STATE OF MICHIGAN

COURT OF APPEALS

DENNIS LaLONE and DIANNE LaLONE, as Conservators of the Estate of BRANDON LaLONE, and CHRISTOPHER T. HAENICKE, as Next of Friend of AUSTIN W. LaLONE and BRYANNA E. LaLONE, minors,

Plaintiffs-Appellees,

v

RIEDSTRA DAIRY LTD.,

Defendant-Appellant,

and

RT ENGINEERING LTD. f/k/a ROTA-TECH DAIRY SHEDS INTERNATIONAL LTD., RT INTERNATIONAL LTD. f/k/a ROTA-TECH DAIRY SHEDS INTERNATIONAL LTD., RT INSTALLATIONS LTD., DeLAVAL, INC., and JOHN BOWERS,

Defendants.

UNPUBLISHED
August 13, 2013

No. 308207
St. Joseph Circuit Court
LC No. 07-000914-NH

Before: WHITBECK, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant, Riedstra Dairy Ltd. (Riedstra Dairy), appeals as on leave granted the trial court's denial of its motion for summary disposition under MCR 2.116(C)(10). Riedstra Dairy contends that the trial court should have granted its motion because it could not have discovered the dangerous condition on its property that seriously injured Brandon LaLone (LaLone). We agree and we reverse and remand.

I. FACTS

A. BACKGROUND FACTS

In 2006, Riedstra Dairy purchased a rotary milking parlor from defendant, DeLaval, Inc. (DeLaval). DeLaval Direct Distribution, a branch of DeLaval, employed LaLone as a service

technician. LaLone was one of the employees who installed the parlor. The parlor began operating on December 18, 2006, but it began to malfunction later in 2006 and required frequent repairs.

Craig Davis, a DeLaval employee, testified that LaLone was at Riedstra Dairy for about 5 hours before he was injured. Steven McCaul, a DeLaval service technician, testified that he and LaLone were working in the same stall at the time of the accident. According to McCaul, LaLone finished his job below the rotary platform and joined McCaul on top of it. While McCaul's back was to LaLone, he heard LaLone say "air line fell off." McCaul testified that he did not see the accident, but that LaLone would have reached into the take-off cabinet to reconnect the air line.

A rotary milking parlor has both a "kick rail," which is a lower rail that prevents the cows from kicking the workers who attach the milking hoses to the cows' udders, and a "breech rail," which prevents the cows from backing up over the kick rail. These rails are attached to vertical support bars, and together form an I-shape. LaLone put his head between the kick and breech rails, and his head was crushed between the stationary vertical bar and the take-off cabinet on which he was working. He was severely injured.

B. THE PINCH POINT

A pinch point occurs when one object is moving in proximity to another, stationary object in such a way that the objects may trap, pinch, or crush a body part between them. At their depositions, three DeLaval employees testified that they did not realize that there was a pinch point between the take-off cabinet and the vertical bar. Ale Riedstra, the president of Riedstra Dairy, testified that he knew what a pinch point was, but that he had not been aware of the pinch point that injured LaLone and that DeLaval had not given him any safety information about it.

Dr. Wendy Sanders, LaLone's expert in safety analysis, testified that she believed that the pinch-point hazard was hidden and that the gap between the take-off cabinet and the vertical bar was not obvious. Dr. Sanders testified that a lay person or casual observer without an engineering background would have no reason to believe that working on the parlor while it was rotating created a hazard. Dr. Sanders testified that

> [t]he hazard of this rotary moving slowly in proximity to a stationary rail, it doesn't appear to be a hazard. Further, the point at which the pinch point is is not readily observable from standing outside the radius of the rotary nor is it readily observable from standing on-board the rotary because the metal cabinet blocks it.

According to Dr. Sanders, the pinch point was not discernable "[f]or a casual observer from any position anywhere." At his deposition, Larry Johnson, an engineer, agreed that a person would not discover the pinch point without an engineering analysis.

C. PROCEDURAL HISTORY

On September 5, 2007, LaLone filed his original complaint against Riedstra Dairy, asserting theories of general negligence and premises liability. LaLone asserted that it was

reasonably foreseeable that the rotary parlor might trap and injure a person's head and that Riedstra Dairy failed to warn LaLone of this danger. Riedstra Dairy denied that LaLone's injury was foreseeable, and responded that either DeLaval or the RT defendants, from whom DeLaval purchased the rotary parlor design, were responsible for LaLone's injury because they had defectively designed the rotating parlor and failed to warn Riedstra Dairy about the dangers associated with it.

In November 2008, Riedstra Dairy moved for summary disposition under MCR 2.116(C)(10) on LaLone's premises liability claim. Riedstra Dairy asserted that the pinch point was open and obvious or, in the alternative, that Riedstra Dairy did not know and could not have known of it. LaLone responded that these issues were questions of fact, and asserted that Riedstra Dairy created the dangerous condition by requiring the parlor to operate while it was being repaired. LaLone attached the affidavit of Gary Huitink to its response. Huitink indicated that the rotary parlor's product literature did not address the pinch-point hazard and that someone not trained as an engineer would not be able to identify the pinch point by "incidental, informal, incremental, or haphazard inspection."

The trial court determined that whether the danger was open and obvious or whether Riedstra Dairy required the parlor to operate while it was being repaired were questions of fact and denied Riedstra Dairy's motion for summary disposition.

In February 2009, Riedstra Dairy moved for summary disposition under MCR 2.116(C)(10) on LaLone's general negligence claim. The trial court granted Riedstra Dairy's motion, determining that there was no question of fact concerning whether Riedstra ever directed DeLaval not to shut the parlor down while repairing it.

In February 2011, after discovery concluded, Riedstra Dairy again moved for summary disposition on LaLone's premises liability claim, asserting the same grounds as it had in its previous motion. The trial court denied Riedstra Dairy's motion, determining that whether Riedstra Dairy should have been aware of the danger was an issue of fact.

Riedstra Dairy applied to this Court for leave to appeal, which this Court denied.[1] The Michigan Supreme Court subsequently remanded the case for this Court to consider as on leave granted.[2]

II. PREMISES LIABILITY

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.[3] We "review[] the entire record to determine whether [the] defendant was entitled to

[1] *LaLone v Riedstra Dairy, Ltd.*, unpublished order of the Court of Appeals, issued March 16, 2012 (Docket No. 308207).

[2] *LaLone v Riedstra Dairy Ltd.*, 491 Mich 940; 815 NW2d 131 (2012).

summary disposition."[4] A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A genuine issue of material fact exists if, when viewing the entire record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.[5]

B. DUTY TO PERSONS HIRED TO REPAIR DANGEROUS CONDITIONS

Riedstra Dairy contends that it did not have the duty to protect LaLone from the dangers posed by the rotary because it hired him to correct a dangerous condition. We disagree.

A party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct.[6] The inherently dangerous activity doctrine is similar to a doctrine of strict liability, and provides that an owner is liable for work that he hires another to do that is inherently dangerous.[7] An exception to this doctrine is that a landowner is not liable when the employee of an independent contractor comes on the landowner's premises to correct the condition that injured the employee.[8]

This exception only applies when the employee was repairing the *precise* condition that injured him.[9] For instance, in *Wilhelm v Detroit Edison Co* this Court did not apply this exception and held that the landowner was liable when a man painting a building was electrocuted.[10] However, in *Nemeth v Detroit Edison Co* this Court applied the exception and concluded that a landowner was not liable to a contractor who was injured by the defective roofing tiles that he was repairing.[11]

Here, LaLone was attempting to repair the take-off components of the rotary parlor. He was not attempting to repair the pinch point that injured him. The junction of the rails, bars, and take-off cabinet injured LaLone, not the take-offs themselves. Thus, LaLone was not injured by the *precise condition* that he was hired to repair. We conclude that this exception does not apply in this case.

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[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] *Id*.

[5] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008); MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[6] *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

[7] *McDonough v General Motors Corp*, 388 Mich 430, 437; 201 NW2d 609 (1972).

[8] *Butler v Ramco-Gershenson, Inc*., 214 Mich App 521, 532 n 6; 542 NW2d 912 (1995); *Nemeth v Detroit Edison Co*, 26 Mich App 481, 485-486; 182 NW2d 617 (1970).

[9] *Wilhelm v Detroit Edison Co*, 56 Mich App 116, 133; 224 NW2d 289 (1974); *Nemeth*, 26 Mich App at 485-486.

[10] *Wilhelm*, 56 Mich App at 133.

[11] *Nemeth*, 26 Mich App at 482, 484.

Riedstra Dairy further urges this Court to expand this exception to provide that a landowner cannot be held liable to a contractor's employee as a matter of law because we should infer that the employee has superior knowledge of any dangerous conditions. This Court has already provided that the trier of fact may consider an employee's superior knowledge of defects when determining whether a landowner should have known about a dangerous condition.[12] We decline to expand the existing exception because the trier of fact may already consider the employee's and landowner's relative states of knowledge.

C. DUTY TO INVITEES

Riedstra Dairy contends that it did not owe LaLone a duty to warn him about the pinch-point hazard because it could not have known about it. We agree.

A premises owner has a duty to protect invitees—persons who enter the owner's premises at his or her express or implied invitation—from hidden or latent defects on his or her property.[13] This duty of care "extends to instrumentalities on the premises that the invitee uses at the invitation of the premises owner."[14] This duty requires the owner to inspect the premises and to "warn of any discovered hazards."[15] However, "[t]he mere existence of a defect or danger is not enough to establish liability[.]"[16] The landowner is only liable if he or she could have discovered the risk with reasonable care.[17]

Here, there is no indication in the record that Riedstra Dairy, exercising reasonable care, could have discovered the pinch-point hazard. LaLone's experts consistently testified that a person would need an engineering background and would need to conduct an engineering analysis to discover the pinch point.

Dr. Sanders testified that the pinch point was not discernable "[f]or a casual observer from any position anywhere." Both Huitink and Larry Johnson, an engineer, indicated that an engineering analysis was required for a person to discover the pinch point. Huitink even specified that "to determine under what circumstance the Cabinet and vertical pipe constitute a pinch point or crush point requires careful scrutiny, training or engineering knowledge or experience, something more than that provided to or developed by the average dairy farmer . . . ." Dr. Sanders agreed that a person who did not have an engineering background would not believe that working on the parlor while it was rotating constituted a hazard.

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[12] See *Nemeth*, 26 Mich App at 486-487; *Wilhelm*, 56 Mich App at 135-136.

[13] *Riddle*, 440 Mich at 90-91.

[14] *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

[15] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

[16] *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965), quoting *Prosser on Torts*, 2d, p 459.

[17] *Id*.

LaLone contends that Riedstra Dairy may not rely on the affidavit of Gary Huitink to support its motion for summary disposition because the affidavit would be inadmissible hearsay at trial. We disagree. An admission by a party opponent is not hearsay.[18] An admission by a party opponent includes "a statement of which the party has manifested an adoption or belief in its truth."[19] When a party files an affidavit, he or she manifests an adoption of belief in its truth.[20] We conclude that Huitink's affidavit would not be inadmissible as hearsay. Further, Huitink was only one of the experts that opined that a person would need an engineering background to discover the pinch point.

There is no evidence in the record that any of Riedstra Dairy's employees, including Riedstra, had an engineering background. And even if Riedstra Dairy had requested the product information from DeLaval—as LaLone asserts that it should have done—the product information did not address the danger associated with the pinch point. When considering the record evidence in the light most favorable to LaLone, there is no evidence from which reasonable minds could conclude that Riedstra Dairy could have discovered the pinch point by exercising reasonable care.

D. CREATION OF DANGEROUS CONDITIONS

LaLone contends that even if this Court concludes that Riedstra Dairy could not have known about the pinch-point hazard, summary disposition is inappropriate because Riedstra Dairy created the dangerous condition that injured LaLone. We disagree.

Generally, as discussed above, a defendant must have actual or constructive notice of a dangerous condition on its property to be liability for failing to warn about it.[21] But in some cases, "[a]ctive negligence exists [because] a defendant or his agents have created a dangerous condition. In that case, proof of notice is unnecessary."[22]

Here, the pinch-point hazard only exists while the parlor is operating. LaLone contends that the evidence creates a reasonable inference that Riedstra Dairy required the parlor to operate while it was being repaired, and thus created the dangerous condition that injured LaLone. We disagree for two reasons.

First, the trial court granted Riedstra Dairy's motion for summary disposition on LaLone's ordinary negligence claim, after it determined that there was no issue of fact concerning whether Riedstra Dairy ever prohibited DeLaval employees from shutting down the

[18] MRE 801(d)(2).

[19] MRE 801(d)(2)(B).

[20] *Barnett v Hidalgo*, 478 Mich 151, 162; 732 NW2d 472 (2007).

[21] *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991).

[22] *Id*.

parlor while repairing it. Because LaLone's negligence claim has failed, LaLone clearly cannot prove that Riedstra Dairy, by active negligence, created a dangerous condition.

Second, there is no genuine issue of material fact concerning whether Riedstra Dairy required the parlor to rotate while it was being repaired. The only support for LaLone's argument is (1) a statement by Diaz-Chang—inconsistent with his own prior and subsequent deposition testimony—that Riedstra led his employees to believe that they could not shut the rotary parlor down, and (2) the inference that, because Riedstra Dairy would lose money if the parlor was shut down, Riedstra must have required it to operate while it was being repaired.

In contrast, all of the DeLaval employees testified that Riedstra did not require the parlor to continue to rotate, but—for various reasons—they expected that the parlor would rotate while they were repairing it. And Riedstra testified that he believed that the servicemen had superior knowledge of when they should shut down the parlor, and he never required them to keep it rotating while they repaired it.

Viewing the evidence and inferences in the light most favorable to LaLone, we conclude that no reasonable mind could conclude that Riedstra Dairy created the dangerous condition that injured LaLone.

III. CONCLUSION

We conclude that reasonable minds could not differ concerning whether Riedstra Dairy should have known about the pinch-point hazard or whether it created the dangerous condition that injured LaLone. Therefore, the trial court should have granted Riedstra Dairy's motion for summary disposition.

We reverse and remand for entry of summary disposition in favor of Riedstra Dairy. As the prevailing party, Riedstra Dairy may tax costs under MCR 7.219. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly