STATE OF MICHIGAN

COURT OF APPEALS

DARYL BRONKEMA, Next Friend of JACKSON THOMAS BRONKEMA, CALEB ANDREW BRONKEMA, and SAVANNAH JOY BRONKEMA, and DARYL BRONKEMA and MELISSA BRONKEMA, Husband and Wife,

Plaintiffs-Appellees,

v

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

Defendant/Cross-Plaintiff-Appellant,

and

SPECIALITY MANUFACTURING COMPANY and its ROLA-CHEM CORPORATION Division,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
April 21, 2009

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

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

PER CURIAM.

In this personal injury case, defendant Ferwerda Enterprises, Inc., d/b/a Holiday Inn Express Ludington ("Holiday Inn"), appeals by right from a jury verdict following the grant of a directed verdict in plaintiffs' favor on the issue of negligence. Under the circumstances, we vacate the judgment, reverse the trial court's grant of summary disposition disposing of Holiday Inn's claims against Specialty Manufacturing Company and its Rola-Chem Corporation Division (together, "Rola-Chem"), and remand for a new trial.

Plaintiffs filed their negligence action in July 2005 against Holiday Inn alleging that in April 2004, while they were guests at the Holiday Inn in Ludington, they suffered injuries as a result of "poisonous gases" entering the hotel pool area where they were swimming. Holiday Inn filed a notice of non-party fault alleging that Rola-Chem manufactured the system at issue and that Rola-Chem could have offered and installed a feature (a "flow switch" or "safety valve") in the system that would have prevented the gas leak but that Holiday Inn was not informed of the

feature or given the option to purchase it. Plaintiffs amended their complaint to bring in Rola-Chem as a defendant and Rola-Chem moved for summary disposition.

Holiday Inn argues that the trial court erred in granting summary disposition in favor of Rola-Chem. We agree. We review de novo a trial court's ruling on summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

Looking first at the design defect claim, "[a] manufacturer has a duty to eliminate any unreasonable risk of foreseeable injury." *Cacevic v Simplimatic*, 248 Mich App 670, 680; 645 NW2d 287 (2001) (internal quotations and citations omitted). A prima facie case of a design defect based on a claim of omission of a safety device requires a showing of: the magnitude of foreseeable risks evidencing the need for the safety device; and a showing of alternative safety devices and whether they are effective as a reasonable means to minimize the foreseeable risk of danger from using the product. *Id.*

According to Rola-Chem, the trial court dismissed the design defect claim because plaintiffs and Holiday Inn failed to disclose an expert on the design issue. Given the complete dearth of an explanation in the record by the trial court to explain the dismissal of the design defect claim, whether plaintiffs' active claim or Holiday Inn's cross-claim, we have assumed Rola-Chem's assertion as true. Rola-Chem argues that expert testimony is required to make a prima facie case of design defect, relying on *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 435; 542 NW2d 612 (1995). However *Lawrenchuk* states: "a plaintiff must produce expert testimony where a breach of duty based on a design defect *in a building* is alleged." *Id.* at 433 (emphasis added). Since this is not a building defect case, it is not specifically on point. Even assuming Rola-Chem is correct, the problem with the argument is that at the time of summary disposition, plaintiffs were the only party asserting a claim against Rola-Chem.

As pointed out by Holiday Inn's counsel, Holiday Inn had no claim against Rola-Chem and no duty to find or disclose an expert to testify on that issue. Moreover, plaintiffs' lack of an expert had no bearing on whether Holiday Inn could point to Rola-Chem as a non-party at fault during trial. Thus, Holiday Inn had no need to file a design-defect claim against Rola-Chem until it knew whether or not it could point to Rola-Chem as a non-party at fault during trial. Because the trial court ruled that Holiday Inn could not, Holiday Inn then requested permission to file a cross-claim. The trial court granted Holiday Inn the right to file a cross-claim against Rola-Chem, but denied the issues at the summary disposition hearing *before* the pleading was ever filed. The order denying the cross-claim after it was filed states the cross-claim was denied for the reasons set forth in the record at the hearing.

Thus, we are reviewing a trial court's anticipatory denial of a defendant's cross-claim against a third-party based on the plaintiffs' failure to disclose an expert to support their own claim against the third-party. Plaintiffs and defendant are adverse parties; it is the nature of our system. Given plaintiffs' own admission that they were not certain why Rola-Chem was brought into the case, it is fair to assume that plaintiffs were not aggressively litigating their claim against Rola-Chem. It is illogical, then, to preclude Holiday Inn from being able to assert its own claim against Rola-Chem based on their adversaries' failure to pursue their own claim against Rola-Chem. Because plaintiffs' lack of an expert witness cannot preclude Holiday Inn's ability to assert a design defect claim against Rola-Chem, there was no basis on the record to support the trial court's grant of summary disposition on this issue.

The trial court also erred in granting summary disposition on the failure to warn claim. The reasonableness of a failure to warn and the question of whether a manufacturer has provided adequate warnings are both questions of fact for the jury using a standard of reasonable care under the circumstances. *Taylor v Wyeth Labs*, 139 Mich App 389, 397-398; 362 NW2d 293 (1984). See also, *Bouvrette v Westinghouse Electric Corp*, 245 Mich App 391, 395-396; 628 NW2d 86 (2001). Although Holiday Inn's counsel expressly conceded that there were warnings contained within the manual that came with the Rola-Chem system, its argument was premised on whether Tim Ferwerda should have been informed by the Rola-Chem salesperson of the existence of and necessity for a flow switch when he was placing his order. Thus, whether the warnings in the manual were adequate in light of Rola-Chem's failure to inform Ferwerda of the existence and necessity of safety flow valves at the time he placed his order for the controller, was an open question for the jury. Additionally, the jury also needed to consider whether it was reasonable under the circumstances for the Rola-Chem salesperson not to warn Ferwerda about the flow switch at the time of order. The trial court explicitly held, not that there was no duty, but that the manuals sufficiently fulfilled the duty to warn. This was a finding of fact on a disputed issue and, therefore, was not appropriate in the context of a motion for summary disposition.

We disagree with Rola-Chem that Holiday Inn should have been regarded as a sophisticated user, thereby alleviating any duty to warn. Generally, commercial users of bulk materials must be regarded as "sophisticated users." *Bock v General Motors Corp*, 247 Mich App 705, 714; 637 NW2d 825 (2001). The trial court concluded that Holiday Inn was not a sophisticated user simply because Ferwerda purchased multiple controllers. We agree. The mere bulk purchase of items does not make someone a commercial user subject to sophisticated user status. Moreover, "'[a] manufacturer's liability to a purchaser or a user of its product should be assessed with reference to whether its conduct, including the dissemination of information about the product, was reasonable under the circumstances.'" *Id.* quoting *Antcliff v State Employees Credit Union*, 414 Mich 624, 630; 327 NW2d 814 (1982). Thus, even if Holiday Inn were a sophisticated user, there is still a question of reasonableness under the circumstances, and being a sophisticated user is simply one of those circumstances. In light of the outstanding fact question as to whether the dissemination of the warning information regarding safety flow values was reasonable based on Ferwerda's conversations with the Rola-Chem salesperson and in light of the manuals shipped with the controllers, summary disposition was improper, and the failure to warn issues should have been presented to the jury.

Holiday Inn next argues that the trial court erred in granting a directed verdict on the issue of negligence. We agree.[1] We review de novo a trial court's directed verdict and view the evidence taking all inferences in the light most favorable to the nonmoving party. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005).

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[1] We note that the parties' arguments regarding res ipsa loquitur are misplaced. The doctrine of res ipsa loquitur only permits a plaintiff to proceed to the jury without an expert witness. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). Whether plaintiffs met the requirements is irrelevant to the question of whether they were entitled to a directed verdict on the issue of negligence.

"Directed verdicts are not favored, especially in negligence actions." *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992). They are appropriate only when no factual question exists upon which reasonable minds may differ. *Cacevic*, *supra* at 679-680. Plaintiffs argue that various admissions by Ferwerda and Holiday Inn employee Jeffrey Curtis made at trial proved negligence such that the only issue remaining was damages.[2] This argument ignores that there were still outstanding factual issues that had to be decided by a jury. Specifically, there were two separate and distinct versions as to how the gas came to be in the pool area, requiring witness credibility. Additionally, once the jury determined which version of events it believed, there was still the issue of whether the circumstances that resulted in the creation of the gas were the result of negligence by Holiday Inn employees.

According to Holiday Inn employee Eric Saya, on April 9 he noticed a leak coming from a joint in the PVC pipe that circulated the pool water. He went to Home Depot and purchased various materials to repair the leak. He began the repair around 2:00 p.m. that afternoon, and it took about 30 minutes. He shut down the water circulation system, including the chemical feeders, but did not empty the pool of people. He repaired the elbow and went back to his other maintenance duties while he let the adhesive bond. About an hour to an hour and a half later (somewhere between 3:30 or 4:00 p.m.), he started the water circulation system back up. He then reiterated, multiple times, that he waited for the water pump to "catch its prime" before he turned the controller/chemical feeders back on. Saya checked on the repair at various times throughout the day, and it was fine. He went back to the mechanical room around 8:00 p.m. because he had to get back to the jail as he was out on work release. He noticed at that time that the elbow had "blown," but had no idea how much before 8:00 p.m. the repair had broken. When he went into the room, the water pump was still pumping water out of the broken pipe. He turned the chemical feeder system off at that time. According to Saya, "[t]he only problem was that the elbow blew apart." He did not believe that poisonous gases were put into the pool area.

Curtis' version presents a different scenario of how the gas ended up in the pool area. Specifically, Curtis reported to the Department of Health that based on his investigation:

> "Maintenance has just finished fixing the leak in the two inch line for the pool filter system. When the repair was finished, he turned back on the pump for the system. Maintenance waited until the pump started to prime before he turned on the chemical feeders. Talking with the Fire Department, we concluded that when chemical feeders were turned on, there must have been a large air pocket in the two inch line. The water in the line had not reached the area where the feeders connected the two inch line. When the chlorine and the acid pH reducer was fed into the line, they mixed in an air pocket and caused chemical reaction that formed chlorine gas. . . . The gas was pushed out, as soon as the water reached the air pocket, the gas forced out the pool line and into the pool."

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[2] We note that at least one of these "admissions" was objected to, and the trial court sustained the objection.

If the jury believed Saya's testimony, the water pump was primed and Curtis' version of events was not possible. Rather, the likely cause of the gas was the chemical feeders dispensing chemicals into the piping after the repair failed. Under Curtis' version, Saya's failure to wait an adequate period of time after the initial repair before turning on the chemical feeders resulted in the gas being created and expelled when he first turned the pump back on. These different versions would result in the gas having been released into the pool area at two very different times. Under Saya's version, it would have been released at some point after his repair and various checking, but prior to 8:00 p.m. Under Curtis' version, the gas would have been created and expelled around 4:00 p.m.

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. *Id*. See also *Hughes v John Hancock Mut Life Ins Co*, 351 Mich 302; 88 NW2d 557 (1958) ("[C]ases tried to a jury must go to a jury for their verdict . . . where, as here, the case turns upon the credibility of the witnesses" [citation omitted]).

There was an additional outstanding factual issue as to whether Curtis reasonably believed that the chemical feeder system contained adequate safeguarding devices. Curtis testified that he read the booklet that came with the controller which contained the warning: "Warning, . . . injury may result if safety switch such as a flow switch is not installed to remove power from the controller in event of pool pump or circulation failure." However, he also testified that in reading the entire manual, "it says it'll shut off if there's no flow," which was why he did not tell Saya to make sure the flow switch was installed. Thus, at the time Curtis installed the system, he thought the flow safety valve was already incorporated into the system he had. Indeed, both installation manuals state, without any notation that a flow safety valve is required:

> 3. "No Flow" Shut-Off:
>
> If no flow (or insufficient flow) through manifold for more than 10 seconds, pH set point light will flash, light bars will turn off, *and chemical feed devices connected to controller will shut down. Resumed flow will turn controller back on*. [Emphasis added].

Therefore, the manual itself contained contradictory information as to whether the chemical feed devices would continue to inject muriatic acid and chlorine into the system if there were no water in the pipe. Page 26 of both manuals includes a similar statement: "If control shuts down with *no* light bars lit and one or both set points flashing indicates [sic] that there is no water flow or inadequate flow through the clear manifold (emphasis is original)." Curtis testified that he relied in part on this statement for his belief that the system already included the safety valve. Thus, in evaluating whether the installation of the Rola-Chem system without a safety value was

negligent, the jury needed to determine whether it was reasonable, based on the statements contained in the manual, for Curtis to presume that a safety flow value was included. As these are factual issues upon which reasonable minds could differ, the trial court's directed verdict on negligence was improper. *Cacevic, supra* at 679-680.

Finally, Holiday Inn argues that the trial court erred in admitting videotape evidence of the minor plaintiffs' injuries. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the trial court chooses a decision falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Plaintiffs originally proposed eight hours of video. The trial court agreed that 8 hours was far too long and ordered the video cut to two hours and that plaintiffs make certain that the specific instances chosen were relevant, such as showing post-soccer, during cold weather, bloody noses, etc., but that each needed a specific purpose or relationship "so it doesn't simply become cumulative."

Holiday Inn argues that a "day-in-the-life-of" video should show the problems a plaintiff experiences on a typical day in his or her life, but that plaintiffs' video shows two years worth of coughs and nose bleeds edited to give the impression that the children had perpetual problems. Holiday Inn then concludes that the video was both cumulative and prejudicial. In support of its position, Holiday Inn cites *Strach v St John Hosp Corp*, 160 Mich App 251; 408 NW2d 441 (1987). In *Strach*, this Court concluded that the "day-in-the-life-of" videotape was properly admitted, even though some portions were unfairly prejudicial, because "on the whole, it was more probative than prejudicial." *Id.* at 278. Holiday Inn appears to argue that the difference in content between the *Strach* video and plaintiffs' video requires a different conclusion here.

"Evidence is not inadmissible simply because it is prejudicial." *Waknin v Chamberlien*, 467 Mich 329, 334; 653 NW2d 176 (2002). Under MRE 403, the probative value of the evidence must be outweighed by the danger of *unfair* prejudice in order to be excluded. *Id.* For evidence to be unfairly prejudicial, there must exist "'a danger that marginally probative evidence will be given undue or preemptive weight by the jury.'" *Id.* at n 3, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The videotape shows the impact of the coughing, wheezing, and bloody noses on the children's lives. Some segments show one or two of the injured children sitting quietly or actively playing without problem while the others are experiencing problems. Such portions belie the argument that the video gives the appearance of perpetual issues. Moreover, because the segments are date-stamped, the jury could determine for themselves how frequently the incidents occurred.

There are portions of the video that are prejudicial. In *Strach, supra* at 278, this Court concluded that certain portions of the tape, such as the one showing the crucifix over the bed, were unfairly prejudicial. The tape in this case contains similar prejudicial images of Daryl Bronkema reading from the Bible to the kids at the dinner table on Christmas morning and making a statement about "God's time," in addition to multiple clips of Christmas present opening for both 2004 and 2005. Additionally, certain clips were duplicative, with at least one

clip appearing in two different places in the video, listed for both "exertion" and for "daytime coughing."[3] The segments were not completely chronological, so there was no way to determine if the children were getting worse or better or staying the same over time. However, as described by Melissa Bronkema, the clips were in groupings such as "exertion and irritants," "daytime coughing," "night coughing," "bloody noses," and "sleep coughing." Moreover, an exhibit was admitted listing the clips and how they were grouped, making the reasoning more understandable.

We find that, on the whole, the video contained relevant evidence and was more probative than prejudicial. See *id.* It appeared to give a representative sample of what it was like for these children on a daily basis. The clips ranged in time from early morning to late evening, showing episodes of both long and short duration, taken at various locations (throughout the home, outside, in vehicles), and after various activities or while at rest. Admission of the videotape falls within the range of reasoned and principled outcomes. *Maldonado*, *supra* at 388.

We vacate the judgment, reverse the trial court's grant of summary disposition in favor of Rola-Chem, and remand for a new trial and other proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra

[3] Specifically, the footage of Jackson receiving a nebulizer treatment on 3/9/06.