

IN THE COURT OF APPEALS OF IOWA

No. 0-128 / 89-461

FILED

AUG 30 1990

CLERK SUPREME COURT

MILTON E. NELSON and JOYCE NELSON,
KENNETH MOBURG and DOROTHY MOBURG,

489

Appellees,

vs.

JOHNSON ENERGY SYSTEMS, INC.

Appellant,

and

EDWARD LIVINGOOD, d/b/a WOODLAND
DISTRIBUTORS,

Appellee.

Appeal from the Iowa District Court for Winneshiek
County, Joseph C. Keefe, Judge.

Defendant appeals the district court's judgment,
following a jury trial, awarding plaintiffs damages
stemming from a house fire. **AFFIRMED IN PART AND REVERSED
IN PART.**

Steven K. Warbasse, Cedar Rapids, for appellant.

Dennis G. Larson of Larson & Paskach, Decorah, for
appellees.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

In this products liability action, defendant Johnson Energy Systems, Inc. (Johnson) appeals the district court's judgment, following a jury trial, awarding plaintiffs damages stemming from a house fire. We affirm in part and reverse in part.

On October 31, 1981, plaintiffs Milton E. Nelson and Joyce Nelson (Nelsons) purchased a Model J8800 wood furnace manufactured by Johnson. Defendant Edward Livingood (Livingood) sold and installed the furnace. When Livingood took the furnace from its carton for installation in the Nelson home, he noticed that the furnace door would not completely close. As a result, Livingood dismantled the door and, using a rat-tail file, proceeded to file out certain holes on the furnace where the hinge bolts were connected. Livingood completed the furnace's installation on December 1, 1981.

Livingood had distribution rights to sell Johnson's furnaces in Iowa. Johnson provided Livingood with sales brochures and "service bulletins" for its furnaces. Livingood purchased the furnaces directly from Johnson, brought them to Iowa, and then installed them. The furnaces came largely preassembled, but the installer was expected to perform some assembly.

On January 7, 1982, a fire destroyed the Nelson house. The Nelsons were renting the house from plaintiffs Kenneth Moburg and Dorothy Moburg. Following an investigation of

the fire by Fire Marshall Carl Svenson, Svenson determined the fire was caused by a gap in the furnace door which allowed sparks to be emitted. Svenson also noted the existence of a partially-detached baffle in the furnace which contributed to the fire. A fully-attached baffle may have prevented the emission of sparks from the furnace.

The plaintiffs subsequently brought this lawsuit against Johnson and Livingood. The plaintiffs pled claims of negligence, strict liability, implied warranty of fitness, and implied warranty of merchantability. They further alleged that Livingood was acting as Johnson's agent. The jury found Johnson liable on all four theories and further that Johnson was 100% at fault. The jury also determined Livingood was acting as Johnson's agent. No fault was assessed against Livingood.

I.

Our review is for the correction of errors at law. Iowa R. App. P. 4. Johnson first contends the district court erred in overruling its motion for directed verdict. As this court has previously noted:

Parties to a lawsuit have a right to have a legal theory submitted to the jury so long as it is supported by the pleadings and by substantial evidence. In determining whether a jury question is raised, the evidence must be viewed in the light most favorable to the party having the burden of proof. If reasonable minds can differ on the issue, it is for the jury to decide.

Fratzke v. Meyer, 398 N.W.2d 200, 203-04 (Iowa App. 1986)
(citations omitted).

Johnson asserts there was insufficient evidence to prove causation of the gap and that the furnace reached the Nelsons without substantial change in its condition. We conclude plaintiffs produced substantial evidence as to each theory advanced so as to permit their submission to the jury.

As to theories of strict liability in tort and implied warranty, Johnson claims plaintiffs failed to show the furnace reached the Nelsons without a substantial change in its condition due to Livingood's actions in adjusting the door so it would close. As one authority on products liability points out:

There can be no recovery where an intervening, superseding act has broken the causal connection between the defendant's conduct and the plaintiff's injury. The operation of an intervening cause upon the relationship between the product defect and the plaintiff's injury will not, however, relieve the product seller from liability if that intervening act was reasonably foreseeable. While there can be no recovery where an intervening, superseding act has broken the causal connection between the defendant's conduct and the plaintiff's injury, not every intervening act will be sufficient to relieve the defendant of liability. If such act does not supersede the act or omission of the defendant, so as to render it the proximate, and the defendant's act or omission the remote cause of the injury, the plaintiff may still recover. Whether an act may be considered an intervening act, sufficient to relieve the defendant of liability, depends upon whether it could have reasonably been foreseen by the defendant, which is ordinarily a question of fact. If the intervening act was foreseeable, then it is not superseding, and the causal connection between the act of omission of the defendant and the injury is not broken.

2 M. Madden, *Products Liability*, § 144, at 48-49 (2nd ed. 1988) (footnotes omitted).

We conclude fact issues were generated concerning the original condition of the furnace and whether Livingood's actions constituted an intervening act sufficient to relieve Johnson of liability. The trial court therefore correctly overruled Johnson's motion for a directed verdict.

II.

Johnson next asserts the trial court erred in permitting plaintiffs to call two rebuttal witnesses. Johnson's vice president and general manager, Dennis J. Eichorn, testified for the defense. He gave testimony concerning the tightly-fitted conditions of furnace doors when received by consumers.

On rebuttal, the plaintiffs called Lyle Henning and Gary Sickels. Both men's testimony, which rebutted the testimony of Eichorn, concerned the condition of the door on a furnace manufactured by Johnson and sold by Livingood. Their testimony was clearly relevant. The next question is whether the testimony is proper on rebuttal.

The trial court has considerable discretion in determining what rebuttal evidence should be received. Burkis v. Contemporary Indus. Midwest, 435 N.W.2d 397, 400 (Iowa App. 1988); Blakely v. Bates, 394 N.W.2d 320, 324 (Iowa 1986). The mere fact that testimony may have been utilized in the case in chief does not necessarily preclude its use for rebuttal purposes. Blakely, 394 N.W.2d at 324. The trial court did not abuse its discretion in

permitting Henning and Sickels to testify on rebuttal. Their testimony directly rebutted Eichorn's testimony in regard to the state in which Johnson's furnaces reached the consumer.

III.

Johnson also asserts the trial court committed error in its jury instructions by not limiting plaintiff Moburgs to the amounts listed in their petition. Moburgs originally pleaded damages in the sum of \$55,000. Moburgs did not seek to amend their petition as to the amount of damages sought. During the pendency of the case at bar, Iowa Rule of Civil Procedure 69(a) was amended to prohibit pleadings from stating the specific amount of damages sought. Rule 69(a) went on to provide "[t]he specific amount and elements of monetary damages sought may be discovered by the use of interrogatories." Subsequent to this rule modification, the Moburgs set out in their answers to interrogatories the increased amount of damages sought by them. Through these answers to interrogatories, Johnson was made aware of those damages sought by Moburgs. Additionally, our reading of rule 69(a) would prohibit an amendment on the specific amount of unliquidated damages. As such, the only avenue available to Moburgs was via answers to interrogatories.

We find no error on the part of the trial court in its instructions on damages nor in entering judgment against Johnson for damages in excess of those sought in Moburgs' petition. See also Iowa Rules of Civil Procedure 249.

IV.

Johnson further alleges the trial court erred in its instruction concerning strict liability. Specifically, Johnson objects to that portion of the instruction which provides that failure to have the stove doors inspected to represented standards constituted a defective condition. This instruction is erroneous.

As the Iowa Supreme Court has noted:

Failure to test arises in two main factual situations: where adequate tests for defects are not conducted in production and an article containing a defect is marketed, and where the particular article is not defective but the properties of the product in general are not adequately tested before it is released to the public. Here, as with the matter of warning, the duty of the manufacturer is reasonable care.

West v. Broderick & Bascom Rope Co., 197 N.W.2d 202, 212 (Iowa 1972) (emphasis added). Additionally, the manufacturer's duty of reasonable care, as it relates to products liability, also exists as to the inspection of the product. See 1 American Law of Products Liability § 11.1, at 8-9 (3rd ed. 1987) ("As a general rule, a manufacturer has a duty to test and inspect its products, at least where the nature of the product is such that injury from its use is foreseeable if the product is defective, and where tests or inspections are practicable and would be effective. This is an aspect of the manufacturer's duty of reasonable care."); P. Sherman, Products Liability for the General Practitioner § 102, at 3 (1981) (Manufacturer's duty in products liability is reasonable care in construction

design, inspection, representation, packaging and warning.); 72 C.J.S. Products Liability § 24, at 35-36 (Supp. 1975). Reasonable care is a negligence standard, not one grounded in strict liability. See Banks v. Koehring Co., 536 F.2d 176, 178 (8th Cir. 1976) (Court found substantial evidence to support plaintiff's claim that defendant had been negligent in failing to exercise reasonable care in design and testing of product.). As explained in Restatement (Second) of Torts § 300, comment c at 77 (1965):

A failure to make an inspection does not create liability, unless the inspection, if made, would have disclosed the particular defect which makes the use harmful to the other. The failure to inspect would be negligent if inspection would have discovered other defects which would make the thing unsafe for use, but it is not the cause of the plaintiff's harm unless it would have disclosed the particular defect which brought about the harm.

See also Smith v. Michigan Beverage Co., 495 F.2d 754, 757 (7th Cir. 1974). We conclude that the instructions in question should not have included the provision that failure to have the stove doors inspected to represented standards constituted a defective condition for that type of allegation lies in negligence. See 2 M. Madden, *supra*, § 14.8, at 63; see generally 72 C.J.S. Products Liability, § 23, at 34 (Testing and inspection of product generally irrelevant to imposition of liability under strict liability.). Similarly, an action pertaining to a failure to have the product meet certain advertised standards would be based upon a warranty theory, not strict liability. We

therefore reverse the verdict on plaintiffs' claim of strict liability. Retrial of this case is unwarranted, however, since Johnson was found to be at fault on the other three theories and the erroneous instruction on strict liability was nonprejudicial as to those verdicts. In so holding, we in no way intimate that a products liability claim cannot be brought simultaneously under negligence, breach of warranty, or strict liability theories.

Since the rule of strict liability in tort applies to a retailer as well as a manufacturer of a defective product, see Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 520 (Iowa App. 1977); Kleve v. General Motors Corp., 210 N.W.2d 568, 571 (Iowa 1973), both retailer and manufacturer would be equally liable for injuries caused by a defective product. See Hubbard v. McDonough Power Equip., Inc., 83 Ill. App. 3d 272, 404 N.E.2d 311, 317 (1980). Johnson asserts the jury rendered an inconsistent verdict by its finding against Johnson but not Livingood on the issue of strict liability. We need not determine this issue for our vacation of the jury's verdict on strict liability renders this question moot.

Finally, Johnson argues that there was insufficient evidence to find Livingood was an agent of Johnson. Even if we assume for the sake of argument that Johnson is correct, we find no prejudice befell Johnson since the jury assigned no fault to Livingood. Costs of this appeal are assessed against defendant Johnson.

AFFIRMED IN PART AND REVERSED IN PART.