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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-654 / 93-482

KEVIN GALE MUNSON and **KAREN JEAN MUNSON,**

Appellants,

vs.

LEVITON MANUFACTURING COMPANY, INC.,

Appellee.

Appeal from the Iowa District Court for Dallas County, Dale B. Hagen, Judge.

Fire victims appeal directed verdict against them and the court's refusal to allow amendment. **AFFIRMED.**

Jack W. Rogers, Des Moines, for appellants.

W. Timothy Wegman of Peddicord, Wharton, Thune & Spencer, P.C., Des Moines, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

In 1985 the plaintiffs, Kevin and Karen Munson, built a new home in Woodward, Iowa. Installed in the basement and two upstairs bedrooms were two pull chain porcelain light fixtures. A jury question was generated on whether the fixtures were manufactured or designed by defendant, Leviton Manufacturing. Several years after the home was built, the Munsons decided to remove one wall of the upstairs bedroom to make the living room larger. The light fixture in the bedroom closet was not altered. On the morning of December 18, 1989, Kevin and Karen left for work. Their three children remained at home watching television before their school bus arrived. The children left at 7:30 a.m. No one noticed any odor or smoke at that time.

At around 10:18 a.m. smoke was reported coming from the Munson residence. After the fire was put out by the Woodward Fire Department, investigators determined that the fire originated in the ceiling of the living room closet and at the location of the light fixture. The intense heat destroyed most of the living room closet light fixture. An identical light fixture was found in an upstairs bedroom closet.

On October 2, 1991, the Munsons filed a petition against Leviton based on the theories of product liability and negligence. Leviton filed a motion for summary judgment, asserting there was no credible evidence that the

light fixture was manufactured or designed by Leviton, or that a manufacturing defect in the light fixture was present. The district court denied the motion, and the action proceeded to trial.

During defense counsel's opening statement, counsel informed the jury that the Munsons had purchased insurance on the home prior to the fire. Counsel for the Munsons objected to any statements regarding the issue of insurance and moved for a mistrial. The district court overruled the motion for mistrial. During trial, defense counsel objected to any testimony by the engineer regarding his opinion of whether the light fixture was faulty. The district court sustained the motion. At the close of all the evidence, Munsons' counsel moved, pursuant to Iowa Rule of Civil Procedure 106, to amend their petition to include the doctrine of res ipsa loquitur. The district court denied the amendment. The district court subsequently granted Leviton's motion for directed verdict. The Munsons have appealed.

The Munsons argue that the district court erred in not permitting them to amend their cause of action to include the doctrine of res ipsa loquitur. They contend that the issue of negligence was raised, and within that general issue was the doctrine of res ipsa loquitur. They assert this issue was tried by consent of the parties. The Munsons further argue that since the district court concluded that there was sufficient evidence that Leviton

was the manufacturer of the light fixture to generate a jury issue, the court should have submitted this issue of whether the fixture was faulty to the jury. They contend that if negligence was not established directly, then it was established by circumstantial evidence. The Munsons lastly argue the district court erred in failing to grant their motion for mistrial, since these comments were prejudicial and misleading.

I. **Res Ipsa Loquitur Amendment.**

At the end of plaintiffs' evidence, but before they rested their case in chief, they moved the court for permission to amend their claim to include the theory of res ipsa loquitur per rule 106 of the Iowa Rules of Civil Procedure.

The court considered arguments of counsel, and then overruled the motion finding that the addition of this new theory at that point in the trial would prejudice defendant as it had not prepared to defend such a claim.

Rule 106 of the Iowa Rules of Civil Procedure states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely

> when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Iowa R. Civ. P. 106. This rule became effective July 1, 1984. There are not many decisions interpreting this rule so we look to its predecessor for case authority and construction. The predecessor was rule 88 of the Iowa Rules of Civil Procedure and it stated:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Iowa R. Civ. P. 88.

"Allowance of an amendment to a pleading is the rule and denial the exception, although an amendment is not permissible which will substantially change the issue." Allison-Kesley AG Center, Inc. v. Hildebrand, 485 N.W.2d 841, 845 (Iowa 1992); M-Z Enters., Inc. v. Hawkeye Security Ins. Co., 318 N.W.2d 408, 411 (Iowa 1982).

Allowance or disallowance of amendments under rule 88 is a matter for the exercise of trial court discretion. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976).

It is within the trial court's sound discretion whether an amendment to conform to the evidence should be allowed,

and the court's decision will be reversed only if there is a clear abuse of discretion. Cedar Falls Bldg. Ctr., Inc. v. Vietor, 365 N.W.2d 635, 639 (Iowa App. 1985).

John Paul Robinson, a professor of electrical engineering and a person who was established as an expert and offered as such by plaintiffs in their case in chief, was the last witness to testify for the plaintiffs. Following his testimony, plaintiffs' counsel moved the court for leave to amend their petition to include the theory of res ipsa loquitur.

The plaintiffs filed their petition in these proceedings nearly one and one-half years prior to the date of trial. Their expert witness, Robinson, was deposed by defendant in August of 1992, and his report was prepared prior to that date. Defendant contends, and this court agrees, plaintiffs had ample opportunity at that point to move to amend their petition to include the theory of res ipsa loquitur, but they failed to do so. They chose instead to rely on strict liability and claims of negligence. It is the position of the defendant that by permitting the amendment and allowing the theory of res ipsa loquitur the issues involved and to be defended by defendant would have been substantially changed by allowing the amendment at the late date, i.e., the end of plaintiffs' case in chief.

In these proceedings defendant served upon plaintiffs an interrogatory pursuant to the provisions of Iowa Rule of

Civil Procedure 125. This interrogatory required plaintiffs to set forth the mental impressions and opinions held by their expert. In response, the plaintiffs identified John P. Robinson to be their expert and, in further response to the interrogatory, attached a copy of his report.

Throughout the testimony of Robinson, defendant's counsel consistently objected to any questions that would elicit an opinion from Robinson concerning the actual cause mechanism of this fire or pertaining to any defect existing in the product. By our count, at least eight times this objection was successfully made by defendant's counsel. The point being at no time did the expert called by plaintiffs give an opinion as to the actual cause mechanism of this fire or to the existence of any defect in the product.

Fresh with that information and circumstance, as it all took place just prior to the request for amendment, the trial court overruled and denied plaintiffs' motion to amend to include the theory of res ipsa loquitur. The trial court was aware, obviously, of the record just made, and we assume was conversant with the fact that res ipsa loquitur is inappropriate unless the moving party has established the cause of the fire. That is, that the conduct of the defendant was a substantial factor in bringing about the result, i.e., the fire. The mere possibility of such causation is not enough. See

Northwestern Nat'l Ins. Co. v. Raid Quarries Corp., 249 N.W.2d 640 (Iowa 1977); Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579 (Iowa 1973).

Against that factual background with knowledge of that indicated law and giving due consideration to the time when this request was made and conversely the lack of diligence in making such a request long before trial when defendant would have ample opportunity to prepare to defend against this theory, the trial court exercised its discretion and denied the right of amendment. We rule that such a denial was not an abuse of discretion and the court did not err in refusing to allow the requested amendment.

II. Failure to Submit on the Issue of Faulty Light Switch.

Plaintiffs next appeal the failure of the trial court to submit their claim to the jury on the basis of an alleged faulty switch.

This failure to submit was the natural result of a motion for directed verdict successfully urged by defendant's counsel at the end of the plaintiffs' case in chief. The court first stated that there was sufficient evidence as to who actually manufactured the device to submit to the jury. However, the trial court found that there was a dearth of expert testimony presented that would establish, even for jury consideration, any degree of probability or certainty that the product in question was

in a defective condition at the time it left the manufacturer's control or that there had been any sufficient proof of defective condition in this device or product. Northwestern National Insurance Co. v. Raid Quarries, Inc., 249 N.W.2d 640 (Iowa 1977), and Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579 (Iowa 1973), were both referred to the trial court by plaintiffs' counsel and considered by the court in making its decision.

The court found that, at best, the jury would be left to speculate as to the existence of any defective condition in the product involved and, more importantly, what was the cause of this accident or fire. As indicated above, the fact of the fire itself is insufficient to infer negligence.

On the record we find that the trial court was correct in sustaining the motion for directed verdict as there was insufficient evidence to submit this case to the jury on either the theory of strict liability or specified negligence. No error was committed by the trial court in sustaining the motion for directed verdict.

III. Mistrial Issue.

The plaintiffs urged mistrial because defendant's counsel, in his opening statement, injected the subject of "insurance coverage." The trial court considered that under the particular facts and circumstances of this case, it was not impermissible for counsel to do so and further

held that defendant's attorney would not be prohibited from continuing with such line of inquiry and statement during the course of trial. The court made no effort to admonish the jury that they should not consider the subject of insurance either in the trial or in their deliberations.

It is not necessary for us to pass on trial court's decision in that regard since we have sustained the trial court's directed verdict in these proceedings and no issues were submitted to a jury for its consideration.

We have determined the trial court did not commit any reversible errors and the judgment entered is in all respects affirmed.

AFFIRMED.