# STATE OF MICHIGAN

# COURT OF APPEALS

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GARY DUBANIK,

Plaintiff-Appellant,

v

BRASS FORGINGS COMPANY,

Defendant,

and

NATIONAL MACHINERY COMPANY and SQUARE D COMPANY,

Defendants-Appellees.

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UNPUBLISHED
July 16, 1996

No. 174334
LC No. 91420362 NP

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

In this products liability action, plaintiff Gary Dubanik appeals of right the order granting summary disposition to defendants Square D Company and National Machinery Company. We affirm.

Plaintiff began working as a press operator at Quality Steel Products in 1989. Plaintiff used a punch press that was designed, manufactured and sold by defendant National. The press had an attached electric foot pedal that functioned as an operation switch. Defendant Square D designed and manufactured the foot pedal. On April 9, 1990, while plaintiff was cleaning the press, the press cycled without being activated by him. The ram struck and crushed plaintiff's hand, which was eventually amputated.

National had sold the press in 1945; the press had pneumatic controls at that time. Defendant Brass Forgings[1] acquired the press in 1983, and sold it to Quality Steel four years later. Quality Steel

* Circuit judge, sitting on the Court of Appeals by assignment.

employees altered the controls from pneumatic to electric. As modified, the electrical controls made it possible for an operator to shut off the flywheel without shutting off the electrical actuating devices. While in use, metal residue built up on the dies in the press. To clean the press, the safety instructions provided that the operator shut off the press, wait until the flywheel completely stopped, and insert a die block. The operator would then use hand tools to scrape the residue off the dies.

Just before the accident, plaintiff had moved the foot pedal under the press so that he would not inadvertently turn on the press. Plaintiff did not shut off the electrical power to the controls, but had turned off the flywheel. Plaintiff did not wait, however, for the flywheel to completely stop before reaching inside the press with his hand. Also, plaintiff did not insert a die block into the press.

Plaintiff testified at his deposition that he understood that shutting off the power to the press would not stop the flywheel. Plaintiff testified that he "always" put in a die block to prevent the press from operating when he cleaned it, but on the day of the accident, he "thought it was just going to be quick this time, just reach in and get out . . . ." Plaintiff admitted that he knew that he was taking a risk by placing his hand in the press at the point of operation.

Plaintiff filed a complaint, alleging that the press and/or foot pedal were defectively designed and caused the press to cycle unexpectedly. Plaintiff also claimed that defendants failed to warn him of the dangers associated with the press and the foot pedal. Defendants moved for summary disposition, which the circuit court granted. Plaintiff now appeals.

Plaintiff initially argues that the circuit court erred in ruling that neither National nor Square D had a duty to warn plaintiff of the dangers in operating the press. We review decisions regarding summary disposition under a de novo standard. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995), *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. In ruling on such a motion, the Court should consider the pleadings, affidavits, depositions, admissions and other documentary evidence. MCR 2.116(G)(5), *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), *Phillips, supra*, 213 Mich App at 397.

Additionally, plaintiff argues that defendants had a duty to warn him. The existence of a duty is generally a question of law for the court. *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). Questions of law are also reviewed de novo. *Pakideh v Franklin Commercial Mortgage*, 213 Mich App 636, 640; 540 NW2d 777 (1995), *Colangelo v Tau Kappa Epilson Fraternity*, 205 Mich App 129, 132; 517 NW2d 289 (1994).

Plaintiff argues that National should have warned him that the press could actuate when the flywheel was in the "coastdown" mode, i.e., when it was not completely stopped. Plaintiff also contends that Square D should have warned him of the dangers of using a top-guarded only foot pedal to activate a forging press. To prevail in a failure to warn case, a plaintiff must show that: (1) the defendant owed a duty to warn the plaintiff of the danger; (2) the defendant breached the duty to warn;

(3) the defendant's breach was the proximate cause and actual cause of the plaintiff's injury; and (4) the plaintiff consequently suffered damages. *Tasca v GTE Products Corp*, 175 Mich App 617, 622; 438 NW2d 625 (1988).

Before a manufacturer or seller may be liable for failing to warn, the manufacturer or seller must: (1) have actual or constructive knowledge of the danger; (2) have no reason to believe that those for whose use the product is supplied will realize its dangerous condition; and (3) have failed to exercise reasonable care to inform users of the product's dangerous condition or of the facts which make it likely to be dangerous. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 389-390; 491 NW2d 208 (1992).

The circuit court correctly granted summary disposition to National and Square D. Even considering the facts most favorably toward plaintiff, he has not established that National and Square D had a duty to warn him. Plaintiff has not shown that defendants had actual or constructive knowledge of the claimed danger: that is, that plaintiff would put his hand in the press at the point of operation without a die block in place and while the flywheel was still operating. Also, plaintiff's own testimony established that he realized the danger in placing his hand at the point of operation without the die block in place.

As to Square D, plaintiff presented no evidence that he activated the foot pedal, or that the foot pedal was activated by another source. Indeed, plaintiff testified that he slid the foot pedal under the machine to prevent it from being activated. Therefore, plaintiff's argument that Square D should have fully encased the foot pedal is immaterial. Moreover, plaintiff has not shown that the foot pedal was defective. The foot pedal could be safely used with the press. See *Coolbaugh v Square D Co*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 1991 (Docket No. 125383), and appended to defendant Square D's appellate brief. Even if the foot pedal was involved in the injury, Square D is not liable because it could not have foreseen the specific misapplication of the foot pedal. In other words, Square D could not have known that Quality Steel would use the foot pedal with that particular press and that plaintiff would reach into the press while the flywheel was operating and without a die block in place. See *Childress v Gregen Mfg Co*, 888 F2d 45, 49 (6th Cir 1989), *Jordan v Whiting Corp (On Rehearing)*, 49 Mich App 481, 486-487; 212 NW2d 324 (1973), rev'd on other grounds 396 Mich 145 (1976). Plaintiff has no viable failure to warn claim against defendants.

Plaintiff next contends that the proximate cause of his injury was a question of fact for the jury to decide. To establish proximate cause in a duty to warn case, a plaintiff must present evidence that he would have used the product differently had the manufacturer warned him. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 251-252; 492 NW2d 512 (1992). Plaintiff testified that he had received a warning sheet with safety precautions. Plaintiff said that his employer instructed him to place a die block in the press when cleaning it. Nonetheless, plaintiff did not place the die block in the machine. Plaintiff was also warned to wait until the flywheel stopped before cleaning the press. On the day of the accident, plaintiff did not wait for the flywheel to stop. Plaintiff was warned, and thus was aware of the dangers, but he did not heed those warnings. Therefore, plaintiff has not met his burden to

produce evidence demonstrating that he would have used the press differently had he been given additional warnings.

Finally, plaintiff asserts that the press had a design defect. Plaintiff claims that National should have equipped the press with an interlocking die block. Quality Steel, however, provided plaintiff with a die block that he failed to use. That die block would have prevented the ram from crushing plaintiff's hand. Because plaintiff failed to use the regular die block, National's failure to provide an interlocking die block is immaterial.

Affirmed.

/s/ Maura D. Corrigan
/s/ Chad C. Schmucker

[1] The parties stipulated to dismiss Brass Forgings from this action, and it is not a party to this appeal.