

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Neal and Bonnie Messer,)	
)	Supreme Court
Plaintiffs and Appellants,)	Case No: 20150065
)	
vs.)	
)	
B&B Hot Oil Service, Inc. and JB's Welding,)	
)	
Defendants and Appellees,)	
)	

APPEAL FROM ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
ENTERED FEBRUARY 20, 2015, ORDER FOR JUDGMENT ENTERED MARCH 5,
2015, AND JUDGMENT ENTERED MARCH 6, 2015, BY THE HONORABLE
WILLIAM A. HERAUF, JUDGE OF THE DISTRICT COURT, STARK COUNTY
DISTRICT COURT, STATE OF NORTH DAKOTA, CIVIL NO. 45-2013-CV-00304

REPLY BRIEF OF APPELLANTS NEAL AND BONNIE MESSER

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STATUTES:

N.D.C.C. § 28-01.3-019

ARGUMENT

(1.) Appellee JB's Welding ("JB's") misstates the evidence, and ignores those facts which contradict its position – facts which establish the existence of numerous genuine issues of material fact for resolution by the jury. *See Barsness v. General Diesel & Equipment Co., Inc.*, 383 N.W.2d 840, 844 (N.D. 1986) (“ . . . if there is any doubt as to the existence of a genuine issue of material fact, or if differing inferences can be drawn from the undisputed evidence, there is a jury question and summary judgment is improper when questions of negligence are in issue.”). In considering a motion for summary judgment, the evidence must be viewed “in the light most favorable to the party opposing the motion.” *Green v. Mid Dakota Clinic*, 2004 ND 12, ¶¶ 5-6, 673 N.W.2d 257 (citations omitted).

(2.) JB's assertion there is no “evidence, testimony or even assertion that suggests there was any problem or defect with the actual work performed by JB's Welding including the actual welding performed” (Brief of Appellee at ¶ 6), “there is no allegations of any negligent work being performed by JB's Welding whatsoever” (id. at ¶ 28), “JB's Welding was not even a part of that process or decision making [re: propane system]” (id.), and “there is no evidence to establish that JB's Welding's action proximately resulted in the loss” (id. at ¶ 29), are blatantly false. As discussed in paragraphs 7 through 15 of Appellants' Brief, considerable testimony from JB's owner and employee, Jim Bahley and Scott Tysver, as well as B&B's owner, Blaine Fugere, establishes JB's direct involvement in the design, manufacture and assembly of the knockoff truck (“knockoff”), and specifically, the burner assembly (i.e. fire box). It was the failure to design, manufacture and assemble the burner assembly with a safety mechanism as

required by NFPA 58 which was the proximate cause of the explosion. Highlights from their testimony follows:

- Fugere (B&B), Bahley and Tysver (JB's) admit they were jointly involved in designing, manufacturing and assembling the knockoff, and they were trying to reverse engineer another hot oil truck B&B had purchased from third-party Energy Fabrication, Inc. ("EnerFab truck"). (App. 24 at 49-50; 28 at 196-97; 34-38, 40-43, 59-61, 66-67, 69, 72-76.)
- According to Fugere, JB's work on the knockoff included, in part, building the burner box and propane distribution system, including piping. (App. 28 at 198.)
- Bahley testified, as did Tysver, that the owner of B&B, Blaine Fugere, was at JB's shop on a daily basis during the design and assembly of the knockoff and had daily input in relation to the design and assembly work completed by JB's on the knockoff, including input in regards to any changes or modifications he wanted to the knockoff. (App. 37-43, 51-52.)
- Tysver testified 70% of the design and assembly work on the knockoff was done by JB's, and 30% by B&B. (App. 41-43.)
- They also testified the knockoff was transferred back and forth between B&B and JB's as the design and assembly work progressed, and JB's and B&B were at that time located in shops that were next door to each other. (App. 44-45, 67.)

(3.) In addition, as discussed in paragraphs 17 through 23 of Appellants' Brief, Messers' cause and origin expert Robert Whitemore ("Whitemore") directly places the blame for the unreasonably dangerous condition of the knockoff, and proximate cause for the explosion, upon JB's. JB's assertion Messers have taken Whitemore's testimony out

of context, and assertion “Whitemore never stated that it was JB’s Weldings responsibility to incorporate a shut off valve or other comparable safety device” (Brief of Appellee at ¶ 25) is also false. JB’s only provides a selective sampling of Whitemore’s deposition testimony, while ignoring the real substance of Whitemore’s opinions placing fault directly upon JB’s. The following are highlights from Whitemore’s opinions in this regard:

- the 2009 knockoff didn’t have any safety features in relation to the burner assembly as required by NFPA 58, section 6.23. (App. 129.)
- there was a violation in the manufacturing process for the subject hot oil truck by JB’s. (App. 129-32 at 82-95.) Specifically, under NFPA 58, JB’s violated the provisions of NFPA 58 Section 6.23.7.4, which provides, in relevant part, “[a]ll gas fired heating appliances shall be equipped with safety shut-offs in accordance with 5.2.7(A) except those covered in 6.19.2.8(2).” (App. 132 at 94-95.) In this case there was no such “safety shut off” provided at all with the “knock off” 2009 hot oil truck. (App. 132.)
- “the subject knock-off truck . . . was defective in its design and manufacture at the time the finished product was provided and/or furnished to B&B Hot Oil Service, Inc.” and “[t]he subject knock-off truck did not have any safety mechanisms pertaining to the LP gas system to shut the gas off in the event of a leak.” (App. 135-36 at ¶ 4.) “Such a safety feature should have been addressed and designed into the system in conjunction with the fire box assembly” which “was manufactured by JB’s and designed jointly by B&B Hot Oil Service, Inc. and JB’s Welding.” (*Id.*)

- “the defects in the design and manufacture of the subject knock-off truck, including but not limited to the fire box assembly, rendered the finished truck unreasonably dangerous at the time it was accepted by, and/or furnished to, B&B Hot Oil Service, Inc., when put to a use for which it was intended or could reasonably be anticipated.” (*Id.* at ¶ 5.)
- “JB’s was negligent in its attempt to reverse engineer an Enerfab hot oil truck by failing to design and manufacture the fire box assembly on the knock-off truck with an electronic shut off valve as contained on the Enerfab truck, or other suitable safety mechanism for the LP gas system to shut the gas off in the event of a leak.” (App. 136 at ¶ 6.)
- “JB’s Welding’s negligence was a proximate cause of the explosion which resulted in the damage to the Messer storage building at issue in the above-entitled action.” (*Id.* at ¶ 7.)

Whitemore’s placement of blame upon JB’s could not have been more clearly stated. JB’s, and the district court, simply chose to ignore the evidence supporting Messers claims against JB’s.

(4.) JB’s also misstates the facts when it asserts, and the district court erred in concluding, JB’s was only involved in welding the shell of the truck. JB’s described its work on the knockoff as follows in written discovery:

JB’s Welding built the sub-frame, fire box, and tool boxes. We mounted the pumps and propane tank. We plumbed suction and discharge. We built the hose rack, hard line racks, and bolted the unit to the chassis. The tank was built by Fargo Tank and it was welded to the subframe by JB’s Welding.

(App. 108 at Answer to Interrogatory No. 8.) In addition, Fugere testified JB’s work on the knockoff included, in part, building the burner box and propane distribution system,

including piping. (App. 28 at 198.) JB's work on the knockoff encompassed the system for which NFPA 58 required a safety mechanism – a safety mechanism which was never incorporated into the knockoff and which should have been designed into the system by JB's in the opinion of Whitemore. The district court's assertion lines from deposition testimony were taken out of context by Messer's counsel, and conclusion JB's was only involved in welding the shell of the truck with no involvement with the propane distribution system, are clearly contrary to the evidence in this case, and evidences an improper weighing of the evidence by the district court.

(5.) JB's assertion "construction of the burner box or firebox had absolutely nothing to do with the independent decision to include or exclude an automatic shutoff valve" is incorrect. As discussed, NFPA 58 requires gas fired heating appliances to incorporate a safety shut off, and according to Whitemore, such safety mechanism should have been addressed and designed into the system in conjunction with the fire box assembly. The fire box assembly is the core of the gas fired heating appliance on the knockoff.

(6.) In addition, even assuming JB's was only doing welding, which is contrary to the evidence, JB's would still have the responsibility to be familiar with and comply with what the NFPA codes required for the finished product, including the fire box assembly component part thereof. JB's cannot skirt its responsibility by asserting it relied on B&B to comply with codes (fact question), especially given JB's long history of designing and manufacturing hot oil trucks for others, and given it is undisputed JB's was responsible for the fire box assembly.

(7.) The district court also misinterpreted and misapplied North Dakota's products liability law by failing to distinguish between the hot oil truck as a whole and its various

component parts. JB's sold to B&B (the user or consumer) the burner/fire box assembly, a component part of the knockoff for which a safety shut off was required. At the very least, a genuine issue of material fact exists as to whether the failure to design in and incorporate a safety shut off system was a defective condition which made the product (truck mounted fire box assembly and hot oil system) unreasonably dangerous to not only users of the product, but also to anyone or anything in proximity to the product. In Whitemore's opinion such defect in design and manufacture rendered the product unreasonably dangerous when put to the use for which it was intended or could reasonably be intended. (App. 135-36 at ¶¶ 2-7.)

(8.) Under strict products liability, liability extends not only to the consumer or user of the unreasonably dangerous product, but also to others who suffer personal or property injury as a result of the defective product. *See e.g. Horst v. Deere & Co.*, 769 N.W.2d 536, 547 (Wis. 2009).

(9.) In addition, although JB's did sell a defective product to B&B, a products liability claim does not require a sale of a product. Under the Act, a "product liability action" is defined to mean, "any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of . . . property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product." N.D.C.C. § 28-01.3-01(2)(emphasis added). Merely manufacturing, constructing, designing, formulizing, installing,

preparing, assembling, testing, packaging, or labeling of a product in a negligent manner suffices.

(10.) JB's and the district court incorrectly focused upon what JB's affirmatively did, instead of considering what JB's failed to do, dispute its duty to do so. Negligence, proximate cause and foreseeability are questions of fact for a jury to decide.

(11.) JB's assertion of intervening causes for the explosion are without merit, and all involve genuine issues of material fact in dispute. In addition, it is disingenuous to argue the alleged occurrence of events, for which the missing safety feature would have been designed to address and protect against, constitute an intervening cause. JB's design and manufacturing defect was a "but for" cause of the explosion. It was the failure to design in an automatic shut off safety system or other comparable safety feature, required by the applicable NFPA code, which ultimately caused the leaking propane which resulted in the explosion. The opinions of Whitmore, and the testimony of Fugere, Bahley and Tysver create numerous genuine issues of material fact for the jury to decide.

CONCLUSION

(12.) For the foregoing reasons, Messer request the district court's grant of summary judgment dismissing Messer's claims against JB's be reversed and the case remanded to the district court for a jury trial.

(13.) Dated this 2nd day of June, 2015.

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CERTIFICATE OF COMPLIANCE

(14.) The undersigned, as attorneys for the Plaintiffs/Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 1,981 .

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(15.) I hereby certify that a true and correct copy of the foregoing **Reply Brief of Appellants Neal and Bonnie Messer** was on the 2nd day of June, 2015, emailed to the following:

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