

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph H. Kenney, Esquire, as
Next Friend of John Keyes,
a minor,

Plaintiff,

v.

DEERE & COMPANY and
BRIAN KEYES,

Defendants.

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: CIVIL ACTION
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: NO. 98-602
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MEMORANDUM

R.F. KELLY, J.

MARCH 7, 2000

Before this court is the Motion of Defendant Deere & Company ("Deere") for Partial Summary Judgment on Plaintiff's claims of negligence, failure to warn, breach of warranty and punitive damages, pursuant to Rule 56 of the Federal Rules of Civil Procedure.¹ The Complaint in this case alleges that, on April 6, 1991, Brian Keyes was operating a Deere lawn tractor and, while riding in reverse, he ran over his son, John Keyes, then five-years old, amputating his leg. For the following reasons, Deere's Motion for Partial Summary Judgment will be granted with respect to Plaintiff's claims of negligence, failure to warn, and breach of warranty and denied with respect to Plaintiff's claim of punitive damages.

STANDARD OF REVIEW

¹ The Amended Complaint also alleges a strict liability claim.

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

DISCUSSION

At the outset the parties disagree as to whether New

Jersey or Pennsylvania law applies to the case at hand for purposes of determining whether Plaintiff's claims of negligence and breach of implied warranty are viable claims for the harm allegedly caused by the Deere tractor. In its summary judgment motion, Deere argues that, under the New Jersey Product Liability Act ("NJPLA"), common law causes of action have been codified and only a single product liability action remains. Although Plaintiff does not dispute that negligence and breach of warranty are no longer viable as separate claims for harm caused by a defective product under New Jersey law, Plaintiff characterizes Deere's motion for dismissal of these claims as premature, arguing that Pennsylvania law should apply in this case, and, thus, this Court must determine what state law applies before ruling on the viability of Plaintiff's claims.

A. CHOICE OF LAW

As a federal court sitting in the Eastern District of Pennsylvania, this Court must apply the choice of law rules of the Commonwealth of Pennsylvania when determining which state's substantive law applies to a diversity case. Petrokehagias v. Sky Climber, Inc., Nos. Civ. A. 96-6965, 97-3889, 1998 WL 227236, *3 (E.D. Pa. May 4, 1998). According to Pennsylvania's two-part choice of law analysis, a court must first determine whether a false conflict exists "between the ostensibly competing bodies of law." Aircraft Guar. Corp. v. Strato-Lift, Inc., 951 F. Supp.

73, 76-77 (E.D. Pa. 1997). "A false conflict exists where `only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law.'" LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). If a false conflict does exist, the court must apply the law of the state whose interests would be harmed if its law were not applied. See, e.g., Lacey v Cessna Aircraft Co., 932 F.2d 170, 187-88 (3d Cir. 1991) (finding false conflict where application of Pennsylvania strict liability law would further Pennsylvania's interests in deterring manufacture of defective products and in shifting cost of injuries onto producers without impairing British Columbia's interest in fostering industry within its borders, but applying British Columbia's negligence standard would not serve British Columbia's interest and would harm Pennsylvania's interest). But when the governmental interests of both jurisdictions would be impaired if their law were not applied, a true conflict exists. Id. at 187 n.15. If there is a true conflict between the laws of two or more states, then the court must determine which state has the greater interest in the application of its law.²

² To determine which state has a greater interest in applying its law in a torts case, courts may consider such issues as the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered. Courts should consider the quality over

This Court finds that there is a true conflict between the products liability laws of Pennsylvania and New Jersey. See Petrokehagias, 1998 WL 227236 at *4-5 (finding true conflict between New Jersey and Pennsylvania products liability law).³ Because no "false conflict" exists, a review of the facts of this case is necessary to determine whether New Jersey or Pennsylvania has a greater interest in applying its law. Here, the contacts with New Jersey form the foundation of the case before this Court. Indeed, the accident occurred at the minor plaintiff's home in New Jersey, at which time the minor plaintiff lived with his parents, including co-defendant Brian Keyes. Also, Brian Keyes purchased the Deere tractor at issue from a Deere dealer in Pennington, New Jersey. Furthermore, the minor plaintiff still resides in New Jersey with his mother, and, although Brian Keyes is now temporarily residing part-time in Pennsylvania, he is renovating a home in New Jersey that he intends to move into full time in the near future. Thus, New Jersey law should apply to all the claims in this case.

B. PLAINTIFF'S NEGLIGENCE & BREACH OF WARRANTY CLAIMS

the quantity of contacts attributable to each state. Petrokehagias, 1998 WL 227236 at *4.

³ In Pennsylvania a plaintiff can maintain separate actions for breach of warranty and strict products liability, while New Jersey products liability law, as codified by the NJPLA, does not permit negligence and breach of warranty as separate claims for injuries caused by defective products. Petrokehagias, 1998 WL 227236 at *5.

As stated above, the instant action involves allegations that a product, Deere's tractor, caused harm to the Plaintiff. Accordingly, the NJPLA controls Plaintiff's claims. Walus v. Pfizer, 812 F. Supp. 41, 43 (D.N.J. 1993). "Because the NJPLA 'generally subsumes common law product liability claims,' . . . New Jersey state courts, the Third Circuit and federal district courts have dismissed product liability claims based on theories other than strict liability." Id.; Repola v. Morbark Indus., Inc., 934 F.2d 483, 492 (3d Cir. 1991) ("NJPLA generally subsumes common law product liability claims, thus establishing itself as the sole basis of relief under New Jersey law available to consumers injured by a defective product."); Tirrell v. Navistar Int'l, Inc., 591 A.2d 643, 647 (N.J. Super. Ct. App. Div.) (common-law actions for negligence or breach of implied warranties are subsumed within New Jersey Product Liability Act), cert. denied, 599 A.2d 166 (N.J. 1991). Based on the above, Plaintiff's negligence and breach of implied warranty claims are dismissed.

C. PLAINTIFF'S FAILURE TO WARN CLAIM

Deere contends that Plaintiff's failure to warn claim fails as a matter of law and there is no evidence to support such a cause of action.⁴ A New Jersey plaintiff bringing a failure to

⁴ "A failure to warn, or a failure to warn adequately, may constitute a defect in a product sufficient to support a cause of action in strict liability." Zaza v. Marquess & Nell,

warn claim has the burden of proving that the manufacturer did not warn the consumer of the risks attendant to the product, and that the failure to warn was a proximate cause of plaintiff's injuries. Sharpe v. Bestop, Inc., 713 A.2d 1079, 1083 (N.J. Super. Ct. App. Div. 1998), aff'd, 730 A.2d 285 (N.J. 1999). Accordingly, Deere contends that the evidence of record establishes that Deere properly warned of the risk of injury that materialized in this case and that even if a different warning was given, Brian Keyes would not have acted any differently.

For failure to warn claims, the NJPLA sets forth a strict liability analysis that is similar to a negligence analysis by defining an adequate warning as one that a reasonable prudent person in the same or similar circumstances would have provided. Zaza, 675 A.2d at 632. In this regard, the Products Liability Act states:

In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstance would have provided with respect to the

Inc., 675 A.2d 620, 632 (N.J. 1996). "[T]he defect is in the failure to warn unsuspecting users that the product can potentially cause injury." Id.

danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used.

N.J.S.A. 2A:58C-4.

The NJPLA does not require that warnings be given by a particular means, but, instead, permits manufacturers and dealers to convey reasonable warnings or instructions by the most efficient and effective means available, whether written, oral, or some combination of the two. Repola, 934 F.2d at 491. Thus, "[t]he duty of a machine manufacturer is simply to take reasonable steps to ensure that appropriate warnings for safe use reach foreseeable users of the equipment. What is reasonable depends on the circumstances of a given case." Grier v. Cochran Western Corp., 705 A.2d 1262, 1266 (N.J. Super. Ct. App. Div. 1998).

1. OBVIOUS DANGER?

A preliminary dispute arises between the parties as to whether Deere had a duty to warn in this case. If the injury suffered in the instant action was an inherent or obvious danger associated with using a lawn tractor, Deere is absolved of this responsibility. See Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1253 (N.J. 1990) (recognizing that section 3a(2) of the NJPLA has transformed "obvious danger" into a defense except in instances involving industrial machinery or other workplace

equipment). Here, Deere defines the danger in this case as simply being cut by the rotating blades of a lawn mower, not backing over young children while operating a riding mower in reverse, as characterized by Plaintiff. According to Deere, it is elementary that blades of a lawn tractor or mower are sharp and have the ability to cut, which is so basic to its functioning or purpose that the danger of amputating arms and legs if they are run over by such machines is "obvious."

In deciding whether plaintiffs have a cognizable failure to warn claim under New Jersey law, a court must predict how the New Jersey Supreme court would decide the case, . . . and for guidance "must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand"

Griesenbeck v. American Tobacco Co., 897 F. Supp. 815, 820

(D.N.J. 1995) (finding that defendant cigarette manufacturer had no duty to warn that product was fire hazard if left burning on couch). With respect to whether lawn cutting machines present an obvious blade contact hazard for users and children, the New Jersey Supreme Court has stated the following:

[I]n the case of a lawn mower, the danger of being cut by sharp, exposed blades during use is not inherent: the manufacturer can include a cover that extends to the ground, so that the machine still cuts grass (its intended use) but does not pose nearly so great a threat of injury during operation. Thus, an inherent danger arises from an aspect of the product that is indispensable to its intended

use. The danger of exposed, sharp blades is indispensable to knives, but not to lawn mowers.

Roberts v. Rich Foods, Inc., 654 A.2d 1365, 1373 (N.J. 1995).

Based on the above, this Court finds that, under New Jersey law, the injury suffered by John Keyes was not "obvious," and, thus, Deere did have a duty to warn of the blade contact hazard at issue in this case.

2. ADEQUACY OF WARNINGS

Next, Deere submits that the lawn tractor at issue was accompanied by adequate warnings against operating the machine with children present and operating the mower blades while going in reverse.⁵ Specifically, the warnings on the Keyes mower state the following:

CAUTION

HELP AVOID INJURY

- READ OPERATOR'S MANUAL
- KNOW LOCATION AND FUNCTION OF CONTROLS
- KEEP SAFETY DEVICES (GUARDS, SWITCHES) IN PLACE AND WORKING
- NEVER CARRY CHILDREN
- LOOK BEHIND BEFORE BACKING
- KEEP CHILDREN AND OTHERS AWAY WHEN OPERATING MACHINE
- STOP ENGINE BEFORE PLACING HANDS OR FEET

⁵ On page 2 of the Owner's Manual that accompanied the Deere tractor is a bold warning (positioned next to a picture of a tractor backing over a child) to protect children by keeping them away when operating the machine. The warning also directs users of the tractor to stop the PTO and look behind the tractor for children before backing up, not to let children operate the tractor and to never carry children or allow them to ride on the tractor, mower, or any attachment. (Def.'s Mem., Ex. C.)

- NEAR POWER DRIVEN PARTS
- DO NOT DRIVE WHERE MACHINE COULD SLIP OR TIP
- IF MACHINE STOPS, GOING UP HILL, SHUT OFF PTO AND BACK DOWN SLOWLY
- WHEN LEAVING MACHINE:
 - STOP ENGINE -SET PARK BRAKE -REMOVE KEY

DANGER

(affixed to right deck covering blades with discharge chute and framed between pictures of fingers and toes being detached and objects being thrown)

ROTATING BLADE

DO NOT PUT HANDS OR FEET UNDER OR INTO MOWER WHEN ENGINE IS RUNNING

THROWN OBJECTS

BEFORE MOWING, CLEAR AREA OF PEOPLE AND OBJECTS THAT MAY BE THROWN BY BLADE
DO NOT OPERATE MOWER WITHOUT DISCHARGE CHUTE OR ENTIRE GRASS CATCHER IN PLACE

DANGER

(affixed to left deck covering blades and accompanied by pictures of fingers and toes being detached)

ROTATING BLADE

DO NOT PUT HANDS OR FEET UNDER OR INTO MOWER WHEN ENGINE IS RUNNING

(Def.'s Mem. of Law in Supp. of Partial Summ. J., Ex. B.)

Plaintiff contends that the above warnings are inadequate to demonstrate the risk or even the possibility that the mower could run over a human being, child or otherwise, such that the blades would come into contact with that person. (Pl.'s Resp. to Mot. for Partial Summ. J. of Def. at 21.) According to Plaintiff, "[a] mere 'caution' to keep children and others away while operating the machine does not suggest the enormity of the

danger." Id. Plaintiff adds that there was a "subsequent additional decal" which was added to the Model 265 Deere riding mowers in August of 1988 which more appropriately signaled consumers that the same injury suffered in this case could occur. That warning label reads as follows:

DANGER

ROTATING BLADES CUT
OFF ARMS AND LEGS

- Do not mow when children or others are around
- Do not mow in reverse
- Look down and behind before and while backing
- Never carry children
(framed between pictures of child being run over by tractor moving forward and in reverse)

(Pl.'s Resp. to Mot. for Partial Summ. J. at 23.)

Thus, Plaintiff argues that Deere's Motion for summary judgment on Plaintiff's failure to warn claim should be denied because there is a material issue of fact concerning whether the placement of this improved warning would have prevented the accident at issue, even though the above pictorial graphic decal was added to Deere machines after the subject tractor and others were already distributed. See, e.g., Molino v. B.F. Goodrich Co., 617 A.2d 1235, 1244 (N.J. Super. Ct. App. Div. 1992) ("Manufacturers have a continuing duty to warn of a product's dangers even after distribution."), cert. denied, 634 A.2d 528 (N.J. 1993).

Despite Plaintiff's contentions, this Court finds that the difference in the above warnings is minor, and liability should be based upon more than a mere semantic difference in emphasis. See Seeley v. Cincinnati Shaper Co., 606 A.2d 378 (N.J. Super. Ct. App. Div. 1991) (court rejected proof of inadequacy of warnings where plaintiff's expert merely proffered semantical difference in warning language accompanying press brake machine that severed operator's hand), cert. denied, 617 A.2d 1220 (N.J. 1992).

In Monahan v. Toro Co., 856 F. Supp. 955 (E.D. Pa. 1994), a husband brought a products liability action against a lawn tractor manufacturer arising from an accident in which a tractor overturned and killed the plaintiff's wife. In that case, the claims alleged included, among other things, a negligence cause of action for failure to warn. The court reviewed the plaintiff's claims that the warnings which Toro provided both on the machine and in the operator's manual were neither proper nor adequate and determined that the plaintiff failed to prove that the alleged insufficiency of defendant's warnings caused the accident at issue. In this regard, the court stated:

While plaintiff has offered a different version of a warning, plaintiff has offered no evidence to suggest that Mrs. Monahan could not see the warnings which were provided, that she did not read them, or that she was unable to understand them. Instead,

plaintiff claims that the warnings should have been more precise about the danger of using the tractor on a slope and the possibility of rollover. Plaintiff's argument is flawed, however, because Mrs. Monahan was well aware of the danger of a rollover even without a warning expressly stating it. She had had a rollover in the spring of 1991, one year before the fatal accident. (Sean Monahan Dep. at 64). Thus, the plaintiff can point to no evidence that would show that the alleged insufficiency of defendant's warnings - not explicitly illustrating and warning of the hazard of a rollover - in any way caused Mrs. Monahan's accident because unrefuted evidence shows that Mrs. Monahan was independently aware of the danger of using the tractor on a slope. Therefore, defendant's motion for summary judgment on the issue of negligence for failure to warn must be granted.

Monahan, 856 F. Supp. at 966. The same can be said for the case at hand. As Deere points out, Brian Keyes, the lawn tractor operator in this case, did know of the danger. In this regard, Mr. Keyes acknowledges that he read and understood the warning decals on the tractor at the time he took possession of the machine.⁶ (Def.'s Reply, Exs. 1, 3, Keyes Deps., dated 3/23/99 at 99 and 11/15/99 at 26-27.) Furthermore, Mr. Keyes stated that when he mowed the lawn he was aware of where his children were, so as to avoid any injuries, and thought he knew where they were at the time of the accident. (Pl.'s Opp'n Mem., Ex. A, Keyes

⁶ It is worth noting that, prior to the accident, Mr. Keyes knew that the blades on the Deere lawn tractor would keep turning when he backed up. (Pl.'s Opp'n Mem., Ex. A, Keyes Dep., dated 3/23/99, at 28-29.)

Dep., dated 3/23/99, at 100-01.) Moreover, Mr. Keyes testified that, despite the accident, he continued to cut the lawn with his children outdoors and on the property. (Pl.'s Opp'n Mem., Ex. A, Keyes Dep. at 100-01.) Thus, even assuming that Plaintiff carried his burden of proving that Deere's warnings were inadequate, which he has not done, the presumption that if an adequate warning had been given it would have been heeded disappears in this case, since Deere has presented sufficient evidence to rebut the presumption.⁷ See Sharpe, 713 A.2d at 1086 (plaintiff loses benefit of "heeding presumption" where defendant presents rebuttal evidence such that reasonable minds could differ as to whether warning, if given, would have been heeded by plaintiff). As a result, Plaintiff in this case must carry the burden of persuasion as to proximate cause. Id. Because Plaintiff has failed to supply this Court with any evidence establishing that a different safety warning would have prevented Brian Keyes from backing over his son, summary judgment shall be

⁷ Plaintiff has argued to no avail that Mr. Keyes' testimony is insufficient, under Sharpe, to show that the defendant user has in the past failed to heed safety warnings as construed by the reasonable user, and that his indifference to such warnings was habitual. In fact, Mr. Keyes testified that prior to the accident he occasionally had given his children rides on the John Deere lawn tractor while operating the mower deck. (Pl.'s Opp'n Mem., Ex. A, Keyes Dep. at pp. 70-71.) He further testified that in the year preceding the accident he had mowed the lawn to the rear of the house with his wife and children present in that area an unspecified number of times. Id. at 73-74.

granted in favor of Deere on Plaintiff's failure to warn claim.

D. PUNITIVE DAMAGES

"Punitive damages are awarded `upon a theory of punishment to the offender for aggravated misconduct and to deter such conduct in the future.'" Smith v. Whitaker, 734 A.2d 243, 254 (N.J. 1999). "Mere negligence, no matter how gross, will not suffice as a basis for punitive damages. Rather, plaintiff must prove by clear and convincing evidence a `deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences.'" Id. Accordingly, the NJPLA has codified the standards for the imposition of punitive damages by requiring proof that the defendant's

acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of the safety of product users, consumers, or others who foreseeably might be harmed by the product. For the purposes of this section "actual malice" means an intentional wrongdoing in the sense of an evil-minded act, and "wanton and willful disregard" means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such action or omission.

N.J.S.A. 2A:58C-5; see also Parks v. Pep Boys, 659 A.2d 471, 479 (N.J. Super. Ct. App. Div. 1995).

In this case, Deere argues that it has actively pursued ways to protect its consumers from the danger of backover blade

contact accidents, and, thus, is entitled to summary judgment on Plaintiff's claim of punitive damages. According to Deere, not only has the defendant manufacturer developed and incorporated safety features with the specific goal of minimizing blade contact, such as improved blade housing and the placement of the mower deck at the center of the product, Deere has continued to finance and participate in studies gauging the safety and feasibility of alternative designs as well as the potential for dangerous incidents involving its products.

Plaintiff, on the other hand, argues that Deere did nothing to eliminate, or even reduce, the number of these injuries, despite its awareness of the hazard. Plaintiff also argues that the defendant's participation on committees and blade contact prevention projects with which it did not follow through to completion does not demonstrate responsible behavior, but, instead demonstrates the egregious and conscious disregard for the safety of the public. Plaintiff adds that Deere's failure to distribute to dealers and prior purchasers of the Model 265 riding mowers the pictorial warning decal developed in 1988 that specifically depicted the injury experienced in this case also warrants an award of punitive damages.

The issue of punitive damages is ordinarily a fact question which should be decided by a jury. See Domm v. Jersey Printing Co., 871 F. Supp. 732, 739 (D.N.J. 1994). However,

partial summary judgment has been entered in New Jersey cases in which a plaintiff has not provided a prima facie basis for the award of punitive damages. See, e.g., Parks, 659 A.2d at 479. In the case at hand, a review of the evidence presented by Plaintiff on the propriety of his punitive damages claim shows that dismissal at this juncture would be premature. See, e.g., Naporano Iron & Metal Co. v. American Crane Corp., 79 F. Supp.2d 494, 1999 WL 1276733, *15 (D.N.J. Dec. 30, 1999). Accordingly, Deere's Motion for Partial Summary Judgment on Plaintiff's punitive damage claim shall be denied.

"As a rule, a claim for punitive damages may lie only where there is a valid underlying cause of action." Smith, 734 A.2d at 250. "[T]here is no valid cause of action in strict products liability absent compensatory damages." Oliver v. Raymark Indus., Inc., 799 F.2d 95, 98 (3d Cir. 1986) (predicting that punitive damages cannot be awarded without compensatory damages in a strict products liability action under New Jersey law). Moreover, the NJPLA mandates a bifurcated proceeding in which

[t]he trier of fact shall first determine whether compensatory damages are to be awarded. Evidence relevant only to punitive damages shall not be admissible in that proceeding. After such determination has been made, the trier of fact shall, in a separate proceeding, determine whether punitive damages are to be awarded.

N.J.S.A. 2A:58C-5b; Herman v. Sunshine Chemical Specialties,

Inc., 627 A.2d 1081, 1088 (N.J. 1993). Thus, should the jury render a verdict in favor of Plaintiff in this case and award compensatory damages, a separate proceeding will determine whether punitive damages are to be awarded.

Based on the above, Deere's Motion for Partial Summary Judgment is granted with respect to Plaintiff's claims of negligence, failure to warn, and breach of warranty and denied with respect to Plaintiff's claim of punitive damages. An order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Joseph H. Kenney, Esquire, as
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ORDER

AND NOW, this 7th day of March, 2000, upon consideration of the Motion for Partial Summary Judgment filed by Defendant Deere & Company, and all responses thereto, it is hereby ORDERED that Defendant's Motion is GRANTED with respect to Plaintiff's claims of negligence, failure to warn, and breach of warranty and DENIED with respect to Plaintiff's claim of punitive damages.

BY THE COURT:

ROBERT F. KELLY,

J.