STATE OF MICHIGAN

COURT OF APPEALS

GERALD T. HEATON and JONNA HEATON,

Plaintiff-Appellee/Cross-Appellant,

v

BENTON CONSTRUCTION COMPANY, d/b/a GREAT LAKES SUPERIOR WALLS,

Defendant-Appellant/Cross-Appellee,

and

PRISTINE HOME BUILDERS, DANIEL J. BONAWITT, GRAIG'S HOME DESIGN SERVICES, L.L.C., and CRAIG W. THORTON,

Defendants.

UNPUBLISHED
October 27, 2009
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No. 285805
Shiawassee Circuit Court
LC No. 06-003972-CK

Advance Sheets Version

Before: MURRAY, P.J., and MARKEY and BORRELLO, JJ.

MURRAY, P.J. (*concurring in part and dissenting in part*).

I concur in the majority's opinion that this is a products liability case, but respectfully disagree with its conclusion that Daniel J. Bonawitt was not a sophisticated user. In my view, Bonawitt was a sophisticated user, and, as a result, the trial court should have granted defendant Great Lakes Superior Walls' motion for summary disposition, and dismissed plaintiffs' claim to the extent that it was premised on a failure to warn.

Although the parties argue over whether plaintiffs' claim was actually one in negligence or products liability, it was both. In other words, plaintiffs' claim was one of products liability that was based on a negligence theory. See *Prentis v Yale Mfg Co*, 421 Mich 670, 682; 365 NW2d 176 (1984); *Lemire v Garrard Drugs*, 95 Mich App 520, 523; 291 NW2d 103 (1980); *Bullock v Gulf & Western Mfg*, 128 Mich App 316, 319; 340 NW2d 294 (1983). Such a theory, as the majority recognizes, also falls squarely within the plain language of the statute. MCL 600.2946. And, although there are several statutory defenses and standards that are applicable to

one or more products liability theories, defendant relies exclusively on the "sophisticated user" defense to a failure to warn theory contained in MCL 600.2945(j) and MCL 600.2947(4).[1]

The statutory definition of "sophisticated user" is:

> "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user. [MCL 600.2945(j)]

I would hold that there was no genuine issue of material fact that Bonawitt was a sophisticated user. It is undisputed that Bonawitt had been a professional homebuilder for the past 12 years, and that this was his exclusive line of business. The evidence is also undisputed that Bonawitt had built approximately 19 homes during his 12 years of business, and it is clear that when he contracted with plaintiffs to build their home, he held himself out as a professional homebuilder. Consequently, because of his training, experience, and profession, Bonawitt was a sophisticated user. At a minimum, given his profession and experience, he would generally be expected to be familiar with retaining walls that he purchased for use in building a home.

In light of this conclusion, I would reverse the trial court's order in part, and remand for dismissal of plaintiffs' failure to warn theory. Such a dismissal would not necessitate dismissal of the entire judgment, because plaintiffs also posited a failure to instruct theory, which is different from a failure to warn. See MCL 600.2945(i) (defining "production" as both "instructing" and "warning") and *Talcott v Midland*, 150 Mich App 143, 148; 387 NW2d 845 (1985). In all other respects, I concur in the majority opinion.

/s/ Christopher M. Murray

[1] I am assuming, because it is not addressed by the parties, that the "sophisticated user" defense applies to plaintiffs' cause of action even though the transaction was between defendant and Bonawitt, and this discussion is over whether Bonawitt, rather than plaintiffs, was a "sophisticated user."