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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
No. 49161-3-II
BY _____
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JOHN O'CONNELL

Petitioner,

v.

MACNEIL WASH SYSTEMS LIMITED, a Canadian designing and manufacturing company doing business in Thurston County, Washington; AUTO WASH SYSTEMS LLC, a Washington limited liability company; PATRICK HARRON & ASSOCIATES, LLC, a Washington limited liability company; ANDERSONBOONE ARCHITECTS, PS, a Washington professional service company; KAREN BOWMAN and "JOHN DOE" BOWMAN, and their marital community; and DOE CORPORATIONS 1 through 3; Jointly and Severally,

Respondents.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. RCW 7.72.030

The Washington State Legislature codified product liability claims with the Tort Reform Act of 1981. The stated purpose of the act, “‘That the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired.’ Laws of 1981, ch.27, § 1.” *See, Falk v. Keene Corp.*, 113 Wn.2d 645, 653, 782 P.2d 974 (1989). The WPLA is the exclusive remedy for product liability claims in Washington. *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 853, 774 P.2d 1199 (1989). The WPLA creates a single cause of action for product-related harm with specified statutory requirements for proof. *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 71, 866 P.2d 1054 (1993).

The two major cases relied on by Respondent for the contention no claim for product liability exists in the present case both pre-date the Tort Reform Act of 1981. *Bich v. General Electric Co.*, 27 Wn.App 25, 28, 614 P.2d 1323 (1980), in which the Court determined a viable products liability claim existed, and *May v. Defoe*, 25 Wn.App 575, 578, 611 P.2d 1275 (1980). *See*, Respondent Brief at p. 10. Both cases applied the common law products liability standards that existed before 1981.

The Court in *Falk* states:

Following RCW 7.72, a plaintiff seeking to establish manufacturer liability for defective product design will establish liability by proving that, at the time of manufacture, the likelihood that the product would cause plaintiff's harm or similar harms, and the seriousness of those harms, outweighs the manufacturer's burden to design a product that would have prevented those harms and any adverse effect a practical, feasible alternative design would have on the product's usefulness. RCW 7.72.030(1)(a). If the plaintiff fails to establish this, the plaintiff may nevertheless establish manufacturer liability by showing the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer. RCW 7.72.030(3). If the product design results in a product which does not satisfy this consumer expectations standard, then the product is not reasonably safe. *Id.*, at 654.

The statute thus creates two different approaches to proving liability, either a risk-utility test or a consumer expectation test for both design defect and failure to warn claims. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1992)(failure to warn claim); *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989)(design defect claim). Although RCW 7.72.030 uses the term "negligence," strict liability is the applicable standard for a failure to warn or a design defect claim maintained under RCW 7.72.030(1)(a) or (b). *Ayers*, 117 Wn.2d at 765, 818 P.2d 1337, *Soproni v. Polygon Apartment Partners*, 137 Wn. 2d 319, 326-327, 971 P.2d 500 (1999).

B. RCW 7.72.030(1)

The Declaration of Mr. O'Connell's expert, Dr. Gary Sloan, establishes a prima facie case; the injury in this case is a well known problem in the car wash industry. CP 444. Even Respondent's expert, Harvey Miller, acknowledges the issue of cars hitting pedestrians at car washes is a known problem in the industry. CP 284. Dr. Sloan opines the addition of safety bollards, or other guards, to the car wash system, eliminates or reduces the likelihood of pedestrian injury. CP 446. In the alternative, MacNeil should have warned O'Connell about this known hazard.

MacNeil sold Mr. O'Connell a car wash system which it knew, or should have known, would expose Mr. O'Connell to the exact injury he suffered. Furthermore, the Declarations of both Dr. Sloan and Harvey Miller reference the March, 2011 article by Anthony Analetto, in which he states, "Bollards equal safety." CP 506. Mr. Analetto has 28 years of experience in the industry and is the former director of operations of a 74 location national car wash chain. *Id.* MacNeil, a leading provider of car wash systems, knew or should have known the problem, and knew or should have known the solution. Yet, they did not change the design of their car wash system and they did not provide any warning of the problem of cars hitting employees in this type of car wash system. Both RCW 7.72.030(1)(a) and (1)(b) subject MacNeil to liability in this situation.

Respondent asserts no component part of the car wash system provided by MacNeil caused the injury to Appellant, so no claim exists under the WPLA. This contention ignores the statutory explanation of a “relevant product.” RCW 7.72.010(3) states a “relevant product” is, “that product or its component part or parts, which gave rise to the product liability claim.” To assert the claim must arise from a component part, ignores this explanation. In the present case, MacNeil sold Appellant a car wash system that did not include the necessary safety component of a bollard or guard. MacNeil should have known this component part would prevent the exact kind of injury suffered by Mr. O’Connell. If the Plaintiff can demonstrate the feasibility of minimizing risk by an alternative design, a genuine issue of material fact is created and summary judgment is inappropriate. *See, Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352-353, 588 P.2d 1346 (1979), *See also, Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 329, 971 P.2d 500 (1999). Dr. Sloan’s Declaration demonstrates the feasibility of minimizing the risk of this injury by including a bollard or other guard. This creates a genuine issue of material fact that should have precluded the Superior Court granting summary judgment in this matter. The mere fact the design of the car wash system meets industry standard is not dispositive if a feasible alternative is provided. *Id.*, at 327-328.

Dr. Sloan also opines, a warning regarding the dangers of car jumping

off the correlator system, more likely than not, would have prevented this incident as long as the safety recommendations were followed. CP 446. Sloan's opinion creates a genuine issue of material fact regarding proximate cause, notwithstanding MacNeil's assertion this hazard was "open and obvious." Here, Mr. O'Connell testified he relied on MacNeil to provide a complete car wash system because they held themselves out as the best in the world. Mr. O'Connell relied on MacNeil to provide a safe car wash system. He knew they provided many safety warnings and design features, including lock outs for repairs and danger overhead flags. CP 533. MacNeil has offered no testimony an adequate warning would not have prevented Mr. O'Connell's injury in this situation.

Both subsection (a) and subsection (b) require a balancing test. On one side of the balance in subsection (a) are the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms. On the other side of subsection (a)'s balance are the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that a feasible alternative design would have on the usefulness of the product. Similarly, on one side of the balance in subsection (b) are the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms. On the other side of subsection (b)'s balance are the adequacy of the warnings that were provided and the ability of the manufacturer to have provided an alternative warning that would have prevented the injury. *Ayers*, 117 Wn.2d at 763, 818 P.2d 1337 (1992).

This balancing test under RCW 7.72.030(1)(a) or (b) requires the

summary judgment order be reversed. Mr. O'Connell has provided adequate expert opinion to preclude summary judgment as to both the design of the product and the necessity to provide adequate warnings.

C. RCW 7.72.030(3)

The WPLA provides a claimant can prove liability by showing “the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” RCW 7.72.030(3). Thus, even if MacNeil fails to otherwise establish a claim under the WPLA, “the plaintiff may nevertheless establish manufacturer liability by showing the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” *Falk*, 113 Wn.2d at 654, 782 P.2d 974.

Mr. O'Connell chose MacNeil because they were “the Cadillac of car wash systems.”CP 531. He relied solely on MacNeil to tell him what was necessary, because MacNeil said they were, “The largest, most trusted, dependable car wash equipment people in the world.”CP 536-537. (Over objection from MacNeil's counsel).

MacNeil created an expectation for an ordinary consumer like John O'Connell, that the system he purchased from MacNeil would include an entire car wash system, including any necessary safety equipment to prevent injury. This expectation alone is enough to survive summary judgment pursuant to RCW 7.72.030(3). *See, Pagnotta v. Beall Trailers of*

Oregon, Inc., 99 Wn.App. 28, 39, 991 P.2d 728 (2000).

II. CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests this Court reverse the order granting summary judgment for Respondent and remand the case for further proceedings in the trial court.

DATED: February 16th, 2017.

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