No Fact Hearing Required on Whether Injured Worker Had Choice of Tools

By David Gialanella

A manufacturer defending a product-liability suit by an injured construction-site worker can't introduce evidence of comparative negligence by the worker or his employer as a defense, a federal judge ruled on Wednesday.

District Judge Mary Cooper, in *McGee v. Stihl Inc.*, 08-cv-520, gave broad interpretation to a New Jersey Supreme Court ruling that bars consideration of negligence by a worker who has no "meaningful choice" but to use the equipment assigned to him.

That the plaintiff in the present case was an assistant superintendent who chose to do the task himself rather than assign a laborer, and had options on how and where to use the machine, did not raise questions of fact that would divest him of the protection of *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150 (1979), Cooper said.

The manufacturer may, however, adduce evidence of the plaintiff's conduct as it relates to proximate cause of the accident, and evidence of the employer's conduct as it relates to alleged failure to warn.

On March 25, 2007, Robert McGee, employed by Joseph Jingoli & Son of Lawrenceville, was cutting pipe with a gas-powered saw made by Stihl Inc. of Virginia Beach, Va., when the blade kicked back and hit him in the face, causing severe cuts and damaging the skin, muscle, nerves and bones, according to the suit. He alleges he is permanently disfigured and disabled.

McGee asserted claims of strict liability and breach of warranty, arguing that the machine is defective when, as here, it is used with blades other than those Stihl recommends, and further that there was a failure to warn.

In its answer, Stihl argued that McGee and Jingoli were comparatively negligent. The manufacturer sought to proffer evidence at trial that Jingoli permitted the machine to be substantially altered by ordering and supplying some of its employees, including McGee, with unauthorized saw blades for use in cutting pipe. It contended that Jingoli ignored the manufacturer's warnings against the use of certain blades and failed to instruct its employees in the proper use of the machine.

On the plaintiff's motion for summary judgment, Cooper dispatched Stihl's arguments that *Suter* did not apply because McGee was not compelled to use the machine and had options as to the "manner and means of cutting the pipe."

Those arguments "tend to go to the very comparative negligence of McGee that the *Suter* rule prohibits from consideration," Cooper said. "*Suter* does not dictate a fact analysis as to whether an employee had a 'meaningful choice'; rather, it provides a rule, grounded in public policy, that an employee engaged in an assigned task, as a matter of law, is deemed to not have a meaningful choice whether to use equipment provided by the employer."

Though the state Supreme Court has allowed comparative negligence to be used as a defense when a plaintiff with actual knowledge of a defective product's danger knowingly and voluntarily encounters that risk, the defense is not available "when an employee is injured in an industrial setting while using a defective product supplied by the employer for its intended or foreseeable purposes," Cooper said, citing *Johansen v. Makita U.S.A. Inc.*, 128 N.J. 86 (1992).

The construction site at which McGee was injured qualifies as an "industrial setting," even though *Suter* arose from a factory accident, she said.

As for Jingoli's comparative negligence, Cooper agreed with McGee that because a negligence action against his employer is barred by the Workers' Compensation Act, any claim by the manufacturer that the employer was negligent is barred as a matter of law.

Cooper noted, however, that in some contexts, a defendant may assert the "empty chair" defense — shifting blame to a joint tortfeasor who is not in the courtroom.

She held Stihl may not introduce evidence of employer negligence to dispute that alleged design defects of the machine proximately caused McGee's injuries, because proof that the machine was defectively designed would beget a predetermination of proximate cause.

But Stihl may present evidence of Jingoli's conduct in response to McGee's failure-to-warn claim, as that could prove to be a supervening proximate cause of the accident if the machine is not found to be defectively designed, she ruled.

McGee's attorney, Barry Packin of Nagel Rice in Roseland, calls the decision "a great victory for all construction workers and factory workers."

"There [are] opinions out there that run contrary to what *Suter* holds … and Judge Cooper got it completely correct," he says. "There should be no such thing as a meaningful choice hearing."

Packin says that allowing Stihl to argue comparative negligence as to the employer would have amounted to a "double whammy" for McGee — the inability to recover from Jingoli along with the prospect of a smaller recovery from Stihl if it could prove Jingoli's conduct helped cause the accident.

Stephen Rudolph of Monte & Rudolph in Sea Girt, Stihl's lawyer, did not return a call. ■