STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1188

Nereus Montemayor,
Appellant,

vs.

Sebright Products, Inc., d/b/a Bright Technologies,
defendant and third party plaintiff,
Respondent,

vs.

VZ Hogs, LLP,
Third Party Defendant.

Filed November 20, 2017
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Dodge County District Court
File No. 20-CV-14-32

Paul R. Dahlberg, Patterson Dahlberg, Rochester, Minnesota (for appellant)

R. Stephen Tillitt, Marissa K. Linden, Gislason & Hunter LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Stauber, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

On remand following the Minnesota Supreme Court's decision that there are genuine issues of fact with regard to whether respondent owed a duty to appellant in this products-liability matter, appellant challenges the district court's alternative bases for granting summary judgment. We conclude that appellant's failure-to-warn claim and control-panel design-defect theory fail as a matter of law. But we also conclude that appellant has presented sufficient evidence to create a genuine issue of material fact with respect to his start-up design-defect theory. Accordingly, we affirm in part, reverse in part, and remand to the district court for further proceedings.

FACTS

Appellant Nereus Montemayor was severely injured at his workplace when he crawled inside of a machine called an extruder, attempting to remove jammed materials. While Montemayor was inside the machine, another employee started it, causing a hydraulically powered press, called a plenum, to crush Montemayor's legs. Montemayor initiated a products-liability action against the manufacturer of the extruder, respondent Sebright Products, Inc., d/b/a Bright Technologies, asserting both failure-to-warn and design-defect claims.[1]

[1] Sebright in turn brought third-party claims against Montemayor's employer, VZ Hogs, LLP. The district court dismissed the third-party claims as moot upon dismissing Montemayor's claims against Sebright. The third-party claims are not at issue on appeal.

The district court granted summary judgment dismissing all of Montemayor's claims, reasoning that (1) Sebright did not owe a duty to Montemayor, (2) Montemayor could not prove causation with respect to his failure-to-warn claim, and (3) Montemayor could not prove, with respect to his control-panel design-defect theory, that the extruder left Sebright's control in a defective condition. Montemayor appealed, and this court affirmed on the ground that Sebright owed no duty to Montemayor. *See Montemayor v. Sebright Prods., Inc.*, No. A15-1188, 2016 WL 1175089, at *4 & n.3 (Minn. App. Mar. 28, 2016) (*Montemayor I*). The Minnesota Supreme Court granted Montemayor's petition for further review, and concluded that the question of duty is a matter for the jury. The supreme court remanded to this court with instruction to consider the district court's alternative bases for granting summary judgment. *Montemayor v. Sebright Prods., Inc*., 898 N.W.2d 623, 628 n.2, 633 (Minn. 2017) (*Montemayor II*).

D E C I S I O N

On appeal from summary judgment, we decide de novo "whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Id.* at 628. We view the facts in the light most favorable to the nonmoving party. *Id.* But summary judgment is mandatory for the defendant when "the record reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *see also DLH, Inc. v. Russ*, 566 N.W.2d 60, 69-71 (Minn. 1997) (detailing summary-judgment standard). "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect

to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH*, 566 N.W.2d at 71.

"Failure-to-warn and design-defect claims are separate causes of action, but each requires the manufacturer to owe a duty of care to the injured party." *Montemayor II*, 898 N.W.2d at 628-29. Our supreme court determined that genuine issues of material fact exist with respect to whether Sebright owed a duty to Montemayor. *Id.* at 631. The issues now before us relate to the other elements of Montemayor's failure-to-warn and design-defect claims. *Id.* at 628 n.2, 633.

I. Sebright is entitled to summary judgment on Montemayor's failure-to-warn claim.

To establish liability under a failure-to-warn theory, a plaintiff must prove that (1) the defendant had reason to know of the dangers of using the product, (2) the warnings fell short of those reasonably required, and (3) the lack of an adequate warning caused the plaintiff's injuries. *See Erickson by Bunker v. Am. Honda Motor Co.*, 455 N.W.2d 74, 77-78 (Minn. App. 1990), *review denied* (Minn. July 13, 1990). With respect to the causation element, we have held that a plaintiff's admitted failure to read the warnings defeats his failure-to-warn claim as a matter of law. *J & W Enters., Inc. v. Economy Sales, Inc.*, 486 N.W.2d 179, 181 (Minn. App. 1992). Montemayor urges us to (1) depart from *J & W* and (2) adopt the "heeding presumption," under which a court assumes, subject to rebuttal, that the plaintiff read and heeded the existing warning. We address each argument in turn.

In *J & W*, the appellant asserted that a warning attached to a fire extinguisher did not adequately warn of the danger of failing to recharge it after each use (i.e., that it would

not function to put out a fire). *Id.* at 180. But the appellant also admitted that he did not recall reading the warning that was attached to the extinguisher. *Id.* On those facts, this court held that the appellant could not prove causation as a matter of law because "[a]bsent a reading of the warning, there is no causal link between the alleged defect and the injury." *Id.* at 181.

In this case, Montemayor asserts that Sebright breached its duty by failing to adequately warn of the dangers of entering the extruder and not providing adequate instructions on how to unjam the machine. He asserts that the existing instructions and warnings were inadequate and that the warnings posted on the extruder were internally inconsistent.

Sebright provided numerous instructions and warnings regarding the extruder. The operation and maintenance manual warns users that the extruder should only be operated by "thoroughly trained personnel," that operators should be sure that no one is inside the extruder before operating it, and that lockout/tagout procedures should be followed before servicing or entering any part of the extruder. The manual also provides instructions on how to clear jams, again advising operators to follow lockout/tagout procedures before entering the extruder, and advising that "[p]ushing devices, such as short 6x6 timber pieces, laid flat on the feed chamber floor, may sometimes help clear the jam and move the material . . . ." And the manual advises operators to "[s]ee your Sebright Products representative for further advice on clearing jams." On the extruder itself, above the discharge chute, Sebright posted warnings about the danger of entering the extruder without disconnecting the power. The two warnings labels read "Follow Lockout/Tagout Procedures Before

Entering," and "Danger: Do Not Enter." The "Danger: Do Not Enter" warning includes a pictogram of a person climbing into the chute, with a red prohibition sign (circle with slash) over it.

It is undisputed that Montemayor did not read any of the warnings, including the written words and pictogram directly above the discharge chute of the extruder, before climbing into it. Thus, just as in *J & W*, a better warning could not have prevented Montemayor's injuries because he did not read the warning that was given. And neither Montemayor nor the other employees working in the area at the time of his accident had read the manual provided by Sebright. Under *J & W*, Montemayor's failure-to-warn claim fails as a matter of law. *See id.* at 181; *see also, e.g.*, *Balder v. Haley*, 399 N.W.2d 77, 81-82 (Minn. 1987) (explaining that appellant could not demonstrate causal relationship between failure to warn of dangers associated with gas valves and his injuries when he and his mother had disregarded multiple verbal warnings to shut off gas line and "[t]here is no reason to believe that a warning label would have done anything more to impress [him] or his mother").

Although Montemayor has not expressly asked us to overrule *J & W*,[2] we note that we are bound to follow this court's published decisions unless there is a compelling reason to depart. *State ex rel. Pollard v. Roy*, 878 N.W.2d 341, 348 (Minn. App. 2016), *review*

[2] In proceedings before the supreme court, Minnesota Association for Justice (MAJ) appeared as amicus curiae and asked the court to overrule *J & W*, asserting that it states an overly broad rule of causation. On remand, this court denied MAJ's request to file an amicus brief, advising that the court has access to MAJ's brief filed in the supreme court and inviting the parties to respond to it in their supplemental briefs.

denied (Minn. Dec. 27, 2016). We discern no compelling reason here. Notably, *J & W* acknowledged that "a claim of warning inadequacy can be based on an allegation that the warning was not conspicuous enough," but stated that the "appellant did not raise this argument in the trial court or on appeal." 486 N.W.2d at 180 n.1. Similarly here, Montemayor makes no argument that the warnings located directly above the opening to the discharge chute that he entered were not sufficiently conspicuous.

Moreover, the evidence on which Montemayor relies in opposing summary judgment demonstrates causation is lacking. Montemayor's expert opines that Sebright should have provided more ready access to the manual and placed a sticker on the control panel providing instructions for unjamming the extruder. But the expert does not explain how these additional steps would have prevented Montemayor's injuries. Of the two VZ Hogs employees who reviewed the manual, one had only paged through it, and testified that the extruder was fairly self-explanatory. The other testified that the manual was located in a waterproof box on the side of the extruder. There is no evidence to support an inference that more employees would have read the manual if it was stored in a different location. With respect to the proposed sticker on the control panel, the employee operating the machine when Montemayor was injured unequivocally stated that he *knew* how to clear a jam and *knew* that the extruder should not be operated if anyone was inside of it. What he did not know was that Montemayor was inside the extruder when he started it up. In sum, as in *J & W*, it is speculative whether placing the manual in a different location or attaching a sticker with unjamming instructions on the control panel would have prevented Montemayor's injuries. "Mere speculation, without some concrete evidence, is not enough

to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

This court has not previously considered Montemayor's second argument—that Minnesota should adopt a "heeding presumption," which gives a plaintiff a rebuttable presumption that an adequate warning would have been read and heeded.[3] *See, e.g.*, *Black's Law Dictionary* 1377 (10th ed. 2014) (explaining nature of presumption). But we note that our supreme court in *Kallio v. Ford Motor Co.* declined to do so. 407 N.W.2d 92, 99 (Minn. 1987); *see also Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 925 (8th Cir. 2004) (predicting that Minnesota courts would not adopt the presumption). It is not this court's role to extend the law. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (explaining that that role "falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987). And even if we applied a heeding presumption, the evidence that neither Montemayor nor the employees operating the extruder read existing warnings would be sufficient to rebut the presumption. *See, e.g.*, *Daniel v. Ben E. Keith Co.*, 97 F.3d 1329, 1333 (10th Cir. 1996) (holding that presumption was rebutted by evidence that the plaintiff was in a hurry and had not looked at the bottle of bleach that caused his injuries and affirming district court's decision not to instruct jury on heeding presumption).[4]

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[3] MAJ also made this argument to the supreme court.

[4] We again note that Montemayor has not challenged the conspicuousness of the warnings on the extruder. *Cf. Rowson v. Kawasaki Heavy Indus., Ltd.*, 866 F. Supp. 1221, 1240 (N.D. Iowa 1994) (denying summary judgment because plaintiff challenged presentation

Under any products-liability theory, "the plaintiff must show a causal link between the alleged defect and the injury." *J & W*, 486 N.W.2d at 181 (quotation omitted). Because Montemayor has not presented competent evidence linking any claimed warning deficiency to his injuries, Sebright is entitled to summary judgment dismissing the failure-to-warn claim as a matter of law.

II. Sebright is entitled to summary judgment on one of Montemayor's design-defect theories.

To prevail on a claim that a product was defectively designed, a plaintiff must prove that (1) the product was in a defective condition unreasonably dangerous for its intended use, (2) the defect existed when the product left the defendant's control, and (3) the defect was the proximate cause of the plaintiff's injuries. *See Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 n.3 (Minn. 1984). With respect to the first element, Minnesota courts focus on "the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors." *Krein v. Raudabough*, 406 N.W.2d 315, 318 (Minn. App. 1987) (citing *Bilotta*, 346 N.W.2d at 622). These factors include:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

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and location of warnings and defendant had not shown that plaintiff "routinely ignored or neglected to read warnings").

Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 212 (Minn. 1982).

Montemayor asserts that the extruder was defectively designed because (a) its control panel could be moved to different locations and Sebright did not provide guidance as to the proper location and (b) it did not have a start-up alarm and delay. We address each of these alleged design defects in turn.

A. Montemayor has not presented competent evidence that the alleged control-panel defect proximately caused his injuries.

Montemayor's first design-defect theory is based on the modular design of the extruder, which allows the control panel to be moved to different locations. The district court reasoned that "Montemayor has not offered evidence to demonstrate that the extruder was defective at the time it left Sebright's control" because VZ Hogs later moved the control panel to a different location. Using this rationale, the district court ruled that "Montemayor's claim for design defect based on his theory that the control panel was placed in an unsafe position cannot be proven." Montemayor's challenge has merit because this design-defect theory is premised on the fact that the control panel could be moved to multiple locations, and Sebright provides no instruction as to where it should be placed. We nevertheless affirm the district court's grant of summary judgment to Sebright on the control-panel design-defect claim because it can be sustained on another ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

Sebright asserts that the alleged control-panel defect was not the proximate cause of Montemayor's injuries as a matter of law. We agree. Montemayor argues that the design

of the extruder was defective because it allowed the control panel to be moved to a location where the operator could not view the extruder's discharge chute. But it is undisputed that the employee who was operating the extruder at the time of Montemayor's injuries saw Montemayor's co-worker standing next to the opening of the chute and nevertheless turned on the machine, causing Montemayor's injuries. On these undisputed facts, no reasonable jury could find that the location of the control panel caused Montemayor's injuries. Thus, the ability to move the control panel to that location cannot support a design-defect claim on this record. *See Lubbers*, 539 N.W.2d at 402 (explaining that although generally "a question of fact for the jury," when "reasonable minds can arrive at only one conclusion, proximate cause is a question of law").

B. There is a genuine issue of material fact regarding whether the extruder is defectively designed because it lacks a start-up alarm and delay.

Sebright argues that summary judgment is appropriate because it is speculative whether an alternative design incorporating a start-up alarm would have prevented Montemayor's injuries. Sebright cites Montemayor's testimony that he did not consider climbing into the extruder to be dangerous, and the absence of any expert opinion as to the length of any appropriate delay and alarm. We are not persuaded. Montemayor's expert expressly opined that "the start-up alarm and time delay would have prevented this incident and resulting injuries." The expert explained that his opinion is based on the following evidence: one of Montemayor's coworkers was able to get out of the machine in 10 seconds, another coworker was able to remove Montemayor from the machine in 3 seconds, exit times would be faster in emergency conditions, and an alarm and delayed

start would allow workers in danger or who see another worker in danger to call out to the operator to stop the machine before it engages and causes injury. We conclude that this evidence is sufficient to create a genuine issue of material fact as to whether the presence of a start-up alarm and delay on the extruder would have prevented Montemayor's injuries. While application of the seven-factor design-defect test may ultimately not support Montemayor's claim, that is a question for the jury. Accordingly, we reverse the district court's grant of summary judgment with respect to the start-up design-defect theory.

Affirmed in part, reversed in part, and remanded.