



IN THE COURT OF APPEALS OF IOWA

RANDALL W. GRAY, AS EXECUTOR)
OF THE ESTATE OF PHYLLIS E.)
JONES, Deceased,)

Appellee,)

Filed September 9, 1977

v.)

NINA LEONE SCHLEGEL and SHELBY)
JEAN STEINHOFF a/k/a SHELBY JEAN)
GOETZ, AS EXECUTORS OF THE ESTATE)
OF C. ROBERT DAACK, Deceased,)

Appellants.)

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2-58291

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Defendant executors appeal an adverse ruling on motion for judgment notwithstanding the verdict in a wrongful death action. Reversed and remanded for new trial.

David W. Leifker, of Hughes & Leifker, of Dubuque, for appellee.

Hal F. Reynolds, of Reynolds, Kenline, Breitbach, McCarthy & Clemens, of Dubuque, for appellants.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This is an appeal from an adverse ruling on a motion for judgment notwithstanding the verdict that appellant's decedent C. Robert Daack was negligent in continuing to operate a gas refrigerator. Daack and appellee's decedent Phyllis E. Jones died from a gas accumulation in a cabin on a barge. We reverse and remand for a new trial.

Appellant contends that Daack had no duty to shut off the gas supply to the refrigerator since his only knowledge was that it was not cooling properly. The evidence was conclusive that the failure to cool had no causal relation to the gas leakage.

To sustain an imposition of liability upon Daack for a failure to shut off the gas refrigerator or to warn decedent Jones of its faulty condition, it must be shown that Daack knew or in the exercise of reasonable care would have discovered the condition requiring warning. *Frantz v. Knights of Columbus*, 205 N.W.2d 705, 711 (Iowa 1973). Under *Frantz* it is also necessary to show such knowledge in delimiting Daack's duty to remedy the defective condition.

The crux of the case is what Daack by the exercise of reasonable care would have discovered. Appellee's expert indicated the most common cause of a failure to cool was a lack of cooling agent, such as Freon. Daack can be charged only with the knowledge a reasonable inquiry would have unearthed. Appellee's proof did not establish that the failure of the heat sensor device in the thermal coupler valve to shut off the gas was a defect discoverable by a routine inspection for repairs by a competent repairman occasioned by a failure to cool.

The record would indicate appellant's motion for judgment notwithstanding verdict should have been granted. Having determined that a reversal is required the question presented is whether the appellee is entitled to a new trial. Rule 26, Rules of Appellate Procedure; *Johnson v. Scott*, 258 Iowa 1267, 1273, 142 N.W.2d 460, 464 (1966).

In its pretrial order and jury instructions, the trial court limited appellee's pleading that the refrigerator was "functioning improperly" to a failure of the pilot light mechanism. Yet, it was uncontroverted that the asphyxiation stemmed from

a failure of a heat sensor device in the thermal coupler valve. Ordinarily such a valve shuts off the gas supply to the burner when the flame is extinguished. Appellant failed to object to the introduction of this evidence. The jury found liability. We are persuaded the jury should be given a second opportunity to view the facts which may be established with proper instruction regarding the applicable law. Rule 26, R. App. P., provides that when a judgment is reversed for error in overruling a motion for judgment notwithstanding verdict which would have terminated the case in favor of the appellant, "... if it appears from the record that the material facts... were not fully developed at trial... and the ends of justice will be served thereby, a new trial shall be awarded of such issue or of the whole case."

In this case, as in **Johnson**, we are persuaded the material facts essential to appellee's claim were not fully developed at trial. 258 Iowa at 1273, 142 N.W.2d at 464. The ends of justice will be best served by ordering a new trial of the whole case.

With a new trial granted, we need not reach the issue of excessive damages urged by the appellant. However, since recovery for loss of services by adult children may be sought in the new trial, we do reach that issue. We recognize the damage portion of the opinion in **Schmitt v. Jenkins**, 170 N.W.2d 632, 666 (Iowa 1969) was decided by an evenly divided court with the award for loss of future parental services beyond the minority years affirmed by operation of law. However, we believe that the present supreme court would endorse **Schmitt** as the law of Iowa. Accordingly, for purposes of this case we adhere to **Schmitt** where it was said:

"The jury in considering loss to the children by their parents' deaths is not limited to the time during which they are minors if it can conclude from the evidence such services would have continued after they attained majority....

... Even adult and married children have the right to expect the benefit of good parental advice and guidance.

Our statute permits the jury to include in its award the value of support as a parent and contains no limitation as to time element during which a child has the right to expect financial aid....

It was a fact question for the jury to determine from all the evidence whether and how long these children even after majority might reasonably expect such financial support from their parents." 170 N.W.2d at 664, 665.

Reversed and remanded for new trial.

All judges concur except Donielson, J. who concurs specially.

DONIELSON, J. (specially concurring)

I concur with the majority opinion as it relates to rule 349, Rules of Civil Procedure. See *Johnson v. Scott*, 258 Iowa 1267, 1273, 142 N.W.2d 460 (1966). However, I decline to join that portion of the opinion dealing with *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 666 (Iowa 1969) because I prefer not to change the state of the Iowa law by adopting what is in essence the minority view. My position is especially reenforced by the fact that such an adoption is not crucial to the disposition of this case. I would prefer to await resolution of this issue by the supreme court.