

No. 1-09-0075

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL HADRYA,)	Appeal from the Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	No. 01 L 1279
v.	_____)	
)	
LIEBHERR-WERK BIBERACH, GmbH,)	Honorable Jennifer Duncan-Brice,
)	Judge Presiding.
Defendant-Appellee.)	

Justice Murphy delivered the judgment of the court.

Justices Neville and Steele concurred in the judgment.

ORDER

HELD: Where defendant presented evidence that safety mechanism was not required by government or industry standard and any mechanism would be ineffective to prevent the harm suffered by plaintiff, without evidence from plaintiff to rebut defendant's expert, the trial court's grant of summary judgment for failure to meet the consumer expectations test and risk utility test for strict liability was proper.

Plaintiff, Michael Hadrya, brought the underlying action against several defendants, including defendant, Liebherr-Werk Biberach GmbH, under a strict liability theory as the manufacturer of a tower crane on which plaintiff was seriously injured on November 9, 2000.

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Following discovery, defendant moved for summary judgment along with other defendants. The trial court granted summary judgment as to defendant. Plaintiff amended his complaint and proceeded to trial. After a mistrial was declared in the first trial, plaintiff settled with all remaining defendants but the lessor of the crane, Morrow Equipment Co., LLC. Plaintiff again amended his complaint, naming only Morrow as defendant and proceeded to trial.

Plaintiff ultimately received a favorable judgment against Morrow. The jury determined plaintiff's damages to be \$6,184,439. However, the jury found plaintiff 40% at fault and the award was reduced to \$3,710,663.40 based on plaintiff's contributory negligence. Plaintiff appeals the trial court's grant of summary judgment to defendant. Plaintiff argues that the trial court erred in finding that, as a matter of law, the crane was not unreasonably dangerous under the consumer expectations test or the risk utility test. For the following reasons we affirm.

I. BACKGROUND

Plaintiff, a journeyman oiler, was responsible for the maintenance and safety of one of the tower cranes on a project known as the River East Project on November 9, 2000. In the morning of November 9, 2000, plaintiff observed a reoccurrence of a problem with the crane's wire rope "jumping" as it spooled on the hoist drum. Plaintiff went onto the machine deck of the counter-jib of the crane to inspect the hoist to assess the condition of the wire rope and try to diagnose the problem. The crane was in operation at this time and the rope "jumped" while plaintiff was inspecting, causing him to lose his balance and fall toward the hoist drum. Plaintiff's right hand became caught in the pinch point of the spooling rope and his right hand was severed from his body at the wrist.

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Plaintiff filed the instant cause of action naming, among other parties, defendant and Morrow Equipment Co., LLC, the company that purchased the crane from defendant and leased it to plaintiff's employer. In his second amended complaint, with respect to defendant, plaintiff alleged that the crane was unreasonably dangerous for the failure of the drum to spool properly and defendant's failure to properly warn of the unsafe conditions. Following discovery, the defendants filed motions to dismiss and for summary judgment.

In a 27-page order, the trial court granted summary judgment to defendant and four co-defendants. The trial court denied summary judgment to Morrow and three other co-defendants. The court provided detailed summaries of the testimony of plaintiff and numerous witnesses and experts. Of importance on appeal are the depositions of plaintiff and the expert witnesses for plaintiff and defendant who testified to the safety issues concerning the spooling issue.

Plaintiff testified that he was a crane oiler and had been licensed as a crane operator since 1998. He was assigned to one of three cranes at the job site as an oiler and was responsible for the safety and maintenance of the crane. About two weeks prior to the accident, the crane was raised and the cable was replaced. At this time, plaintiff noticed that the hoist drum was allowing the hoist cable to jump as it spooled and unspooled to lift and lower loads. Plaintiff informed several parties of the issue and testified that the problem was known throughout the job site. However, he was informed there was not enough time to shut the crane down to remedy the issue.

On the day of the incident, the cable had been jumping excessively and plaintiff discussed the issue with the crane operator. While the crane was operating, with the operator's knowledge,

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plaintiff walked out to inspect the cable from a distance of about two feet. He testified that he knew that the crane would be in operation and that he had no intention of touching the drum or the cable because he knew it would have been dangerous. Plaintiff testified that he knew that the spooling cable would create a pinch point that could draw his hand or clothing in and cause serious harm or death.

He testified that he was trained to never put his hand on any part of a moving hoist drum; however, there was no rule against going on the counter-jib while the crane was in operation. While inspecting the drum and cable, the crane shook violently and plaintiff lost his balance. Plaintiff fell toward the drum and his right hand was pinched, drawn into the spooling hoist mechanism and severed from his body at the wrist. Plaintiff was lowered to the ground by the crane and he was taken to the hospital.

Plaintiff's expert, Eugene Holland, testified that he was an expert in the engineering, design, construction and safety of construction equipment. Holland explained that when a cable is replaced, it must be "trained" by pretensioning it to avoid twisting and jumping. While the information he reviewed indicated that the cable was respooled on November 7, 2000, the problems experienced on November 8 and 9, 2000, clearly indicated that it had not been properly trained and respooled. Of further issue was that the cable utilized was too long, a problem made clear by defendant manufacturer's notice placed on the crane. Holland opined that the crane operator and other parties on the construction site should have demanded the shut down of the crane until the problems with the cable could be fixed either by properly training the cable or replacing it with a shorter cable.

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While defendant's manual prohibits maintenance while the equipment is operating, it does not prohibit inspection. Holland testified that it was not only proper, but necessary for plaintiff to inspect the cable from the position he took. With respect to the crane itself, Holland opined that, because of the other issues regarding the respooling of the cable, the design of the crane did not contribute to the spooling problems. However, he further opined that defendant was in the best position to prevent the hazard by providing a guard and warnings around the hoist drum to prevent access.

Citing to OSHA regulations and ISO and ASME standards, Holland stated that, due to the exposed moving parts, a "standard guard" that could withstand 90 kilograms of force should have been installed. Holland had not conceived or sketched a specific type of guard or developed an estimated cost. He opined it could be one of many types of removable guard rail. Holland added that a cover was not necessary.

Defendant's expert, Howard Shapiro, also testified as an expert in engineering. Shapiro stated that, by the very nature of tower cranes, the hoist drum is guarded by location. Because no person has access to the area and, by industry custom and practice and defendant's manual, maintenance of the hoist drum is prohibited while the crane is operating unless able to communicate with the operator. Shapiro stated that no applicable regulations or industry standards required a guard near the hoist drum. Accordingly, Shapiro concluded that the need for extra protections is unnecessary.

Shapiro opined that the dangers of an operating hoist drum were open and obvious, particularly to the only parties that would be on the deck while it was operating. Therefore, since

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there was no reasonable expectation that anyone without training would be near the drum, no physical guards were necessary. Furthermore, Shapiro stated that any feasible guard would not prevent accidents like the instant scenario. Shapiro stated that the counter-jib, drum and cable are frequently moving, based on the movements and freedom needed for the cable and inherent in the work accomplished. Accordingly, he opined that a minimum gap of eight inches would be needed and such a design would not have prevented the type of accident suffered by plaintiff.

The trial court cited to these and the other depositions in great detail before summarizing the parties' arguments and granting summary judgment to defendant. The court found that Holland clearly stated that the design of the crane did not contribute to the spooling problems for the cable. Therefore, it determined that defendant could not be liable for the allegations concerning the design on that issue or a warning for spooling problems.

Next, the trial court determined that the consumer expectation test did not impose liability. The trial court cited Shapiro's testimony that no crane tower is equipped with a hoist drum guard and no government or industry standards require such a measure. Plaintiff failed to produce any testimony to the contrary to rebut Shapiro, therefore there was no question of fact on this issue. Finally, the trial court also found that plaintiff failed to meet the risk-utility test. Again, the trial court stated that as no evidence was presented to refute Shapiro's testimony that, because the gap would have to be at least eight inches to accommodate the requirements of the cable, the utility of any guard would be negligible and strict liability did not attach.

Plaintiff filed a motion to reconsider arguing that the trial court failed to properly apply the law in disregarding Holland's testimony and accepting Shapiro's testimony. The trial court

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denied the motion, again providing a review of the testimony submitted. In its written order, the trial court quoted additional portions of Holland's testimony. The court highlighted that Holland made only a general statement about a guard being necessary. It reiterated that Holland failed to provide any specific facts as to how one could be constructed, if it would be cost-effective, and, most importantly, if it would provide any real protection. The trial court again cited to Shapiro's opinion that, based on the function of the crane and cable, a hoist drum guard would be ineffective. Plaintiff filed a second motion to reconsider that was denied without comment.

Plaintiff amended his complaint, removing reference to defendant and the matter advanced to trial. The first trial ended in a mistrial and plaintiff settled with all remaining defendants but Morrow for \$950,000. Plaintiff filed his fourth amended complaint, removing reference to all original defendants except Morrow and any other claims. The parties proceeded to trial and the jury determined plaintiff's damages to be \$6,184,439. However, the jury also found plaintiff to be 40% at fault, and the damages award was reduced to \$3,710,663.40. The trial court further reduced the judgment against Morrow to account for the monies received by plaintiff in settlement with the other defendants. This appeal followed.

II. ANALYSIS

Plaintiff seeks reversal of the trial court's summary judgment order and the denial of his two motions for reconsideration. Plaintiff asserts that the trial court erred in granting summary judgment to defendant as a matter of law. Plaintiff argues that, at a minimum, the question of whether the tower crane is unreasonably dangerous under the consumer-expectation test or the risk-utility test is a question of fact that the jury must decide. *Calles v. Scripto-Tokai Corp.*, 224

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Ill. 2d 247, 256 (2007).

Defendant responds that this court should not even address plaintiff's claims because he is estopped from advancing them on several grounds. Defendant claims that: (1) the jury's finding of contributory negligence constitutes a finding of assumption of risk and has a collateral estoppel effect on plaintiff's strict liability claim; (2) plaintiff forfeited his right to appeal summary judgment by subsequently amending his complaint twice without reference to defendant or the instant claim; and (3) plaintiff waived his right to his claim of strict liability based on defective design for failing to specifically plead that allegation.

Unfortunately, we are without the benefit of a reply brief and each of these assertions by defendant has gone unanswered. While defendant's claims each have some merit, and we agree that this court is not a depository in which a party may dump the burden of its argument, there are countervailing positions to each of these arguments. This matter is best disposed simply on the merits of plaintiff's claim on appeal.

Summary judgment may be granted when the pleadings, depositions, admissions and affidavits on file demonstrate no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Where parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the resolution of the matter by the court as a matter of law. *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 397 Ill. App. 3d 512, 523 (2010) (hereinafter *CHRPP*). We review an order granting summary judgment *de novo*. *CHRPP*, 397 Ill. App. 3d at 523. While we also review the evidence in a light most favorable to

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the nonmovant, we cannot ignore evidence unfavorable to the nonmovant and may sustain the trial court on any basis called for in the record. *Ruane v. Amore*, 287 Ill. App. 3d 465, 474 (1997).

The trial court determined that there was no material issue of fact. Defendant's motion for summary judgment was granted based on plaintiffs failure to present evidence to meet either the consumer-expectation test or the risk-utility test. As addressed by the parties, in order to determine whether a product is unreasonably dangerous, Illinois courts must determine if one of these two tests is met. *Calles*, 224 Ill. 2d at 256. As explained by the *Calles* court:

“Under the consumer-expectation test, a plaintiff must establish what an ordinary consumer purchasing the product would expect about the product and its safety. This is an objective standard based on the average, normal, or ordinary expectations of the reasonable person; it is not dependent upon the subjective expectation of a particular consumer or user.” *Calles*, 224 Ill. 2d at 254.

The risk-utility test was adopted as a second test for strict liability claims to satisfy the concern over consumers that might not be aware of what to expect with respect to product safety. Therefore, the risk-utility test allows for a finding of defective design where:

“ ‘the jury determines that the product's design embodies “excessive preventable danger,” or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design.’ ” *Calles*, 224 Ill. 2d at 256, quoting *Barker v. Lull Engineering Co.*, 143 Cal.Rptr. 225, 236 (1978).

The open and obvious nature of a risk and the assumption of risk do not bar liability, but

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are among the factors that courts may consider under the risk-utility test. Additionally, the courts consider the usefulness of the product, whether the product is likely to cause injury, the availability of a substitute, the ability of the manufacturer to eliminate the unsafe character of the product without impairing its usefulness or utility, and the feasibility of spreading the loss by price or insurance. *Calles*, 224 Ill. 2d at 264-65.

Plaintiff cites to *Calles* exclusively to detail these tests and the factors to be considered before discussing the evidence of this case and concluding that he presented evidence to withstand summary judgment for each test. The trial court found that the issues plaintiff pled in support of his claim that the tower crane was unreasonably dangerous were positively refuted by the testimony of the experts and other witnesses. Citing plaintiff's own expert, the trial court found that the design did not lead to the spooling problems, therefore summary judgment as to the claims that the design led to the spooling problem or defendant failed to warn of this issue was proper as they were wholly unsupported. Plaintiff does not challenge these findings on appeal, but challenges the finding that the tower crane was unreasonably dangerous due to defendant's failure to provide proper safety measures.

Plaintiff argues that an ordinary consumer would expect the tower crane to be safe for its intended use. Plaintiff points to Shapiro's testimony that it would be a reasonable expectation that an oiler would stand as close as 3 feet from the hoist drum while the crane was in operation and Holland's testimony that the applicable standards and regulations require guarding. However, the trial court cited to Shapiro's testimony that no crane tower in use today is outfitted with a guarding device as generally noted to by Holland. The trial court added that Shapiro

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testified that no government or industry standards require one.

Both parties provided testimony that it is universally known that all machinery has pinch points and the obvious dangers presented by this. As the trial court also pointed out, no testimony was provided, including by plaintiff, that despite these dangers anyone would expect there to be a guard around the hoist drum. In fact, Shapiro testified that any possible guard would not lend protection because the nature of the hoist drum and cable operation required too much space to allow a functioning guard. As Shapiro testified, the hoist drum was guarded by location and only experienced persons would have access to it while in operation. Plaintiff testified that he understood the dangers and knew that what occurred was a possible outcome. Based on these undisputed facts, the trial court did not err in determining that plaintiff failed to meet the consumer-expectation test.

The trial court also properly determined that summary judgment was proper for plaintiff's failure to meet the risk-utility test. The trial court noted that this test requires a plaintiff to provide evidence that the product's design proximately caused his injury as well as that the benefits of the design do not outweigh the risks. *Wortel v. Somerset Industries, Inc.*, 331 Ill. App. 3d 895, 902-03 (2002). Not only did the evidence show that the design of the tower crane was not the cause of the spooling issue, as addressed above, it also indicated that the failure to include a guard was not the cause.

As Shapiro's uncontradicted testimony indicated, any hypothetical guard would not have saved plaintiff from the harm that befell him because of the very nature of the machine. While Holland testified that "simple types" of guarding could be utilized and completed inexpensively.

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As noted by the trial court, Shapiro provided testimony that this was untrue as no tower cranes had such devices and any possible design would be open to the same issue. The trial court did not commit error by basing its decision on these facts in granting summary judgment.

III. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment to defendant is affirmed.

Affirmed.