs. In 1995, following the death of his mother, Michael Samuelson took over the operation of his family's farm and incorporated Samuelson Farms, Inc. At this time, Samuelson acquired his family's farm equipment, including three older dump trucks that had been used during harvest time for hauling grain from the fields to the elevator. However, Samuelson immediately began phasing out the use of the dump trucks and instead began using wagons pulled by tractors to transport grain. By 1995 or 1996, all three dump trucks were no longer used and had been moved to indoor storage.

In 1997 or 1998, Timothy Merriam contacted Samuelson about purchasing one of the dump trucks. Merriam specifically told Samuelson that his intent was to utilize the truck to haul items. After going to the storage facility and looking at one of the dump trucks, a 1955 International model, Merriam asked Samuelson if there were any problems with it. Samuelson replied that it needed a new battery and gas, but "there was nothing wrong with it." Samuelson also said the truck "was his mother's, she was the only one allowed to drive it, and . . . it was a good truck." Merriam paid Samuelson a couple of hundred dollars for the truck. Samuelson's father had previously acquired this truck at a farm auction in the early 1980's.

For several years in the late 1990's and early 2000's, Merriam used the truck primarily to haul materials. He operated the dumping mechanism four or five times without incident. On March 29, 2005, Merriam was attempting to fill a hole in his driveway with gravel using the truck. After he had deposited some gravel, the bed became stuck in the raised position. While Merriam was reaching in to try to lower the bed, the bed suddenly collapsed on him, causing serious injuries.

It turned out that the truck's dump bed mechanism had a history of jamming intermittently while it had been used in the Samuelson family farm. In fact, Samuelson's mother, who was primarily responsible for operating the truck, had kept a baseball bat in the truck's cab. She would use the bat to "thump" the hydraulic box of the dumping mechanism when needed. Merriam testified that

he had found a baseball bat behind the driver's seat of the truck when he decided to reupholster it, but had no idea of its significance prior to the accident.[1]

On March 28, 2007, the plaintiffs (Merriam, Merriam's wife Justine, and their minor children Christopher, Kayla, and Collin) filed suit against Samuelson and Samuelson Farms seeking damages on four counts: fraudulent concealment, implied warranty of merchantability, implied warranty of fitness for a particular purpose, and negligent failure to warn. All legal theories centered on the defective dumping mechanism in the truck as the proximate cause of Merriam's serious injuries. The defendants (Samuelson and Samuelson Farms, Inc.) answered and raised several affirmative defenses. Subsequently, the defendants moved for summary judgment.

The summary judgment record included deposition testimony from Timothy Merriam, Michael Samuelson, and Merriam's stepbrothers Robert and Wayne Merriam. Samuelson consistently denied knowledge of any prior malfunctions of the dumping mechanism. He testified he was not aware of the bat, he had never used it, and he had not seen anyone else use it. According to Samuelson's testimony, while he was in high school, he would occasionally help out with the family farming operations, mainly driving a combine or tractor. Samuelson graduated from high school in 1986 and moved to Ames to attend Iowa State University. During college, Samuelson would occasionally return home and help with the farm. Samuelson estimated he had driven the International dump truck approximately ten times. However, he never had any

[1] Merriam testified that the bat had dents in it. He later realized that these occurred "because she couldn't pull the bat out fast enough after she tripped the lever."

problems with the dump bed. Further, he had no knowledge of the bed ever becoming stuck in a raised position.

After college graduation in 1990, Samuelson accepted a job planning and running farm shows. This employment took Samuelson to various locations, mostly outside Iowa. During those years, Samuelson had no involvement with the family farm. Samuelson's father hired people as needed to help him farm. In December 1994, Samuelson's mother died.[2] The following year, as noted, Samuelson took over the family farm, but phased out the use of dump trucks in favor of wagons to haul grain.

Merriam has two stepbrothers, Robert and Wayne, both of whom were deposed. When they were children, Robert and Wayne lived near the Samuelson farm. For a few of those childhood years in the late 1980's or early 1990's, Robert and Wayne would go to the Samuelson farm to ride their equipment during harvest time. Samuelson's father would operate the combine, and Samuelson's mother would drive the dump trucks filled with grain to the elevator. Robert testified he rode with Samuelson's mother to the elevator in the 1955 International dump truck approximately twelve times. Three of those times the bed of the truck stuck in a raised position, whereupon Samuelson's mother hit the hydraulic box with the baseball bat to get it to lower. Samuelson's mother characterized this as giving the truck "an attitude adjustment." Robert never saw Samuelson ride in the truck, nor operate it. In fact, he never saw Samuelson help during harvest time.

[2] Samuelson's father also died before this litigation commenced.

Wayne testified that he also rode with Samuelson's mother in the 1955 International dump truck approximately a dozen times. This would have been when he was between about five and eight years old. The only person he saw operate the truck was Samuelson's mother. He never saw Michael Samuelson drive it. Wayne never noticed the truck bed malfunction or saw the baseball bat. However, Wayne was aware that every now and then Samuelson's mother had to use a baseball bat to bring the bed down. Neither Wayne nor Robert alerted their stepbrother of the problems with the dumping bed mechanism prior to the accident.

On January 2, 2009, the district court granted the defendants' motion for summary judgment. By then, plaintiffs had abandoned their fraudulent concealment and implied warranty of merchantability claims. With respect to the failure to warn claim, the court concluded the evidence was insufficient to establish a genuine issue of material fact as to whether Samuelson knew or should have known of the defective dumping mechanism. Regarding the implied-warranty-of-fitness-for-a-particular-purpose claim, the court found the five-year statute of limitations in Iowa Code section 554.2725(2) (2007) barred the claim, and the plaintiffs' relinquishment of their fraudulent concealment claim foreclosed any reliance on equitable estoppel to extend that five-year period. The plaintiffs appeal.

II. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907 (2009). Summary judgment should be granted when the entire record demonstrates there is no genuine issue

as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). We review the facts in the light most favorable to the nonmoving party. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000).

III. Analysis.

A. Failure to Warn.

Iowa follows "the standard set forth in section 388 of the Restatement (Second) of Torts for determining whether a manufacturer or supplier of goods has fulfilled its duty to warn of a product's dangerous propensities." *Lamb v. Manitowoc Co.*, 570 N.W.2d 65, 68 (Iowa 1997). The Restatement section 388 provides:

> Chattel Known to be Dangerous for Intended Use
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Id. (quoting Restatement (Second) of Torts § 388 at 300-01 (1965)). The district court found that the plaintiffs had failed to meet the first element—they could not provide sufficient evidence that Samuelson knew or had reason to know of the truck's dangerous condition.

Samuelson testified he was not aware of the defective dumping bed mechanism. No document or witness statement contradicts this testimony. Simply put, there is no direct evidence that Samuelson knew or should have known of the dangerous condition of the truck. *See* Restatement (Second) of Torts § 388 cmt. g at 304 ("The duty which the rule stated in this Section imposes upon the supplier of a chattel for another's use is to exercise reasonable care to give to those who are to use the chattel *the information which the supplier possesses* . . . ." (emphasis added)).

However, Merriam argues there is circumstantial evidence that Samuelson must have witnessed or been informed of the problem at some point. Samuelson helped out on the farm during his high school and college years, when the truck was in use. Samuelson admittedly used the dump truck approximately ten times himself. Although Samuelson claims he never had a problem operating the dumping bed on these occasions, Robert Merriam testified that according to his childhood observations the baseball bat had to be used about one out of every four times the bed was operated. (On the other hand, Wayne Merriam testified he never saw a malfunction.) The plaintiffs also ask how plausible it is that Samuelson would obtain the truck along the rest of the farm equipment from his father in 1995, yet not be informed of the jamming issues and the need to resolve them by "thumping."

Yet some of the other circumstantial evidence tends to bolster Samuelson's claimed lack of knowledge. Everyone seems to agree that the truck was driven primarily by Samuelson's mother. Neither of the stepbrothers saw Samuelson operate it. When Samuelson took over the farm and its equipment in

early 1995, his mother was already dead. She was not there to tell him about the baseball bat or the need to give the truck an occasional "attitude adjustment." There is no evidence Samuelson's father had operated the dump truck or knew of its tendency to jam. Timothy Merriam himself had no issues with the dumping bed mechanism the first four or five times he operated it. It is notable that this unfortunate accident was the first time during Merriam's ownership that the mechanism had jammed, and it did not occur until after Merriam had owned the truck for approximately seven or eight years.

Thus, from our review of the record, we are unable to agree with Merriam that Samuelson's testimony is "difficult to believe." While we acknowledge there are certainly instances when circumstantial evidence can generate a jury issue even in the face of a sworn denial by a witness, this is not one of those cases. In light of Samuelson's consistent sworn denials that he was aware of a problem with the dumping mechanism, the complete absence of any direct evidence that he had such knowledge, and our inability to draw any meaningful conclusion from the circumstantial evidence, we believe summary judgment was properly granted on this claim. *See, e.g.*, *Pearson v. Jones Co., Ltd*., 898 S.W.2d 329, 333 (Tex. Ct. App. 1995) (discussing in a Restatement (Second) of Torts section 388 case involving an allegedly dangerous horse, evidence that the horse had thrown Ellis's wife "several times" did not raise a fact issue concerning Ellis's knowledge of the horse's dangerous propensities where the record "does not show when the horse threw Ellis's wife or when Ellis obtained the knowledge that the horse had thrown his wife").

B. Breach of Implied Warranty of Fitness for a Particular Purpose.

We now turn to the plaintiffs' claim that the defendants breached the implied warranty of fitness for a particular purpose. The district court relied on the statute of limitations in granting summary judgment to the defendants on this claim. In Iowa, a five-year statute of limitations governs actions for breach of implied warranty. Iowa Code § 614.1(4); *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990). Such actions must be filed within five years after they accrue. Iowa Code § 614.1(4). The Iowa Uniform Commercial Code provides:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Iowa Code § 554.2725(2).

In the present case, the alleged breach of implied warranty occurred in 1997 or 1998 when "tender of delivery" of the International truck was made and thus, the statute of limitations began to run at this time.[3] The statue of limitations expired in 2002 or 2003, which was four or five years before Merriam filed suit. Merriam does not dispute that the five-year limitation period is generally applicable to implied warranty claims. Nor does he maintain that Samuelson

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[3] As Wright and Summers put it:

> Apart from the case in which the warranty "explicitly extends to future performance," the section is quite clear. The statute normally commences to run upon tender of delivery, and the clock *ticks even though the buyer does not know the goods are defective*.

1 James J. Wright & Robert S. Summers, Uniform Commercial Code § 11-9, at 415 (5th Ed. 2000) (emphasis in original).

made a warranty at the time of sale that extended to future performance. Accordingly, the plaintiffs' implied warranty claim is time-barred unless the limitations period was tolled. *See* Iowa Code § 554.2725(4) ("This section does not alter the law on tolling of the statute of limitations . . . .").

Merriam asserts the defendants should be equitably estopped from raising the statute of limitations defense. However, he does not contend Samuelson defrauded him, nor does he maintain that Samuelson did or said anything *after* the sale of the truck to prevent him from bringing suit. *Cf. Christy v. Miulli*, 692 N.W.2d 694, 698, 702-03 (Iowa 2005) (discussing the defendant made misrepresentations after the alleged malpractice). Rather, according to Merriam, an equitable estoppel arises from Merriam's alleged negligent misrepresentation at the time of sale that the truck was in good working order when it was not.

The defendants respond, among other things, that the plaintiffs did not raise negligent misrepresentation below. However, we need not address the matter of error preservation, because we find Merriam's equitable estoppel argument to be insufficient in any event.

In this case, Merriam is essentially trying to rewrite section 554.2725 of the Iowa Uniform Commercial Code. That section provides that the limitations period for a breach of warranty claim commences when tender of delivery is made unless "a warranty explicitly extends to future performance of the goods." Iowa Code § 554.2725(2); *see also City of Carlisle v. Fetzer*, 381 N.W.2d 627, 629 (Iowa 1986) (finding that the limitations period for an implied warranty of fitness claim commenced on tender of delivery and citing "the almost universal rule . . . that a garden-variety implied warranty of fitness will not satisfy this

limitation on the statutory discovery rule"); *Richards v. Midland Brick Sales Co.,* 551 N.W.2d 649, 652 (Iowa Ct. App. 1996) ("The discovery rule applies only when a warranty of future performance has been made, so that discovery of a breach must await performance."). Samuelson's statement that the truck was in good working order clearly was not a statement regarding future performance of the goods. If equitable estoppel could be founded on this statement, a litigant could simply circumvent section 554.2725 by alleging "equitable estoppel" instead of "warranty of future performance." That is impermissible in our view.

It is true that section 554.2725(4) preserves the law of "tolling." However, we are unaware of any Iowa precedent that allows the statute of limitations to be tolled by innocent, non-fraudulent statements regarding the quality of the goods made at the time of the original transaction. In *Kitzinger v. Wesley Lumber Co.*, 419 N.W.2d 739, 741 (Iowa Ct. App. 1987), for example, the plaintiff sued suppliers of certain trusses that had subsequently arched, causing cracks and separation in the plaintiff's home. The district court granted summary judgment to the defendants on the plaintiff's express and implied warranty claims, reasoning that the plaintiff had brought suit more than five years after delivery of the trusses. *Kitzinger*, 419 N.W.2d at 740-41. On appeal, we affirmed. We emphasized that no representations regarding future performance were made at the time of sale, and that no misrepresentations were made after delivery. *Id*. at 741. This case presents a similar set of circumstances and a similar paucity of evidence from which equitable estoppel can be inferred.

Likewise, in *Meier v. Alfa-Laval, Inc*., 454 N.W.2d 576, 580 (Iowa 1990), our supreme court rejected an equitable estoppel exception to the statute of

limitations in a breach of warranty case involving a sale of goods. There, the plaintiffs asserted that the five-year limitations period from date of delivery should be tolled by the defendants' unsuccessful efforts to repair their milking machine system and their assurances that there was "nothing wrong" with it and "everything was working fine." Meier, 454 N.W.2d at 580. The court held, however, that absent some "attempt to lull plaintiffs into inaction," equitable estoppel could not apply. *Id.* If a statement that there is "nothing wrong" with goods *after they have been sold* is insufficient to toll the statute of limitations, as the supreme court held in *Meier*, it is very difficult to see how such a statement *at the time of sale* could have that effect. There is simply no way that Samuelson's statement to Merriam in 1997 or 1998 can be characterized as an effort to "lull" him into not bringing suit.

For the foregoing reasons, we affirm the judgment below.

AFFIRMED.