

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

BACON V. DBI/SALA

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RONALD “TIM” BACON, APPELLANT AND CROSS-APPELLEE,

V.

DBI/SALA, ALSO KNOWN AS DB INDUSTRIES, INC., APPELLEE AND CROSS-APPELLANT,

AND DAVIS ERECTION CO., INC., THE EMPLOYER, AND LIBERTY MUTUAL GROUP,

ITS WORKERS’ COMPENSATION INSURANCE CARRIER, APPELLEES.

Filed June 30, 2009. No. A-08-130.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., and Lindsay G. Arthur, Jr., of Arthur, Chapman, Kettering, Smetak & Pikala, P.A., for appellee DBI/SALA.

IRWIN, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Ronald “Tim” Bacon was injured in a construction accident while he was wearing a self-retracting lifeline (SRL). This appeal involves only Bacon’s strict liability claim against DBI/SALA, also known as DB Industries, Inc. (DBI)--the manufacturer of the SRL--on a failure to warn theory. At trial, after Bacon rested, the court directed a verdict against Bacon based upon its finding that he had failed to prove that the SRL was unreasonably dangerous. We find that Bacon adduced sufficient evidence to create a question for the jury as to whether the product was unreasonably dangerous. Because we do not consider whether the directed verdict could be upheld on the alternate grounds DBI asserted in district court, we remand this cause for retrial. We also address DBI’s cross-appeal regarding expert testimony because it is likely to recur on

retrial, and we conclude that the district court did not abuse its discretion in overruling DBI's motion to exclude the testimony of an engineering expert.

BACKGROUND

On July 28, 2003, Bacon was severely injured in a construction accident at the Qwest Center. Bacon and his crew were installing steel decking in a fire escape, which was to serve as the floor of the fire escape. At the time of the accident, Bacon was standing on top of the second level of the escape where no decking had yet been installed. Bacon was wearing fall protection equipment, which included a full-body harness attached to the SRL. The SRL unit was tied to a beam above Bacon, and the SRL's line was hooked to a ring on the back of Bacon's harness. The SRL was designed to brake its line within 6 to 9 inches, but no more than 42 inches, to prevent its user from falling if it sensed a sudden acceleration. However, the SRL was designed to let out line if a worker was walking around normally. It had a load capacity of up to 310 pounds. The combined weight of Bacon and his work tools was far less than this amount.

At the time of the accident, a crane was unloading the decking onto the frame of the fire escape. The operator had attempted to angle the decking load, which consisted of different-sized pieces of decking, so that he could lift it up through the frame of the escape. The operator had placed one choker (or tie) on the load to secure it. The evidence adduced at trial suggests that this may not have been a safe method of lifting the decking. Once the decking reached the top level, it slipped out of the choker and fell down onto the fire escape piece by piece. Either directly or indirectly, the decking caused Bacon to fall onto the first level of the escape, where decking had already been installed, and incur very serious injuries, including a spinal fracture which led to paraplegia.

The parties disputed the specific mechanism that caused Bacon's injuries. Bacon alleged that he was standing out of the way when the decking fell and that the decking fell on the SRL line, causing the line to drag Bacon off of his foothold and the SRL subsequently failed to arrest his fall. DBI asserted that Bacon's injuries and fall occurred when the decking fell directly onto Bacon.

Bacon commenced an action against several parties, but this appeal concerns only Bacon's claim against DBI. Bacon initially asserted numerous theories of recovery against DBI but tried only strict liability and implied warranty of merchantability claims on a "failure to warn" theory. DBI asserted cross-claims against the other defendants below for their negligence in the construction accident.

Prior to trial, DBI moved to exclude the testimony of Bacon's expert, Jerry Lee Hall, a mechanical engineer. DBI asserted that Hall was not qualified to testify regarding product warnings pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The court overruled DBI's *Daubert* motion and permitted Hall to testify.

On January 14 through 18, 2008, the district court conducted a jury trial. To the extent that other evidence adduced at trial pertains to the assigned errors, we set forth such evidence in the analysis section below. After Bacon rested, DBI moved for a directed verdict on six grounds, one of which counsel conceded was duplicative. The court granted a verdict against Bacon on the ground that "there is insufficient evidence as a matter of law as to the existence of an

unreasonably dangerous defect in the product as it relates to its warnings” and dismissed Bacon’s complaint with prejudice. The court further commented that it had “serious concerns regarding [Bacon’s] proof on causation.” The court also dismissed a remaining subrogation claim and DBI’s cross-claims.

Bacon timely appeals, and DBI cross-appeals.

ASSIGNMENTS OF ERROR

Bacon alleges four errors which we consolidate and restate as follows: Bacon assigns that the district court erred in failing to consider whether he met the burden of proof in his implied warranty of merchantability claim prior to entering a directed verdict. Bacon also assigns that the court erred in granting DBI’s motion for a directed verdict. Finally, Bacon alleges that the court erred in its application of comparative fault principles. We do not reach the final assigned error because it is not necessary to our resolution of this case.

In its cross-appeal, DBI assigns as error the court’s overruling of its *Daubert* motion to exclude Hall’s expert testimony.

STANDARD OF REVIEW

The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

A trial court’s ruling in receiving or excluding an expert’s opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

ANALYSIS

Implied Warranty of Merchantability Claim.

Bacon first argues that the district court failed to dispose of his implied warranty of merchantability claim. We view this as an assertion that the district court failed to enter a final, appealable order disposing of all claims. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). In order for this court to acquire jurisdiction over an appeal where there are multiple claims or parties, pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), the final order must make

an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason

for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties.

Malolepszy v. State, 270 Neb. 100, 108, 699 N.W.2d 387, 392 (2005).

The Nebraska Supreme Court has adopted the rule that when there is both a tort claim based upon a defect in design, manufacturing, or failure to warn and an implied warranty claim, there is only one claim. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000). In *Freeman*, the court adopted the reasoning of the Restatement (Third) of Torts, which recommended that courts merge these two theories of recovery because the elements of both claims are essentially the same. Specifically, the *Freeman* court “recognize[d] that [the appellant’s] allegations regarding breach of implied warranty fall under her allegations of design and manufacturing defects.” 260 Neb. at 574, 618 N.W.2d at 844.

Bacon argues that his strict liability and implied warranty of merchantability claims should not be merged because they “are premised upon different factual allegations and distinct theories of recovery.” Reply brief for appellant at 19. However, we observe that the claims in the operative complaint assert similar allegations, including that DBI defectively designed the SRL which caused it to be unreasonably dangerous for consumers by failing to provide warnings to foreseeable users of and from a known and foreseeable risk. Even if we were to agree with Bacon’s assertion that merger of the two theories is not absolute, we--like the Supreme Court in *Stahlecker, supra*--find the underlying reasoning for the merger as discussed in *Freeman* to be persuasive.

We determine that Bacon’s implied warranty of merchantability claim merged into his strict liability claim. Therefore, Bacon had only one claim, and the district court did not have to dispose of the implied warranty claim separately or enter a special order. Because the district court made a final disposition of Bacon’s single claim, this assignment of error is without merit.

Directed Verdict.

Bacon argues that the district court erred in granting DBI’s motion for a directed verdict. Because the court granted the motion at the close of Bacon’s case, we must determine whether Bacon proved the cause of action and, in so doing, we must consider Bacon’s evidence as true and give him the benefit of reasonable conclusions deducible from that evidence. See *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

To recover against a defendant on a claim of strict liability, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant’s possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff’s injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff’s damages were a direct and proximate result of the alleged defect. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999). Here, the district court directed a verdict in favor of DBI

because it found insufficient evidence as a matter of law regarding the existence of an unreasonably dangerous defect as it related to the SRL's warnings.

Bacon insists that he made a prima facie case that the SRL was unreasonably dangerous due to insufficient warnings. We agree. "Unreasonably dangerous" means that a product has the propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with ordinary knowledge common to the foreseeable class of users as to its characteristics. *Haag v. Bongers, supra*. The danger must result from the use or foreseeable misuse of the product. See *id.* In the context of a failure to warn claim, a product may be unreasonably dangerous because it lacks a warning even though the product itself is not defective. See 3 Am. Law Prod. Liab. 3d § 32:2 (rev. 2004). The defect results from the manufacturer's failure to provide sufficient warnings or instructions. See *Haag v. Bongers, supra*. Whether a product is unreasonably dangerous is a question of fact. See *id.*

We first digress to set forth the evidence which Bacon adduced regarding the mechanism through which he was injured as it is directly relevant to whether a foreseeable user would contemplate the risk. Bacon adduced evidence which suggested that he fell due to the decking's coming into contact with his SRL. One of Bacon's coworkers testified that he saw decking hit Bacon's line, but not Bacon, and that the decking appeared to cause Bacon to be drug off of the fire escape. No other witnesses testified to having witnessed Bacon's entire fall. An orthopedic surgeon who had operated on Bacon testified that Bacon's injuries were more consistent with a fall as opposed to being struck on the back. Also, Bacon called Hall, who holds a Ph.D. in mechanical and aerospace engineering. Hall investigated the incident and concluded that Bacon's fall was caused by the decking's hitting the SRL line.

Second, we conclude that Bacon adduced evidence which, if believed by the jury, indicated that this particular risk would not be contemplated by a foreseeable SRL user--a construction worker. Bacon and two other construction workers each testified that the SRL was supposed to arrest a fall no matter why the fall occurred. Bacon and Michael McKay, who was also a construction worker, testified that prior to the accident, they did not expect that the decking's falling against an SRL line would disable the SRL entirely. Bacon testified that he thought a falling piece of decking would bounce off his SRL. McKay stated that he believed the SRL should have locked up and left Bacon dangling.

Bacon also adduced expert testimony regarding the lack of a warning. According to Hall, industry standards are "usually treated as minimum safe standards." Hall compared the mandatory requirements set forth in the American National Standards Institute (ANSI) Z359.1 for fall arrestors with the DBI user manual for the SRL and only one mandatory requirement was missing from the DBI manual: a warning regarding physical hazards which the product was not designed to withstand. Hall testified that Bacon's injuries were caused by a physical hazard. Hall opined that the SRL used by Bacon violated the warning provisions contained in ANSI Z359.1 and Z535.4. Because there is supporting evidence from both experienced construction workers and an expert witness relying upon industry standards, whether the foreseeable user would have contemplated this risk is a question for the jury.

DBI contends that the foreseeable user would have found this danger open and obvious because construction workers know not to stand under a suspended load or exceed an SRL's weight capacity. We disagree, due to Bacon's theory of the accident. Bacon's claim is based on

the theory that the incident did not result from Bacon's standing below a suspended load. The jury may choose to either accept or reject this theory, but in the context of an appeal from a directed verdict, we must accept as true the evidence presented by Bacon which supports his theory.

DBI next contends that the danger that the SRL could not arrest Bacon's fall was open and obvious because it has a 310-pound rated capacity and the combined weight of the decking, Bacon, and Bacon's tools was approximately 884 pounds. We disagree with this contention because the SRL's weight capacity in this context pertains to the acceptable weight capacity at the end of the line. This figure is not directly related to any limit on the amount of weight that may brush up against the line. Perhaps this could be discovered through the application of advanced mathematics and physics, but Nebraska law "does not require a plaintiff to speculate on injury in order to recognize a possible defect." *Hancock v. Paccar, Inc.*, 204 Neb. 468, 482, 283 N.W.2d 25, 36 (1979). Therefore, the specific danger which Bacon alleged was not open and obvious to the intended user--a construction worker.

Finally, Bacon adduced evidence that he used the SRL in a foreseeable manner because he used it correctly. Bacon himself testified to this fact. The owner of a safety consulting business testified that after investigating the incident, he concluded that Bacon used the SRL appropriately. After resolving every controverted fact in Bacon's favor and giving him the benefit of every inference reasonably deducible from the evidence, we conclude that Bacon adduced sufficient evidence suggesting that the injury occurred while he was using the product in a foreseeable manner so as to make whether the SRL was unreasonably dangerous an issue of fact for a jury.

We therefore find that the district court erred in directing a verdict against Bacon on the ground that the product was not unreasonably dangerous.

Alternative Grounds for Directed Verdict.

DBI argues that even if the district court erred in granting a directed verdict on the ground that Bacon had not proved an unreasonably dangerous product warning defect, there are other sufficient grounds on which we may uphold the district court's directed verdict. DBI asserts that pursuant to *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000), we may uphold the directed verdict on any of the other grounds which DBI asserted in district court. We disagree, because the Nebraska Supreme Court's subsequent decision *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000), prohibits appellate courts from affirming a decision on alternative grounds which were specifically rejected by the trial court and were not assigned as error on cross-appeal. See, also, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

In *McDonald*, the defendant asserted four separate grounds for summary judgment in a single cause of action. The district court granted summary judgment and found that there was no genuine issue of material fact as to the first two grounds but that there was a genuine issue of fact as to two other grounds. This court heard the initial appeal and found that the district court erred in granting summary judgment on the first two grounds. However, we declined to consider the

appellee's argument that this court could sustain summary judgment on grounds which the district court had rejected, because the appellee did not cross-appeal this determination. In upholding our decision, the Supreme Court inquired as to whether such an argument constituted "a request for affirmative relief such that a cross-appeal . . . is necessary." 260 Neb. at 734, 619 N.W.2d at 588. The Supreme Court determined that the appellee's argument constituted a request for a modification, which is a request for affirmative relief and thus must be brought as a cross-appeal.

Here, DBI asserted six bases for its motion for directed verdict presumably upon the belief that any one basis would entitle it to a directed verdict. The district court orally stated that it was "satisfied that there is not sufficient evidence, if any, that shows that the product was unreasonably dangerous due to the lack of warning, which I think takes care of all of the issues." Thus, the instant case differs from *McDonald* because here, the district court did not specifically reject the other grounds asserted by DBI. Rather, it appears that the district court found the existence of one ground, which was alone sufficient to support the directed verdict, and did not consider the other grounds. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Clark v. Clark*, 275 Neb. 276, 746 N.W.2d 132 (2008). Because the district court did not rule upon these alternate grounds and DBI did not cross-appeal on this issue, we will not consider whether the district court could have properly entered a directed verdict based on the other asserted grounds.

Admissibility of Hall's Testimony.

On cross-appeal, DBI assigns that the district court erred in permitting Hall to testify regarding the adequacy of the warnings. DBI alleges that Hall was not qualified to testify as to the effectiveness of product warnings because he had not sufficiently studied "whether a warning that effectively communicates an idea is actually effective at proscribing the cautioned-about conduct." Brief for appellee on cross-appeal at 39. Because Hall's testimony in this context is not relevant to our disposition of this case, we consider this issue only because it is likely to recur upon remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal when those issues are likely to recur during further proceedings. *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005). We primarily focus on the issue of whether Hall qualifies as an expert. The court must "examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education." *State v. Tolliver*, 268 Neb. 920, 927, 689 N.W.2d 567, 575 (2004). When an expert witness' opinion involves scientific or specialized knowledge, Nebraska courts will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *Smith v. Colorado Organ Recovery Sys.*, *supra*. If it is necessary for the court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. *State v. Tolliver*, *supra*. The court then determines whether the expert's "methodology can

properly be applied to the facts in issue” and whether the evidence is more probative than prejudicial. *Id.* at 928, 689 N.W.2d at 575.

DBI argues only that (1) Hall was not qualified to testify as an expert and (2) Hall’s methods were not reliable. We address these arguments in turn.

We conclude that Hall was qualified to testify as an expert in mechanical engineering. Hall testified that he considered himself “to be an expert in mechanical engineering, part of which concerns itself with -- with warnings.” Hall holds doctoral degrees in mechanical engineering and aerospace engineering, was an engineering professor for 37 years, and has worked as an engineer since 1968. Further, we find that Hall’s expertise in mechanical engineering qualifies him to testify as to mechanical engineering standards for product warnings. Hall testified that he has been involved in design and teaching design courses. He taught a project design course where, as part of the course, students designed warnings to alert and remind users of hazards. Hall is familiar with engineering standards promulgated or developed by various organizations including ANSI, which include product warning standards. Hall also expressed familiarity with basic product safety engineering rules contained in the National Safety Council’s Accident Prevention Manual for Industrial Operations. Hall testified that he had also developed product warnings and instructions. Therefore, Hall is qualified to testify regarding engineering as it pertains to safety standards.

We next address whether Hall’s methods were reliable. DBI alleges that pursuant to *Daubert*, Hall did not have a reliable scientific basis for his testimony because he failed to test his product warning theory, his methods were not subjected to peer review, his methods were not generally accepted, and his research was conducted in connection with litigation. However, DBI bases its argument on the fact that Hall admittedly has limited knowledge of human factor research and admittedly failed to subject his proposed warning to scientific tests. Instead, Hall based his opinion on his expert knowledge of ANSI standards and general engineering standards. Therefore, the issue before us is whether these standards were reliable. At trial, Hall testified to the reliability of the ANSI standards. Hall explained that ANSI provided minimum industry safety standards. Hall explained that ANSI standards were developed by a committee of persons with vested interests who created the standards, gathered feedback on the standards, and subsequently revised the standards before adopting them. Hall explained that the ANSI standards which he applied in developing his warning were “what people have agreed upon based on years of . . . research and application.” Hall also explained that industries used ANSI standards so that they did not have to “reinvent the wheel” each time they created a new product warning label. We note that DBI has not contested the reliability of either the ANSI standards or general engineering standards. Therefore, the standards on which Hall based his expert opinion are reliable.

Hall’s testimony allows the jury to draw the permissible inference that his proposed warning would be effective because it was drafted pursuant to ANSI standards--which are based on “years of . . . research and application.” Hall need not have performed the research himself or been an expert in that type of research. We conclude that the district court did not abuse its discretion in permitting Hall to testify as an expert witness.

CONCLUSION

We find that the district court erred in directing a verdict against Bacon based on its finding that the product was not unreasonably dangerous. Because the district court did not rule upon the alternate grounds upon which DBI asserted that a directed verdict would be proper, we decline to consider them. We reverse the decision of the district court and remand the cause for a retrial. For purposes of the retrial, we conclude that Hall's expert testimony regarding product warnings and based on ANSI and general engineering principles is admissible.

REVERSED AND REMANDED.