

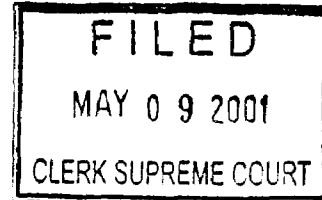
IN THE COURT OF APPEALS OF IOWA

No. 0-784 / 99-1903
Filed May 9, 2001

MARK BEVERLIN,
Plaintiff-Appellant/Cross-Appellee,

vs.

BALZER BROTHERS,
Defendant-Appellee/Cross-Appellant.



Appeal from the Iowa District Court for Des Moines County, Harlan Bainter, Judge.

Plaintiff appeals the district court judgment entered on a jury verdict for defendant in plaintiff's action to recover for injuries he sustained from falling into a vat manufactured by defendant containing boiling grease. **REVERSED AND REMANDED WITH DIRECTIONS.**

Michael J. Schilling of Cahill, Dieterich & Schilling Law Office, Burlington, and George E. Wright of Wright Law Firm, Fort Madison, for appellant.

Peter J. Thill and Roger A. Lathrop of Betty, Neuman & McMahon, L.L.P., Davenport, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Plaintiff Mark Beverlin appeals from a jury verdict in favor of defendant Balzer Brothers (hereinafter "Balzer"), a partnership. Beverlin claims the district court erred in certain evidentiary rulings. In its cross-appeal, Balzer contends the district court should have sustained its motion for directed verdict because Beverlin's claim is barred by the statute of repose. We reverse on the appeal, affirm on the cross-appeal, and remand for new trial.

I. Factual Background and Proceedings. Mark Beverlin sustained devastating injuries when he fell into an open scalding hot vat of vegetable oil on April 21, 1997. At the time of the injury, Beverlin was using the vat to fry potato chips in the course and scope of his employment with Sterzing Food Company. The vat in question was one of six units that had been fabricated by Balzer and sold to Sterzing over a period of years.

Beverlin sued Balzer on May 6, 1998, alleging negligence and strict liability theories. In its answer, Balzer denied liability and asserted the claim was barred by Iowa Code section 614.1(2A)(a) (1997), the statute of repose.¹ The first interrogatory submitted to the jury asked the panel to identify the particular vat in which plaintiff was injured. The jury found Beverlin was injured in vat number six. In its answer to the second interrogatory, the jury found vat number

The statute provides, in relevant part:

[Actions] founded on . . . injuries to the person . . . brought against the manufacturer . . . of a product based upon an alleged defect in the design . . . or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty shall not be commenced more than fifteen years after the product was first purchased . . . or installed

Iowa Code § 614.1(2A)(a).

six was not installed and operational at Sterzing's plant prior to May 6, 1983. The jury then found Balzer was not at fault, and the district court dismissed Beverlin's petition and entered judgment against him for the costs of the action.

On appeal, Beverlin contends the district court erred in (1) permitting Balzer's liability expert to testify the vat was not unreasonably dangerous, and (2) permitting the same expert to testify Iowa Occupational Safety and Health Administration ("IOSHA") inspected Sterzing's premises and found no violations of safety regulations. In its cross-appeal, Balzer claims the district court should have sustained its motion for directed verdict because the record conclusively establishes the vat in question was installed and placed in service at Sterzing more than fifteen years prior to the commencement of this action.

II. Standard of Review. We generally review the admission of evidence under an abuse of discretion standard and do so here. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). Rulings on the admissibility of opinion evidence are not disturbed on appeal unless manifest abuse of discretion is shown. *Hegtvedt v. Prybil*, 223 N.W.2d 186, 189 (Iowa 1974). We review the denial of a motion for directed verdict for correction of errors of law. *Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 466 (Iowa 2000).

III. Evidentiary Rulings.

A. Evidence of IOSHA Inspections. Balzer called Russell Marhefka to testify on liability issues. Marhefka, who holds an undergraduate degree in engineering and a master's degree in engineering management, testified IOSHA

inspected Sterzing's plant before Beverlin's injury. Counsel for Balzer then asked the witness:

Q. And what, if any, citations or corrective action was ordered by IOSHA in 1996 or prior to Mark Beverlin's accident?

Counsel for Beverlin interposed an objection on hearsay and relevance grounds.

The objection was overruled and Marhefka gave the following answer:

A. . . . They were looked at before by IOSHA people prior to Mr. Beverlin's accident, and as far as I recall there was nothing at all said about vat number 6 or any of the vats.

We do not reach the question of whether Beverlin's objections were meritorious because the same evidence was offered by Balzer and received in evidence through another witness. Thomas Blackwood, a manager for Sterzing, testified without objection that IOSHA inspections of the employer's plant prior to and after Beverlin's injury resulted in no citations or other corrective action against the employer. We find no reversible error in connection with the district court's ruling because error, if any, was harmless. See *Miller v. Bonar*, 337 N.W.2d 523, 528 (Iowa 1983).

B. Testimony Regarding Unreasonable Danger. Marhefka was asked to opine whether the vat was unreasonably dangerous. Counsel for Beverlin objected:

Now, Your Honor, we'll object to this. First of all, it is beyond the scope of his Rule 125 answer and beyond the scope of his deposition given August 5, 1999. Also it calls for a legal conclusion, invades the province of the jury, that the witness is not qualified nor is he entitled to give an opinion as to whether or not a vat was unreasonably dangerous. This is for the jury.

The objection was overruled and the witness testified the vat was not unreasonably dangerous.

In *Aller v. Rodgers Machinery Mfg. Co.*, 268 N.W.2d 830 (Iowa 1978), the plaintiff sought to have his expert testify on the question of whether a product design was dangerous to the operator when used in the manner and purpose for which it was intended. *Id.*, at 832. The district court sustained an objection to the testimony. In affirming the evidentiary ruling on appeal, our supreme court concluded:

The court here would have been correct in considering the question at issue as one calling for an opinion on a question of law. The law of strict liability requires that a defective product must be unreasonably dangerous to the user. The requirement of unreasonable danger is a legal standard upon which no witness, expert or non-expert, may express an opinion as to whether or not the person or the conduct or the product measures up to that standard.

Id. at 840. (citations omitted).

Balzer contends the rule set forth in *Aller* was effectively overruled or at least diluted by the adoption of rule 704 of the Iowa Rules of Evidence in 1983. This rule provides "[t]estimony in the form of opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Iowa R. Evid. 704. The comment to the rule provides:

Note, however, that while this section and prior Iowa case law abolish the so-called ultimate issue rule, testimony from experts is not without limitations. Experts are not to state opinions as to legal standards. On this basis, questions such as whether X was negligent or whether a product was unreasonably dangerous may be excluded. *Aller v. Rodgers Machinery Mfg. Co., Inc.*, 268 N.W.2d 980 (Iowa 1978).

Iowa R. Evid. 704 cmt. Balzer contends the comment to the rule supports the proposition the district court may, but is not required to, exclude expert opinion testimony on the ultimate issue of whether a product is unreasonably dangerous. We are not convinced.

Our supreme court restated its approval of the *Aller* restriction on the proper scope of expert testimony after the adoption of rule 704. In *United Cent. Bank of Des Moines v. Kruse*, 439 N.W.2d 849 (Iowa 1989), our supreme court addressed the meaning of the committee comment to rule 704:

Although it is frequently stated that witnesses should not be permitted to give their opinion on questions of domestic law, (citations omitted) there are exceptions to this rule. As presented in the committee comment accompanying Iowa Rule of Evidence 704, this limitation extends only to opinions of law which go to the ultimate issue in the case. *We think the same rule extends to opinions of law which relate to a rule of decision to be directly applied by the court or jury in determining the case, such as the elements of the cause of action.* (Emphasis supplied).

Id. at 852 (emphasis supplied); see also *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992) (reversing district court ruling that allowed investigating officer to testify a motorist had “failed to yield the right-of-way”). Marhefka’s testimony the vat was not unreasonably dangerous was an opinion of law relating directly to a rule of decision to be directly applied by the jury. Thus, the district court erred in overruling Beverlin’s objection. We conclude the error was prejudicial to Beverlin and therefore reverse on this issue. In view of our resolution of this issue, we do not reach Beverlin’s claim Marhefka’s opinion testimony should have been excluded because it was inconsistent with or went beyond the fair scope of the expert’s deposition and answer to interrogatory. See Iowa R. Civ. P. 125(d).

IV. Balzer's Cross-Appeal. On cross-appeal, Balzer contends it conclusively established the vat was sold and installed more than fifteen years before Beverlin commenced this action and therefore proved its affirmative defense based on the statute of repose, Iowa Code section 614.1(2A). In view of this, Balzer contends the district court erred in failing to sustain its motion for directed verdict. In reviewing rulings on motions for directed verdict, we view the evidence in the light most favorable to the party against whom the motion was made regardless of whether the evidence was contradicted. Iowa R. App. P. 14(f)(2); *Top of Iowa Co-op*, 608 N.W.2d at 466. We afford the nonmovant every legitimate inference that can reasonably be drawn from the evidence. *Heick v. Bacon*, 561 N.W.2d 45, 47 (Iowa 1997); *Lawrence v. Grinde*, 534 N.W.2d 414, 418 (Iowa 1995). The proper inquiry is to determine whether the record contains "substantial evidence . . . to support the challenged finding." *Boham v. City of Sioux City*, 567 N.W.2d 431, 435 (Iowa 1997). In applying the standard, it is well settled "if reasonable minds could differ on an issue in light of the evidence presented, the court must submit the issue to the jury." *Kansas City Life Ins. Co. v. Hullinger*, 459 N.W.2d 889, 894 (Iowa Ct. App. 1990). Even if certain facts are not in dispute, a jury question exists if reasonable minds might draw different inferences from those facts. Iowa R. App. P. 14(f)(17).

Balzer bore the burden of proving its affirmative defense. *Dezsi v. Mutual Benefit Health & Accident Ass'n*, 255 Iowa 1027, 1030, 125 N.W.2d 219, 221 (1963). Balzer presented evidence tending to establish it sold Sterzing six vats of the type in which Beverlin was injured. Balzer contends it proved the particular

vat in which Beverlin was injured was billed to Sterzing on March 31, 1982, and placed in service by the buyer on May 12 of the same year. Balzer further asserts Beverlin produced no evidence to contradict the assertion this litigation was commenced more than fifteen years after the product was installed for use. Beverlin contends a fact issue was generated on the issue of when Balzer sold and installed the vat in question in Sterzing's plant and therefore the issue was properly submitted to the jury for decision.

We conclude the district court properly submitted the statute of repose issue to the jury. Balzer sold a total of six vats to Sterzing during the period from March 31, 1982, to 1994.² Sterzing did not submit purchase orders for the vats which bore no serial numbers or other distinguishing markings. The invoice dated March 31, 1982, which Balzer claims related to the vat in which Beverlin was injured, does not specify a vat number. Moreover, the evidence established the numbers Sterzing assigned to the vats within the plant were changed from time to time over the years as Balzer sold and installed additional vats. Balzer offered testimony tending to prove the vat in which Beverlin was injured was denominated by Sterzing as vat number six on the date of injury. Although Balzer's evidence would support a finding vat number six was installed more than fifteen years before this action was commenced, we conclude the resolution of the statute of repose issue involved credibility determinations which were properly submitted to and resolved by the jury. Generally, the jury is in the best

² Sterzing's production manager testified the last of the six vats was installed in 1986. Ron Balzer estimated, however, the last of the vats was installed "probably five years ago."

position to assess credibility. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995); *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). It is the jury's duty to sort out the credibility of witnesses and place credibility where it belongs. *State v. Schertz*, 328 N.W.2d 320, 322 (Iowa 1982). The jury may believe or disbelieve the testimony of witnesses as it chooses. *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984).

Thomas Blackwood, Sterzing's vice-president, and Craig Smith, the company's production manager, gave inconsistent answers under oath when asked to provide the date when the vat was placed in service. In pretrial discovery responses, they initially stated the vat was placed in service on May 28, 1982. At trial, however, they testified Sterzing began using the machine on May 12, 1982. They attempted to explain their confusion by explaining the vats had been renumbered from time to time as additional vats were added to the plant, and by suggesting further research in Sterzing's production records had relieved their confusion. Although both of the claimed in-service dates provided by Blackwood and Smith were in May of 1982, the jury was entitled to reject their impeached testimony as unreliable. It is beyond dispute at least one of the six vats was installed in Sterzing's plant less than fifteen years before Beverlin was injured.³ In view of the absence of serial numbers or other identifying marks on the vats, the apparent confusion of Blackwood and Smith with regard to the in-service date of the vat in question, and Sterzing's history of changing the numbers assigned to the vats as additional units were added to the plant cause

³ The record does not include invoices for five of the six vats sold by Balzer to Sterzing. Accordingly, we are unable to discern how many were installed after May 6, 1983.

us to conclude the jury was properly given the task of resolving the statute of repose issue. Accordingly, we find no error in the district court's ruling denying Balzer's motion for directed verdict.

V. Issues on Remand. The parties disagree with respect to the scope of the issues to be tried on remand. Beverlin contends the statute of repose issue was resolved by the jury and should not be retried. Balzer asserts the issue was "hotly disputed" and should be retried with the liability issue. The general rule dictates when a new trial is ordered, all issues should be retried. See, e.g., *Householder v. Town of Clayton*, 221 N.W.2d 488, 493-94 (Iowa 1974); *In re Estate of Ring*, 237 Iowa 953, 968-69, 22 N.W.2d 777, 785 (1946). However, our cases have authorized a partial retrial with some issues deemed fixed by the first verdict in some instances. See *Schmatt v. Arenz*, 176 N.W.2d 771, 775 (Iowa 1970) (requiring retrial of only damages). Partial retrials may be authorized if "it should appear that the issue to be tried is distinct and separable from the other issues, and that the new trial can be had without danger of complications with other matters." *Larimer v. Platte*, 243 Iowa 1167, 1176, 53 N.W.2d 262, 267-68 (1952) (quoting 39 Am. Jur., New Trial, § 22, at __ (19__)). We conclude the statute of repose issue was fully tried and properly submitted to the jury and decided. The issue is distinct and separable from the remaining issues to be retried. Accordingly, in the interest of judicial economy, we reverse and remand for a new trial of all issues except the statute of repose defense.

REVERSED AND REMANDED WITH DIRECTIONS.

Streit, P.J., concurs; Vaitheswaran, J., concurs in part and dissents in part.

VAITHESWARAN, J. (concurring in part and dissenting in part)

I respectfully concur in part and dissent in part. I disagree only with that portion of the majority's opinion reversing and remanding for a new trial on all issues except the statute of repose defense. In my view, the defense is integrally related to the issue of liability and, accordingly, I would follow the general rule that, when a new trial is ordered, all issues should be retried.