

JAMES CHARLES KIAK,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
CROWN EQUIPMENT CORPORATION,	:	
	:	
Appellee	:	No. 3033 EDA 2007

Appeal from the Order Entered October 24, 2007,  
Court of Common Pleas, Philadelphia County  
Civil Division at No: 3340, October Term 2000

BEFORE: BENDER, DONOHUE and FREEDBERG, JJ.

**\*\*\*Petition for Reargument Filed February 27, 2009\*\*\***

OPINION BY DONOHUE, J.:

Filed: February 17, 2009

¶ 1 Appellant James Charles Kiak (“Kiak”) appeals from the order dated October 17, 2007 and entered October 24, 2007, granting summary judgment in favor of Appellee Crown Equipment Corporation (“Crown”) in a product liability action filed by Kiak. The trial court found that this case was controlled by our recent decision in **Arnoldy v. Forklift L.P.**, 927 A.2d 257 (Pa. Super.), *allocatur denied*, 595 Pa. 710, 939 A.2d 889 (2007), and the law of federal preemption. For the reasons that follow, we reverse.

¶ 2 On November 4, 1998, Kiak was injured while on the job at Victualic Co. America, a foundry located in Easton, Pennsylvania that manufactures couplings to join pipes for sprinkler systems and fire protection. Kiak’s injury occurred when a Crown model 30TSP forklift being operated by a co-worker pinned Kiak between two boxes and nearly amputated his foot.

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Crown manufactured the forklift involved in the accident in 1997, and it was one of eight 30TSP forklifts sold to Victualic in 1998.

¶ 3 On October 24, 2000, Kiak filed a complaint against Crown and Omnilift, Inc., averring counts of negligence, breach of warranty, and strict product liability regarding an allegedly defectively designed back-up travel alarm system on the 30TSP forklift. In his complaint, Kiak alleged that although the forklift had a functioning back-up travel alarm and a strobe light, he was unaware that the forklift was near him until it was just a few feet away and that as a result he was unable to get out of the way in time to avoid injury.

¶ 4 In 2003, prior to the commencement of trial, Kiak withdrew the claims of negligence and breach of warranty, settled with Omnilift, Inc., and proceeded to trial against Crown only on strict liability. On February 4, 2003, the jury returned a verdict in favor of Crown. On February 14, 2003, Kiak filed a post-trial motion contending, *inter alia*, that the trial court erred in refusing to incorporate two proposed limiting instructions to the jury regarding the evidence of the negligent conduct of the co-worker operating the forklift and evidence of the warehouse safety rules. On January 27, 2004, the trial court denied this post-trial motion, and Kiak proceeded to file an appeal.

¶ 5 On December 2, 2005, this Court vacated the jury verdict and remanded the case back to the trial court. ***Kiak v. Crown Equipment,***

**Corp.**, 894 A.2d 829 (Pa. Super. 2005). Crown appealed this decision, but on December 26, 2006, our Supreme Court denied Crown's petition for allocatur. **Crown Equipment Corp. v. Kiak**, 591 Pa. 665, 916 A.2d 634 (2006). Thereafter, on September 10, 2007, Crown filed a motion for summary judgment with the trial court arguing, *inter alia*, that the case was controlled by this Court's subsequent decision in **Arnoldy v. Forklift, L.P.**, 927 A.2d 257 (Pa. Super. 2007), *allocatur denied*, 595 Pa. 710, 939 A.2d 889 (2007). The trial court agreed, and by order dated October 17, 2007 and entered October 24, 2007, granted summary judgment in favor of Crown.

¶ 6 This timely appeal followed, in which Kiak contends that the trial court should not have relied upon **Arnoldy** in granting summary judgment in favor of Crown. Our standard of review for motions for summary judgment is well settled:

Pursuant to Pa.R.C.P. 1035.2(2), a trial court shall enter judgment if, after the completion of discovery, an adverse party who will bear the burden of proof at trial fails to produce "evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to the jury." See **Rapagnani v. Judas Co.**, 736 A.2d 666, 668-69 (Pa. Super. 1999) (summary judgment properly granted when "the record contains insufficient evidence of facts to make out a prima facie cause of action or defense, and, therefore, there is no issue to be submitted to a jury"). A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. **Swords v.**

**Harleysville Ins. Cos.**, 584 Pa. 382, 389-90, 883 A.2d 562, 566-67 (2005). In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. **Hayward v. Medical Center of Beaver County**, 530 Pa. 320, 324, 608 A.2d 1040, 1042 (1992).

**Phillips v. Selig**, 959 A.2d 420, 427 (Pa. Super. 2008).

¶ 7 Based upon our review of the record on appeal in this case, we conclude that the trial court's reliance on **Arnoldy** was misplaced, as the facts presented in this case differ markedly from those in **Arnoldy**. While both **Arnoldy** and this case involve pedestrian injuries resulting from forklift collisions that allegedly could have been prevented by various safety devices, the similarities end there. In **Arnoldy**, the plaintiff/appellant argued that the forklift that struck him "lacked any warning system when it was moving in reverse." **Arnoldy**, 927 A.2d at 260. Specifically, the forklift in **Arnoldy** allegedly "lacked an audible backup alarm, rearview mirrors, any form of beacon or strobe lighting, or any other safety device that would adequately protect individuals from injury caused by the forklift moving in reverse." **Id.** at 260 n.2. The plaintiff/appellant argued that the manufacturer failed to "install additional safety devices" necessary to make the forklift safe. **Id.** at 266.

¶ 8 Based on these facts, in **Arnoldy** this Court concluded that under applicable Occupational Safety and Health Administration ("OSHA")

regulations, the duty to select appropriate safety devices rests with the user of the forklift, not the manufacturer. **Id.** Permitting a state products liability tort law claim would have improperly shifted the burden to the manufacturer:

Such a state law, *i.e.*, a rule of state tort law imposing such a duty, would in effect require manufacturers of these forklifts to install additional safety devices on all forklifts regardless of the existence of the standard incorporated by OSHA that places the responsibility of the determination of situation specific safety devices on the user of the equipment. This is in direct conflict with the purpose behind the OSHA regulation, *i.e.*, to protect employees by allowing the end users of the product to determine which safety device would be the most effective in its particular situation.

**Id.** (citations omitted). As a result, the panel concluded that “[u]nder the circumstances of this particular case, this state tort law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ and accordingly we find it is preempted.” **Id.** (quoting **Geier v. American Honda Motor Co.**, 529 U.S. 861, 873 (2000)).

¶ 9 The case *sub judice*, however, does not involve an allegation that the manufacturer should have installed additional safety devices. Instead, in this case Kiak contends that a safety device selected by his employer and installed by Crown was defective. The record on appeal reflects that Kiak’s employer, as prescribed by OSHA regulations, selected various safety devices for the forklift – including rearview mirrors, a flashing light, and a

backup alarm. Notes of Testimony ("N.T."), 3/27/03, at 94, 97. The driver of the forklift that hit Kiak testified that when backing up at the employer's warehouse he would sometimes use the throttle to get the forklift started and then let the throttle go and "coast" backwards while he looked at his paperwork. **Id.** at 84. Coasting was facilitated by a wire guidance system embedded in the floor of the warehouse which allowed the forklift to essentially steer itself (since it was equipped to sense the signal from the embedded wires and keep itself moving in a straight line between the aisles). **Id.** at 147-150.

¶ 10 According to Kiak's expert witness, Paul Stevens ("Stevens"), the beeping sound of the backup alarm on the forklift that hit Kiak sounded at approximately 78 decibels at a distance of 20 feet and 84 decibels when next to the machine, which sound levels were above the ambient levels in the warehouse (between 67-68 decibels). **Id.** at 144-45. Stevens testified that the backup alarm would stop actuating (sounding) when the throttle was disengaged and the forklift was coasting backwards. **Id.** at 150-51.

According to Stevens, this defect in the backup alarm was hazardous:

Well, basically, the alarm, typically, the way you would expect is, the closer it gets, the louder it is, like with any kind of alarm. And this would stop sounding. And as a result, someone could erroneously conclude the truck is no longer approaching a pedestrian.

**Id.** at 151-52. The failure of the backup alarm to sound when coasting was particularly dangerous in this particular warehouse, Stevens testified, because the “automatic steering” wire guidance system made it unnecessary for the driver to look rearward to steer (thus encouraging coasting to check things like paperwork), and because the narrow aisles left only minimal clearance for pedestrians (thus requiring ample notice to avoid a collision).

**Id.** at 152.

¶ 11 As a result, here Kiak’s products liability case is not premised on the failure of the manufacturer to install an available safety device. Kiak’s employer, as OSHA regulations specify, selected a backup alarm as one of several safety devices to be installed on the forklift, presumably based upon the specific requirements of the particular workplace at issue. Kiak contends that the safety device selected, the backup alarm, was defective because it did not continue to beep when the forklift’s throttle was disengaged and the vehicle coasted in reverse. As such, the backup alarm was allegedly defective because it failed to warn pedestrians that a coasting forklift was approaching in reverse.

¶ 12 Given the nature of the alleged defect in this case, we are not confronted with a conflict of the sort encountered in **Arnoldy** – namely determining whether the manufacturer or the user had the duty to select the necessary and appropriate safety equipment under the workplace conditions presented. Accordingly, this case does not involve a direct conflict between

Pennsylvania state tort law and the federal objectives behind applicable OSHA regulations, as a panel of this Court confronted in **Arnoldy**. To the contrary, this case presents a straightforward claim under section 402A of the Restatement (Second) of Torts, pursuant to which Kiak must prove that Crown sold a defective product, the defect existed when the product left Crown's hands, and the defect caused the plaintiff's injuries. **See, e.g., Hadar v. AVCO Corp.**, 886 A.2d 225, 228 (Pa. Super. 2005).

¶ 13 For these reasons, we reverse the trial court's grant of summary judgment in favor of Crown and remand the case to the Court of Common Pleas of Philadelphia County for trial.

¶ 14 Order reversed. Case remanded. Jurisdiction relinquished.

¶ 15 Bender, J. files a Dissenting Opinion.

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BEFORE: BENDER, DONOHUE and FREEDBERG, JJ.

DISSENTING OPINION BY BENDER, J.:

¶ 1 I respectfully dissent because I believe that the Majority’s basis for reversing the trial court’s grant of summary judgment and remanding for a new trial rests on a distinction between **Arnoldy v. Forklift L.P.**, 927 A.2d 257 (Pa. Super. 2007), and the present case that was not raised or argued by Appellant, namely, Appellant did not argue that the alarm that was installed was defective. Rather, Appellant’s action rested on the contention that the forklift’s manufacturer failed to install adequate or appropriate warning devices, an allegation the falls within the parameters of **Arnoldy**. Since, “an appellate court cannot reverse a court order on the basis of an issue that has not been raised by the appealing party,” **The York Group**,

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***Inc. v. Yorktowne Caskets, Inc.***, 924 A.2d 1234, 1246 (Pa. Super. 2007),

the basis for the Majority's reversal should not stand.