[Cite as *Straub v. CGC Sys., Inc.*, 2010-Ohio-1279.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

JUDITH STRAUB, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-P-0044**
- vs -	:	
CGC SYSTEMS, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2007 CV 0019.

Judgment: Affirmed.

Mark L. Wakefield and *Joseph P. Dunson*, Lowe, Eklund, Wakefield & Mulvihill Co., L.P.A., 610 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 (For Plaintiffs-Appellants).

Harry A. Tipping, Brian J. Seitz, and *Christopher A. Tipping*, Stark & Knoll Co., L.P.A., 3475 Ridgewood Road, Akron, OH 44333 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Judith and Robert Straub, appeal the Judgment Entry/Order of the Portage County Court of Common Pleas, denying their Motion for JNOV or, in the Alternative, for a New Trial. For the following reasons, we affirm the decision of the court below.

{¶2} On February 5, 2007, the Straubs filed a product liability Complaint in the Portage County Court of Common Pleas against defendant-appellee, CGC Systems, Inc. The Straubs alleged that, on May 24, 2006, Judith was an employee of the A.I. Root Company in Medina, Ohio. On that day, Judith was operating a candle baser machine, designed and manufactured by CGC Systems, used to form the bases on candles. Judith's right hand and wrist were severely injured when they were caught in the candle baser machine. The Straubs alleged that the machine was defective "in manufacture or construction," defective "in design or formulation," and/or defective "due to inadequate warning or instruction," under Ohio's product liability laws (R.C. 2307.71 et seq.), and that the alleged defects were the proximate cause of Judith's injury.

{¶3} The candle baser machine is a rectangular table, over which is mounted a conveyor. The conveyor carries a series of twenty-four candle holders, each holding two candles. As the conveyor moves around the table, the lower part of the candles are dipped in wax and molded to form a base. The conveyor does not move continuously, but stops at regular stations in the basing process. The conveyor moves for approximately four seconds and remains stationary for twenty-two seconds in each cycle.

{¶4} The machine operator works at one of the short ends of the table, loading and unloading the candles in the holders. On the table before the operator stands a mounting block. The conveyor carries the holders over the mounting block and stops, while the operator removes the candles that have already cycled and attaches candles without bases.

{¶5} As originally manufactured, there was space between the candle holders and the mounting block sufficient for a person's hand to pass. At a subsequent time,

however, an aluminum plate was attached to the lower part of the candle holders in order to further stabilize the candles during the basing process. With the attached plate, the distance between the holders and the mounting block narrowed considerably, so that a person's hand could be caught in between, and as happened to Judith.

{¶6} The candle baser with the attached stability plates was in operation for about three years, since 2002, until Judith's accident in May 2006. There were no other known cases of injuries arising from the operation of the baser.

{¶7} The case was tried before a jury between April 28 and May 5, 2009.

{¶8} The eight members of the jury found unanimously in favor of CGC Systems by a general verdict. Interrogatories were propounded to the jury. The first interrogatory queried, "Was there a defect in the design of defendant's product?" The jurors' unanimous response was, "no."

{¶9} On May 20, 2009, the Straubs filed a Motion for JNOV or, in the Alternative, for a New Trial.

{¶10} On July 16, 2009, the trial court rendered a Judgment Entry/Order, overruling the Straubs' Motion.

{¶11} On August 10, 2009, the Straubs filed their Notice of Appeal. On appeal, the Straubs raise the following assignments of error:

{¶12} "[1.] Whether the jury's determination that the subject machine was not defective by design was against the manifest weight of the evidence when all of the competent, credible evidence pointed to its design defect."

{¶13} "[2.] Whether the trial court erred when it denied appellants' motion for judgment notwithstanding the verdict or in the alternative for a new trial based on the manifest weight of the evidence."

{¶14} The Straubs' assignments of error will be considered jointly.

{¶15} "[N]ot later than fourteen days after entry of judgment [following a jury trial], a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned, such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion." Civ.R. 50(B); *Freeman v. Wilkinson* (1992), 65 Ohio St.3d 307, 309 (Civ.R. 50(B) "only applies in cases tried by jury").

{¶16} "A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative." Civ.R. 50(B).

{¶17} "A new trial may be granted to all or any of the parties and on all or part of the issues," where "[t]he judgment is not sustained by the weight of the evidence." Civ.R. 59(A)(6).

{¶18} "In evaluating the propriety of the trial court's decision premised on the weight of the evidence, a reviewing court can reverse such an order for a new trial only upon a finding of an abuse of discretion." *Malone v. Courtyard by Marriott Ltd. Partnership*, 74 Ohio St.3d 440, 448, 1996-Ohio-311. When reviewing such a judgment, the court is "guided by the principle that judgments supported by competent, credible evidence going to all the material elements of the case must not be reversed, as being against the manifest weight of the evidence." *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, at syllabus.

{¶19} "There is a basic difference between the duty of a trial court to submit a case to the jury where 'reasonable minds' could differ and the right of a trial court to grant a new trial on the basis of its conclusion that the verdict is not 'sustained by

sufficient evidence.' The former does not involve any *weighing* of evidence by the court; nor is the court concerned therein with the question of credibility of witnesses. However, in ruling on a motion for new trial upon the basis of a claim that the judgment 'is not sustained by sufficient evidence,' the court must weigh the evidence and pass upon the credibility of the witnesses, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of the evidence." *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, at paragraph three of the syllabus (emphasis sic).

{¶20} In the present case, the question of whether the trial court properly denied the Straubs' Motion depends on whether the jury's verdict is against the weight of the evidence. The Ohio Supreme Court has recognized that the standard set forth in *C.E. Morris* "tends to merge the concepts of weight and sufficiency," so that "a judgment supported by 'some competent, credible evidence going to all the essential elements of the case' must be affirmed." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26; cf. *Poske v. Mergl* (1916), 169 Ohio St. 70, 73 ("where there is a motion for a new trial upon the ground that the judgment is not sustained by sufficient evidence, a duty devolves upon the trial court to review the evidence adduced during the trial and to itself pass upon the credibility of the witnesses and the evidence in general"). Accordingly, our standard of review is abuse of discretion. *Rohde*, 23 Ohio St.2d 82, at paragraph one of the syllabus.

{¶21} "[A] product is defective in design or formulation if, at the time it left the control of its manufacturer, the foreseeable risks associated with its design or

formulation *** exceeded the benefits associated with that design or formulation ***." R.C. 2307.75(A).

{¶22} The Straubs argue that the only competent, credible evidence in the record demonstrated that the candle baser was defectively designed. The Straubs rely on the following evidence in the record.

{¶23} Gerald Rennell, a safety engineer with the consulting firm of Technical Safety Associates, testified on behalf of the Straubs that the machine was defective in that the pinch point created by the motion of the candle holders over the mounting block should have, and could have been guarded:

{¶24} Rennell: The machine should have had a guarding system. It is a dangerous machine. I'm surprised it operated as long as it did without someone getting hurt. It's a dangerous machine and has to have a guarding system. It's a violation of all machine guarding practices and ASME codes and anything I can think of, National Safety Council, anybody I can think of would tell you that machine in that condition had to have a guard.

{¶25} ***

{¶26} It was defective and the reason it was defective was because it was unreasonably dangerous. And the reason it was unreasonably dangerous is because there are reasonable safeguarding systems [that] would have prevented this accident that should have been installed on this machine when it was designed and manufactured and so forth.

{¶27} The Straubs also rely on the following testimony given by CGC Systems' sole expert witness, George Wharton, an accident investigator and mechanical engineer for CED Investigative Technologies:

{¶28} Attorney: Mr. Wharton, you would agree with me that this candle baser at the time of Miss Straub's [sic] accident was defective, wouldn't you?

{¶29} Wharton: I agree with you, had a hazard.

{¶30} ***

{¶31} Attorney: You would agree that at the time of Miss Straub's [sic] accident this machine had a pinch point on it, correct?

{¶32} Wharton: Yes.

{¶33} Attorney: And you would agree that pinch point at the time of Miss Straub's [sic] accident was completely unguarded, correct?

{¶34} Wharton: Correct.

{¶35} Attorney: You would agree that that pinch point created a hazard, correct?

{¶36} Wharton: Yes.

{¶37} Attorney: You would agree that that hazard was something that could have been guarded, correct?

{¶38} Wharton: Yes.

{¶39} The Straubs further point out that, following Judith's accident, an "interlock" guard was placed on the baser. Wharton testified that such a guard was technologically feasible at the time of Judith's accident and, unless intentionally disabled, would have probably prevented her injury.

{¶40} The evidence cited by the Straubs could have supported a jury verdict in their favor. It does not, however, mandate that result. Contrary to the Straubs' position, their evidence is not uncontroverted.

{¶41} Considering CGC System's expert, Wharton's, testimony as a whole, he did not admit that the machine was defective. The subsequent cross-examination of Wharton demonstrates that he conceded the existence of a hazard, not the defective design of the machine.

{¶42} Attorney: [Rennell] is the individual who testified in this case earlier about the machine. He agreed with you, he said the machine was defective.

{¶43} Wharton: I'm sorry, I don't remember saying the machine was defective.

{¶44} Attorney: You don't believe the machine was defective?

{¶45} Wharton: I think you asked me and I said there was a hazard, I didn't say it was defective.

{¶46} ***

{¶47} Attorney: You don't believe that a machine that has a hazard that is unguarded has something wrong with it?

{¶48} Wharton: I think it would be preferable to be guarded but it's not necessarily defective.

{¶49} Elsewhere, Wharton testified that a guard was not "absolutely necessary" on the candle baser machine: "There is a hierarchy of protection from hazards as I think you know and the level below a guard, which is not as good as a guard, is training and warnings and both of those had been implemented in Miss Straub's [sic] case to prevent her injury." Wharton is referring to other evidence before the jury that Judith was injured as a result of cleaning the baser while it was operating, a practice prohibited by R.I. Root's posted job safety procedures.

{¶50} We further note that several non-expert witnesses testified that they considered the machine "safe." Phillip Curran, a plant manager at A.I. Root, testified that he considered the candle baser machine safe for an operator because of its speed, "that machine moved like a turtle." Stuart Root is A.I. Root's corporate secretary and was a member of the safety committee at the time of Judith's accident. Root drafted the job safety procedure for operation of the candle baser and identified "pinch points" and "body parts [being] caught in objects" as a possible hazards. Root testified that he believed the machine to be safe without guarding because of the "very slow" speed at which it operated. Likewise, former manufacturing engineer for A.I. Root, Timothy Reitman, testified that he believed the baser machine to be safe. Cf. *Vermett v. Fred Christen & Sons Co.* (2000), 138 Ohio App.3d 586, 609 ("[u]ltimately, the duty is with the employer to insure that appropriate safeguarding methods are implemented").

{¶51} We emphasize that a jury is not bound to accept the testimony of an expert witness. *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, at ¶85 (citations omitted). "The jury alone, as the trier of fact, has the duty to decide what weight should be given to the testimony of any expert witness." *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 82, 1995-Ohio-84; *Pangle v. Joyce*, 76 Ohio St.3d 389, 395, 1996-Ohio-381 ("[o]nce expert testimony was admitted, it was the jury's role to assess the experts' credibility and to assign weight to the experts' testimony and opinions"). "Thus, a jury generally is free to give as little or as much weight to an expert's testimony as it wishes, and an appellate court must afford the jury's determination due deference." *Vinar v. Bexley*, 10th Dist. No. 02AP-701, 2003-Ohio-1788, at ¶22.

{¶52} Moreover, expert testimony is not always necessary to establish or, conversely, to defeat a claim of defective design. *Atkins v. GMC* (1999), 132 Ohio App.3d 556, 564. Where the claim involves "a simple device without complex features or designs," circumstantial or other evidence may be sufficient to determine whether a defect exists. *Aldridge v. Reckart Equip. Co.*, 4th Dist. No. 04CA17, 2006-Ohio-4964, at ¶57. For example, whether guarding is necessary on a conveyor belt has been held "not so complex as to be beyond the knowledge of a lay person so as to require expert testimony." Id. at ¶58.

{¶53} In the present case, there is competent, credible evidence supporting the jury's determination that the candle baser machine was not defective. Although the Straubs' expert testified that the machine was defective, the jury was not bound to accept this testimony. The hazard created by a moving part coming into close proximately with a non-moving part, thereby creating a pinch point, is not so complex as to be beyond the knowledge or understanding of a lay person. CGC Systems' expert

denied that the machine was defective and testified that proper training and safety procedures were acceptable safeguards with respect to this hazard. Finally, there was testimony from employees of the company that purchased the baser that the machine was safe in light of its slow speed, and that its operators were trained to recognize the danger of being caught in the machine. In light of this evidence, the trial court's decision to deny the Straubs' Motion for judgment notwithstanding the verdict and/or new trial does not constitute an abuse of discretion.

{¶54} The two assignments of error are without merit.

{¶55} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, denying the Straubs' Motion for JNOV or, in the Alternative, for a New Trial, is affirmed. Costs to be taxed against appellants.

TIMOTHY P. CANNON, J., concurs,

MARY JANE TRAPP, P.J., dissents with a Dissenting Opinion.

MARY JANE TRAPP, P.J., dissenting.

{¶56} I must respectfully dissent as the Straubs presented unrebutted, competent, credible evidence of a design defect which proximately caused Mrs. Straubs' injury. The majority agrees the "evidence cited by the Straubs could have supported a jury verdict in their favor." As this court noted in *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, "[o]nce a prima facie case has been demonstrated, an adverse party may attempt to negate its effect in various ways. She may cross-

examine the expert of the other party; she may adduce testimony from another expert which contradicts the testimony of the expert for her adversary; further, she may adduce expert testimony which sets forth an alternative explanation for the circumstances at issue. See *Stinson v. England* (1994), 69 Ohio St.3d 451, 455-456." Id. at ¶79.

{¶57} The Straubs made a prima face case. Their expert opined that the candle baser was defective because it was "unreasonably dangerous" and "reasonable safeguarding systems" were available which would have prevented the accident. He further testified that guards are usually installed because of "predictable, foreseeable human error" and that the absence of the guard was the proximate cause of Mrs. Straub's injury.

{¶58} The testimony of the defense expert is oddly devoid of any opinion about whether or not the machine was defective. On direct examination he methodically explained that when there is a hazard, the first task is to try to design away that hazard because if there is no hazard, there is no need for a guard on the machine. He went on to explain that if the hazard cannot be eliminated, you install a guard. There is not one word from this witness about a defect or lack thereof.

{¶59} For the first time upon cross-examination, the defense expert was asked a direct question regarding the defective condition of the machine. He did not say that the machine was *not* defective. He agreed that this machine had an unguarded pinch point that created a hazard.

{¶60} Mrs. Straub's counsel then systematically took the defense expert through his "hierarchy of protection from hazards" described on direct. The hazard could not be designed away. A guard was possible, and an appropriately designed guard could have prevented this accident, but there was no guard on this machine. He agreed that the

hazard here was a pinch point that required a guard and that a guard was technologically feasible at the time it left CGC.

{¶61} He acknowledged that an interlock guard which probably would have prevented her accident was installed later. He also acknowledged that the machine was clearly more dangerous than the people at A.I. Root thought. While this expert, when pressed, would not say affirmatively that the machine was "defective", a term that he defined as having "something wrong with it," his testimony taken as a whole clearly supported rather than rebutted each and every statutory element of a design defect case that was presented by the Straubs in their case-in-chief.

{¶62} Moreover, Mr. Rose, CGC's President, agreed with his company's expert witness that a pinch point of this nature needs to be guarded. Mr. Rose offered no opinions as to a defect either.

{¶63} As we noted in *McWreath*, "[w]hen the evidence is 'uncontroverted,' the record reflects there is no rebuttal evidence at all, looking at the entire range of evidence presented at trial. 'Rebuttal evidence' is evidence that explains, repels, counteracts or disproves facts given in evidence by the adverse party." Id at ¶83, quoting *McCabe v. Sitar*, 7th Dist. No. 06 BE 39, 2008-Ohio-3242.

{¶64} I find no evidence that "explains, repels, counteracts or disproves the facts" establishing a defective product adduced by the Straubs. Thus, I find, as this court did in *White v. Costilow* (July 12, 1996), 11th Dist. No. 95-T-5339, 1996 Ohio App. LEXIS 3044, that when it is clear that the jury failed to consider an element that was established by uncontroverted expert testimony, a trial court should grant a new trial. Id. at 8. Here, all statutory elements were established; they went unrebutted, and the jury lost its way when it found that the product was not defective.