IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NICHOLAS ADAMANY, WILLIAM ADAMANY, JR., COREEN ADAMANY and MIDWEST SECURITY LIFE INSURANCE CO.,

Plaintiffs,

OPINION AND ORDER

04-C-224-C

v.

CUB CADET CORP., MTD PRODUCTS, INC. and MTD CONSUMER GROUP, INC.,

Defendants.

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In this products liability case, plaintiffs Nicholas Adamany, William Adamany, Jr., Coreen Adamany and Midwest Security Life Insurance Company contend that defendants Cub Cadet Corporation, MTD Products, Inc. and MTD Consumer Group, Inc. are liable under negligence and strict liability theories for their design and manufacture of a lawn tractor and for their failure to warn of the risk of burn injuries from the tractor's exhaust system.

This case presents the question whether defendants have proposed enough facts to eliminate any possibility that a reasonable jury could infer that defendants were negligent

or strictly liable for plaintiff Nicholas Adamany's injuries. The answer is no. From the proposed facts, a reasonable jury could infer that defendants designed a defective and unreasonably dangerous product and were negligent in designing their tractor and in failing to warn bystanders of the risk of burn injuries. Therefore, I will deny defendants' motion for summary judgment. Because a jury must first determine defendants' liability before deciding defendants' affirmative defenses of contributory negligence and superseding cause, I will leave it to the jury to decide the merits of those defenses and will wait to decide defendants' public policy defense.

A threshold issue must be addressed. Plaintiffs bring this suit under diversity jurisdiction. 28 U.S.C. § 1332(a). In their complaint, they alleged that plaintiffs were citizens of Wisconsin, that defendant Cub Cadet Corporation is incorporated in Ohio and has its principal place of business there, that defendant MTD Products, Inc. is incorporated in Delaware and has its principal place of business in Ohio and that defendant MTD Consumer Group, Inc. is incorporated in Delaware and has its principal place of business in Ohio. They did not allege plaintiff Midwest Security Life Insurance Company's citizenship. In response to the court's inquiry, they amended their complaint to allege that plaintiff Midwest Security Life Insurance Company is a stock corporation incorporated in the state of Wisconsin with its principal place of business in Onalaska, Wisconsin. I conclude that diversity jurisdiction is present.

In deciding defendants' motion, I have considered the language of the American National Standards for Turf Care Equipment, ANSI/OPEI B71.1-1986 and the Proposed Lawn Mower Safety Standard by Consumer Union, July 1975,. Plaintiffs propose as fact that defendants violated these standards and introduce the language of these standards through an affidavit of one of their experts. Aff. Wesley Buchele, March 10, 2005, Exh. A. Defendants dispute the proposed fact on the ground that the opinion of plaintiffs' expert does not meet the admissibility requirements of Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Although the affidavit of plaintiffs' expert does not state that he is introducing a true and correct copy of the ANSI and Consumers' Union standards, defendants do not object to the language of the standards or the application of them to their product. Therefore, I have included the language of the standards in the undisputed facts.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

## UNDISPUTED FACTS

### A. The Parties

Plaintiffs William Adamany, Jr. and his wife Coreen Adamany, reside in Prairie du Chien, Wisconsin and are citizens of the state. (William Adamany is referred to in the

complaint as "Jr."; at his deposition, he was referred to as "III.") They have four children, including William Adamany, IV, who was born on June 19, 1990, and Nicholas Adamany, who was born on March 24, 1997, and who was involved in the accident at issue in this case. (To avoid confusion, I will refer to William Adamany, the parent, as "William" and William Adamany, his son, as "Will.") At the time of the accident, Nicholas was five. Plaintiff Midwest Security Life Insurance Company is a stock corporation incorporated in the state of Wisconsin with its principal place of business in Onalaska, Wisconsin.

Defendant Cub Cadet Corporation is an Ohio corporation with its principal place of business in Ohio. Defendant MTD Products, Inc., is a Delaware corporation with its principal place of business in Ohio. Defendant MTD Consumer Group, Inc., is a Delaware corporation with its principal place of business in Ohio. MTD Consumer Group, Inc. is a wholly owned subsidiary of MTD Products, Inc.

B. The Lawn Tractor

Plaintiffs William and Coreen Adamany own a Series 2000 Cub Cadet lawn tractor that William purchased in used condition in the summer of 1998, when it was two years old. When he bought it, the dealer instructed him on its operation, by showing him how to start the mower and operate it. William never questioned the dealer about heat buildup in the front bumper because he was not aware of it. The lawn tractor came with what appeared to

be the original owner's manual, which William read once or twice from cover to cover. The owner's manual stated, among other things:

> **III. CHILDREN**
>
> Tragic accidents can occur if the operator is not alert to the presence of children. Children are often attracted to the machine and the mowing activity. **Never** assume that children will remain where you last saw them.
>
> 1. Keep children out of the mowing area and in watchful care of an adult other than the operator.
>
> 2. Be alert and turn machine off if children enter the area.
>
> ***
>
> 5. Never allow children under 14 years old to operate the machine. Children 14 years and over should only operate machine under close parental supervision and proper instruction.

After the purchase, Coreen Adamany read the pictorial warning sticker that was on the machine and read the warnings contained in the owner's manual. Coreen and William read every page of the owner's manual that contained safety instructions and read through the entire warning sticker on the machine. William was aware that the owner's manual warned against allowing children under the age of 14 to operate the machine and he was aware of this particular warning on the day of the accident. Coreen was aware that the lawn tractor contained a sticker warning not to mow around children. Because of the danger of

the machine and the chance for projection of objects from the machine, William and Coreen were strict about insuring that kids were not in the area when a parent was mowing.

Coreen knew that the tractor was always warm in the front after it had been in use because she could feel heat coming from the front of the lawn tractor when she walked past the front of it. William had previously felt heat coming from the front of the lawn tractor and thought it was similar to the heat felt by a person walking in front of a car. He did not believe that a person would expect to burn himself on the bumper of a car if he were to bump it. Will Adamany could feel heat coming from the front of the tractor when he walked past it before the accident occurred.

According to the American National Standards for Turf Care Equipment – Power Lawn Mowers, Lawn and Garden Tractors, and Lawn Tractors – Safety Specifications: ANSI/OPEI B71.1-1986, standard 14.2 requires, for heat protection, a guard or shield to prevent inadvertent contact with any exposed component that is hot and may cause burns during normal starting, mounting and operation of the machine. A 1975 proposed standard for lawn mower safety issued by Consumers' Union, standard 1205.9, has the following requirements for hot surfaces:

> (a) Exhaust systems surfaces above the mower's blade housing that reach temperatures above 150° C (300° F) in operation shall be located or shielded to protect against hazardous contact. A shield, if used, shall require the use of a tool for removal (a coin shall not be considered a tool) or, if hinged, shall automatically return to the protective position if moved. Compliance shall be

> in accordance with the Hot Surface Protective Probe Test 1295.21®), and, if hinged a shield is used, with Guard and Shield Pull Test 1204.21 mm.

C. The Accident

Will began operating the lawn tractor in 2001, the summer before the accident. William showed him how to use the lawn tractor, discussed the sign and warning label with him and told him not to operate the lawn tractor when his brothers or other children were present. Will's parents did not allow him to operate the lawn tractor while the blade was engaged.

On May 29, 2002, William and Coreen were outside working on a landscaping project in their yard. Will asked whether he could use the lawn tractor to give his friend a ride if she sat in the attached trailer. William, Coreen and the friend's mother agreed he could as long as he was careful. The tractor had not been running for at least one hour at the time Will asked to drive it.

William and Coreen did not give Will any other safety instructions before Will began driving the tractor on this day. At the time William permitted Will to drive the lawn tractor with his friend on the attached trailer, William did not know where Nicholas was. As Will was driving the lawn tractor, his younger brother, Nicholas, approached Will from behind on his bicycle, without any warning. While passing the tractor, Nicholas's bicycle became "wobbly," causing him to lose control of his bicycle and fall. Nicholas believes that the

bumper of the lawn tractor hit his buttocks after he fell off his bicycle.

Will stopped the lawn tractor immediately when he saw his brother Nicholas fall from his bike. Less than a second elapsed from the time that Will saw Nicholas riding his bike on the left side of the lawn tractor to the time that Nicholas fell. The lawn tractor was traveling at a speed of 5 miles an hour or less when the accident occurred. Nicholas sustained third degree burns to his buttocks and perineum and was hospitalized for almost two weeks at the University of Wisconsin Hospitals and Clinics. After the accident, William inspected the lawn tractor and noticed that the exhaust system was directly against the back side of the front bumper. The Simplicity lawn tractor that William purchased after the accident had an exhaust system that was shielded.

## OPINION

Wisconsin law applies in this diversity action. Threshermen's Mutual Ins. Co. v. Wallingford Mutual Ins. Co., 26 F.3d 776, 780 (7th Cir. 1994) (in diversity suit, federal court applies forum's law). Defendants contend that plaintiffs' complaint fails to identify whether plaintiffs are seeking recovery against them under a strict liability or negligence cause of action. Plaintiffs point out that their complaint meets the "short and plain statement" requirements under Fed. R. Civ. P. 8 and that under Wisconsin law, plaintiffs in a products liability case may proceed under both strict liability and negligence theories.

In their complaint, plaintiffs state that defendants' lawn tractor "was defective in design, manufacture, and in the warnings given, and was unreasonably dangerous to others when used in a reasonably foreseeable manner, and was so defective at the time it left the hands of the Defendants" and that the "defects in [the] riding lawn tractor and the Defendants' negligent design and manufacture of the lawn tractor were a proximate cause of the injuries sustained by Plaintiff Nicholas Adamany." Under the liberal pleading standards of Rule 8, these statements are sufficient to state claims under both strict liability and negligence theories. Plaintiffs are correct when they assert that Wisconsin law allows plaintiffs to sue under both theories. See, e.g., Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 328, 230 N.W.2d 794, 796 (1975) (complaint stated cause of action based upon both negligence and strict liability); Gracyalny v. Westinghouse Electric Corp., 723 F.2d 1311, 1313 (7th Cir. 1983) (action in strict tort liability and negligence); Insolia v. Philip Morris, Inc., 216 F.3d 596, 605 (7th Cir. 2000) (defendant can be both negligent and negligent "per se"). Accordingly, I will address plaintiffs' claim under both strict liability and negligence theories.

### A. Strict Liability

In strict liability cases, a plaintiff must prove: 1) that the product was in defective condition when it left the possession or control of the seller: 2) that it was unreasonably

dangerous to the user or consumer; 3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages; 4) that the seller engaged in the business of selling such product; and 5) that the product was one that the seller expected would and did reach the user or consumer without substantial change in the condition it was when it was sold. Gracyalny, 723 F.2d at 1317 (citing Dippel v. Sciano, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967). In strict liability, or negligence per se, the plaintiff need not prove fault; "[t]he focus in negligence per se is on the condition of the product, i.e., on the results of the defendant's actions." Insolia, 216 F.3d at 604.

To determine whether a product is defective and unreasonably dangerous, Wisconsin courts apply the consumer-contemplation test, under which a product is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics. Green v. Smith & Nephew AHP, Inc., 245 Wis. 2d 772, 798-99, 629 N.W.2d 727, 739-40 (2001); see also Sumnicht v. Toyota Motor Sales, U.S.A., Inc., 121 Wis. 2d 338, 368, 360 N.W.2d 2, 15 (1984) (product is not defective when it is safe for normal handling and consumption). For a defective design to be unreasonably dangerous, the defective design condition must be hidden and not an obvious defect. Sumnicht, 121 Wis. 2d at 369, 360 N.W.2d at 16.

In applying Wisconsin law, the Court of Appeals for the Seventh Circuit has

suggested five factors to be used when determining the reasonableness of a design. Id., at 372, 360 N.W.2d at 17 (citing Collins v. Ridge Tool Co., 520 F.2d 591, 594 (7th Cir. 1975)). These factors are: 1) conformity of the defendant's design to the practices of other manufacturers in the industry at the time of manufacture; 2) the open and obvious nature of the alleged danger; 3) the extent of the claimant's use of the product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident; 4) the ability of the manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive; and 5) the relative likelihood of injury resulting from the product's present design. Id. Plaintiffs can show the existence of a product's defective design that is unreasonably dangerous through expert opinion testimony formed after an examination of the product. Id.

1. Exhaust shield

According to plaintiffs, shielding would have prevented Nicholas's contact with the high temperature engine exhaust components. Without such shielding, they argue, the lawn tractor was defective and unreasonably dangerous. In addition, plaintiffs contend that the lawn tractor's design violated The American National Standards for Turf Care Equipment-Power Lawn Mowers, Lawn and Garden Tractors, and Lawn Tractors-Safety Specifications:

ANSI/OPEI B 71.1-1986 and the Proposed Lawn Mower Safety Standard promulgated by Consumers' Union. Defendants concede that the burns sustained by Nicholas Adamany were caused by the lawn tractor's exhaust system. Dfts.'s Br., dkt. #28, at 5. However, they argue that it is common knowledge to the ordinary consumer that the exhaust systems of various products, such as cars, motorcycles and lawn equipment, become hot during operation and that contact with hot exhaust or exhaust pipes can cause burns.

The parties dispute whether the burns sustained by Nicholas were the result of his brushing up against the tractor's bumper, the exhaust fumes or the exhaust pipe. It is irrelevant which component of the lawn tractor caused Nicholas's burns. Although I agree with defendants that ordinary consumers would know that exhaust systems generally become hot, an ordinary consumer would not expect to burn himself simply by coming into contact with the front of the lawn tractor. It is undisputed that the lawn tractor's exhaust system was directly against the back side of the front bumper, that Nicholas believes that the bumper of the lawn tractor hit his buttocks and that he sustained third degree burns to his buttocks and perineum. It is undisputed also that Coreen, William and Will all felt heat coming from the front of the tractor after it had been in use and that William stated that the heat was similar to that felt by a person walking in front of a car. Finally, it is undisputed that the Simplicity lawn tractor that William purchased after the accident had an exhaust system that was shielded. Defendants propose no facts to suggest that shielding the exhaust

system of a lawn tractor was unusual in the industry at the time or that doing so would impede the usefulness of its product. Drawing all inferences in favor of the nonmoving parties, a reasonable juror could conclude that defendants' lawn tractor was defective, posed an unreasonable danger and was a substantial factor in causing Nicholas's injuries.

The parties dispute whether the design of defendants' lawn tractor violated the American National Standards for Turf Care Equipment-Power Lawn Mowers, Lawn and Garden Tractors, and Lawn Tractors - Safety Specifications: ANSI/OPEI B 71.1-1986 and the Proposed Lawn Mower Safety Standard promulgated by Consumers' Union. Defendants argue that the purpose of the ANSI guideline is to provide a heat shield for the operator of the lawn tractor, not bystanders. Defendants do not address the Consumers' Union standard. Even if I assume that defendants' product complied with the ANSI safety standards, a reasonable juror could still infer that the lawn tractor was unreasonably dangerous because a person could accidently touch the front of the tractor and burn himself, and such a burn is not an obvious consequence of touching the front of a lawn tractor. Therefore, I will deny defendants' motion for summary judgment with respect to plaintiffs' strict liability claim as it applies to the design and manufacture of the tractor.

2. <u>Failure to warn</u>

Plaintiffs argue that defendants are strictly liable for the absence of an adequate

warning label regarding the heat generated by the tractor. "[A] seller must give the purchaser of a dangerous article a warning that is accurate, strong, and clear, and readily noticeable." Gracyalny, 723 F.2d at 1319. The parties dispute whether the tractor had a label that warned about hot surfaces. Defendants argue that there was a warning of hot surfaces located on the right front of the tractor directly above the front bumper and exhaust outlet pipe when it left the defendants' care, custody and control. Dfts.' Br., dkt. #28, at 9. Plaintiffs argue that even if one assumes that this label was on the tractor, the warning should have been more specific. According to plaintiffs, the tractor should have warned that its high-temperature exhaust components created a severe risk of burn injuries to bystanders, especially children. Plts.' Br., dkt. #34, at 13.

Drawing all inferences in favor of plaintiffs, it is reasonable to assume that plaintiffs would not have purchased defendants' lawn tractor if it had warned of the possibility of burn injuries to children. When plaintiffs purchased the lawn tractor in 1998, they had two children. It is undisputed that when William purchased the tractor, he never questioned the dealer about the heat buildup in the front bumper because he was not aware of it. It is undisputed also that plaintiffs knew that it was dangerous to operate the tractor in the presence of children and that defendants warned that children are attracted to the machine. If plaintiffs had been aware of the additional risk of burns to children and other bystanders even after someone used the tractor, plaintiffs may have decided that the risk to their

children was too great and would have considered purchasing a different product. If plaintiffs had purchased a tractor that had a different design, it is possible that Nicholas's injuries would never have occurred. Therefore, a reasonable jury could infer that defendants' warning label regarding hot surfaces on its lawn tractor was inadequate and that, as a consequence, it was a substantial factor in causing the accident. Regardless, "the adequacy of a warning is an issue for the jury." Gracyalny, 723 F.2d at 1319. I will deny defendants' motion for summary judgment on plaintiffs' strict liability claim as it relates to defendants' failure to provide an adequate warning.

B. Negligence

Plaintiffs make the same arguments about the lack of a shield and adequate warning on the tractor under the theory of negligence. The elements of a negligence claim are: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." Antwaun A. v. Heritage Mutual Insurance Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456, 461 (1999). "The test for negligence is whether the conduct foreseeably creates an unreasonable risk to others." Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 732, 275 N.W.2d 660, 664-65 (1979). However, there is no recovery under a negligence theory unless the plaintiff can prove that the defendant's negligence was a cause

of his injuries. Cause is established by showing that the defendant's negligence was a substantial factor in producing the injury. Clark v. Leisure Vehicles, Inc., 96 Wis. 2d 607, 617, 292 N.W.2d 630, 635 (1980).

I have concluded already that a reasonable jury could infer that coming into contact with the front of defendants' lawn tractor and defendants' failure to warn bystanders that they may burn themselves if they contact the front of the tractor were substantial factors in causing Nicholas's injury. As a result, the pertinent questions with respect to plaintiffs' negligence claims are whether defendants had a duty of care and whether they breached that duty when they designed the front of the tractor exhaust system and failed to provide a more specific warning. "The duty of care of a defendant is established when we can state that it was foreseeable that the defendant's act or omission could harm or injure another person." Morden v. Continental AG, 235 Wis. 2d 325, 355, 611 N.W.2d 659, 674 (2000). When assessing foreseeability, it is sufficient to show that "some injury could reasonably have been foreseen." Id. at 356, 611 N.W.2d at 674. Thus, the question becomes whether defendants knew or should have known that the tractor's exhaust system posed a foreseeable risk of injury. Id. I have noted already that it is undisputed that the lawn tractor's exhaust system was directly against the back side of the front bumper and that an ordinary consumer would not expect to burn himself simply by coming into contact with the front of the lawn tractor. Therefore, a reasonable jury could infer that defendants knew or should have known that

placing the tractor's exhaust system directly against the back side of the front bumper posed a foreseeable risk of injury.

Having established that defendants owed a duty of care, I must consider whether a reasonable jury could infer that defendants breached that duty. "In gauging the liability of a manufacturer, [courts] ask whether a 'reasonably prudent person in the shoes of the defendant manufacturer' would exercise the same degree of care." Morden, 235 Wis. 2d at 358, 611 N.W.2d at 675. Defendants argue that their lawn tractor conformed to the ANSI safety standards and that the purpose of the standards is to provide a heat shield for the *operator* of the lawn tractor. Dfts.' Br., dkt. #38, at 8. Even if I assume that defendants met the ANSI safety standards, a reasonable jury could infer that defendants were negligent for failing to prevent a bystander from contacting hot exhaust components. It is undisputed that a 1975 proposed standard for lawn mower safety by Consumers' Union, requires a shield for a hot exhaust system to protect against hazardous contact. The Consumers' Union standard does not specify that the shield is to protect the operator only. It is reasonable to assume that reasonably prudent manufacturers would be aware of the Consumers' Union standard. In addition, a reasonable jury could view a reasonably prudent manufacturer as one who shields both the operator and bystanders from coming into contact with hot exhaust systems.

Moreover, it is undisputed that plaintiffs purchased a Simplicity lawn tractor after the

accident that had a shield around its exhaust system. Evidence of 'the custom in the industry (what the industry was doing) and the state of the art (what the industry feasibly could have done) at the time' of the design or manufacture is relevant to the jury's determination of negligence." Id. at 359, 611 N.W.2d at 675-76. Defendants fail to propose any facts suggesting that it was impossible or unnecessary to protect bystanders from coming into contact with their tractor's exhaust system. Because the Simplicity lawn tractor had a shield around its exhaust system, a reasonable jury could infer that defendants breached their duty of care by failing to add similar protection to its tractor and therefore were negligent in the manufacture of their product.

Similarly, a reasonable jury could infer that defendants breached their duty of care by failing to place a specific warning on the front of the tractor identifying the risk that bystanders may burn themselves if they come into contact with the front of the tractor. Again, a reasonable interpretation of the Consumers' Union standard for lawn mower safety suggests that manufacturers should shield the exhaust systems to protect against hazardous contact by anyone. I have concluded that it is reasonable to assume that a reasonably prudent manufacturer would have been aware of this proposed standard. Even if defendants flouted the proposed standard by not placing a shield around their tractor's exhaust system to protect bystanders, a reasonable juror could conclude that at the very least defendants should have placed a specific warning about the risk of burn injuries to bystanders who

contact the front of the tractor. Because a reasonable jury could conclude that defendants were negligent in both the design of their tractor and failure to warn of risk of burn injuries, I will deny defendants' motion for summary judgment as to plaintiffs' negligence claim. Gracyalny, 723 F.2d at 1316 ("In negligence cases, questions concerning the reasonableness of the parties' conduct, foreseeability and proximate cause particularly lend themselves to decision by a jury.").

### C. Affirmative Defenses

Defendants raise three defenses to plaintiffs' strict liability and negligence claims: 1) contributory negligence; 2) superseding cause; and 3) public policy considerations.

#### 1. Contributory negligence

Defendants argue that by allowing their 12-year-old son Will to use the lawn tractor as a toy, plaintiffs William and Coreen Adamany were contributorily negligent in causing Nicholas's injuries. "A consumer may be found to be contributorily negligent if he or she sustains injuries from a product while abusing or misusing, or after altering that product." Green, 245 Wis. 2d at 815, 629 N.W.2d at 747 (contributory negligence is defense to strict products liability claims). "Contributory negligence as a cause-in-fact of injury is judged by the same 'substantial factor' test as a defendant's negligence and is generally a jury question

unless reasonable men could not disagree on the issue." Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 736, 275 N.W.2d 660, 666-67 (1979). Defendants assert that plaintiffs knew that the lawn tractor would be used in an area where other young children were playing but allowed Will to misuse the lawn tractor in an unforeseeable manner by giving his friend a ride. Therefore, defendants contend that they should not be held liable for Nicholas's injuries.

The flaw in defendants' argument is that nothing about Will's driving contributed to Nicholas's injuries. Nicholas fell from his bike in proximity to the tractor and was burned when he contacted the front of the tractor. They do not suggest that Nicholas would not have been burned if everything else had been the same, but one of his parents had been driving. Drawing all inferences in favor of the plaintiffs, a reasonable jury could conclude that the age of the driver was not a substantial factor in the cause of Nicholas's injuries. If William and Coreen were negligent, it was in failing to control Nicholas while the tractor was being driven. This is a factor for the jury to consider.

2. Superseding cause

Similar to their contributory negligence defense, defendants contend that Will's use of the tractor as a toy was a superseding cause of the accident involving Nicholas. Wisconsin courts recognize a superseding cause as "an intervening force which relieves an actor from

liability for harm which his negligence was a substantial factor in producing." Stewart v. Wulf, 85 Wis. 2d 461, 475, 271 N.W.2d 79, 85 (1978). Negligent tortfeasors are relieved of liability under this doctrine only in infrequent cases that present "unusual and extreme considerations." Id. at 479, 271 N.W.2d at 88. In adopting § 447 of the Restatement (Second) of Torts (1965), the Wisconsin supreme court recognized that foreseeability is a key factor in deciding to apply the doctrine of superseding cause. Gracyalany, 723 F.2d at 1323; see also Stewart, 85 Wis. 2d at 476-77, 271 N.W.2d at 86-87. A tortfeasor will not be relieved of responsibility if the intervening act should have been anticipated. Id.

Although the question of superseding cause is one of law, the trial court decides the question only after the trier of fact determines that the first actor's conduct was a substantial factor in causing the plaintiff's loss. Id. at 475, 271 N.W.2d at 86 (citing U. S. Fidelity & Guaranty v. Frantl Industries, Inc., 72 Wis. 2d 478, 490, 241 N.W.2d 421 (1976)). Because it will be up to a jury to determine whether defendants' lawn tractor was a substantial factor in causing Nicholas's injuries, I am unable to determine whether plaintiffs' actions were a superseding cause of those injuries.

3. Public policy considerations

According to defendants, even if they were negligent in the design and failure to warn bystanders of the hot exhaust components of their lawn tractor, public policy considerations

insulate them from liability. "Some of the public policy reasons for not imposing liability despite a finding of negligence as a substantial factor producing injury are: (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point." Morgan, 87 Wis. 2d at 737, 275 N.W.2d at 667.

Specifically, defendants argue that plaintiffs' misuse of the lawn tractor as a toy was not something they could or should have reasonably anticipated. Therefore, defendants contend that their negligence is too remote from the injury to impose liability. Public policy considerations are questions of law solely for judicial decision. Id. However, "it is generally better procedure to submit the negligence and cause-in-fact issues to the jury before addressing the public policy issue." Morgan, 87 Wis. 2d at 738, 275 N.W.2d at 667 (citing Padilla v. Bydalek, 56 Wis. 2d 772, 779-80, 203 N.W.2d 15 (Wis. 1973)). I will reserve judgment on defendants' public policy defense until after a jury determines defendants' liability on plaintiffs' claims.

ORDER

IT IS ORDERED that

1) The motion for summary judgment of defendants Cub Cadet Corp., MTD Products, Inc. and MTD Consumer Group, Inc. is DENIED as to the strict liability and negligence claims brought by plaintiffs Nicholas Adamany, William Adamany, Jr., Coreen Adamany and Midwest Security Life Insurance;

2) I will reserve judgment on defendants' public policy defense until after a jury determines defendants' liability on plaintiffs' claims.

Entered this 16th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge