IN THE COURT OF APPEALS OF IOWA

No. 5-517 / 94-1046

MICHAEL BREDBERG, A Minor Person, by His Parents, **James L. Bredberg,** and **Linda K. Bredberg,** and **JAMES L. BREDBERG** and **LINDA K. BREDBERG,**

Plaintiffs-Appellees,

vs.

PEPSICO, INC., A Corporation, and **PEPSI COLA GENERAL BOTTLERS, INC.,** A Corporation,,

Defendants-Appellants.

JOYCE'S INCORPORATED d/b/a **JOYCE'S FOOD LAND,**

Defendant.

FILED
FEB 28 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pocahontas County, Louie F. Beisser, Judge.

Syllabus: manufacturer and bottler appeal from action involving exploding carbonated beverage bottle. **REVERSED AND DISMISSED.**

Mark A. Woolums and Martha L. Shaff of Betty, Neuman & McMahon, Davenport, for appellant PepsiCo, Inc.

Dawn R. Seibert of Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, for appellant Pepsi Cola General Bottlers, Inc.

Richard B. Maher of Marks, Clare & Richards, Omaha, Nebraska, for appellee.

Heard by Sackett, P.J., and Habhab, and Cady, JJ.

SACKETT, P.J.

Defendants-appellants PepsiCo, Inc., and Pepsi Cola General Bottlers, Inc., in a products liability action, appeal the trial court's denial of their motions for judgment notwithstanding the verdict and new trial. We find defendants' requests for directed verdict should have been granted. We reverse and dismiss.

On July 22, 1990, plaintiff-appellee Michael Bredberg was injured by a Diet Mountain Dew soda bottle. Plaintiff had purchased the soda from a vending machine located outside a grocery store operated by defendant Joyce's Incorporated. Plaintiff claimed the soda bottle exploded in his hand after he got it from the machine. He brought suit against Joyce's Incorporated, PepsiCo, Inc., and Pepsi Cola General Bottlers, Inc. Defendant PepsiCo owns the formula and trademarks for Diet Mountain Dew and licenses the rights to manufacture and distribute it to independent bottling companies. Defendant Pepsi Cola is such a bottling company and bottled the beverage claimed to have caused plaintiff's injury.

Throughout the trial, defendants claimed plaintiff had dropped the bottle causing it to break and injure his hand. The fault of Joyce's Incorporated and plaintiff was submitted to the jury on the theory of negligence. Fault of PepsiCo and Pepsi Cola was submitted on a theory of strict product liability. The jury apportioned fault among the parties as follows: plaintiff - fifty percent; defendant Joyce's Incorporated - five percent; defendant Pepsi Cola - twenty-five percent; and defendant PepsiCo - twenty percent. Defendant Pepsi Cola and defendant PepsiCo filed post-trial motions

for judgment notwithstanding the verdict and new trial, and the motions were denied. They now appeal. Joyce's Incorporated is not a party to the appeal.

Defendant PepsiCo claims the trial court should have granted its motions for directed verdict and for judgment notwithstanding the verdict. Questions involving the sufficiency of evidence to generate a submissible jury issue in the face of a motion for directed verdict present issues of law. *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 96 (Iowa 1995). When reviewing the denial of a motion for a directed verdict or judgment notwithstanding the verdict, we view the evidence in the light most favorable to the resisting party. *Id.* When the sufficiency of the evidence to support a jury finding is at issue, we look to whether there is substantial evidence to support the finding. *Id.*

To recover against the manufacturer of an alleged defective product on the theory of strict liability, plaintiff must show:

1. Defendant sold the product.

2. Defendant was engaged in the business of selling the product.

3. The product was in a defective condition at the time of sale.

4. The defective condition was unreasonably dangerous to plaintiff.

5. Plaintiff used the product in the intended manner or in a manner reasonably foreseeable by defendant.

6. The product was expected to and did reach plaintiff without substantial change in its condition.

7. The defect was a proximate cause of plaintiff's damage.

8. The amount of the damage.

Fell v. Kewanee Farm Equip. Co., a Div. of Allied Prods., 457 N.W.2d 911, 916 (Iowa 1990).

The evidence showed defendant PepsiCo authorized the suppliers from whom defendant Pepsi Cola could buy bottles. There was no competent evidence defendant PepsiCo controlled the design or specifications of the bottles other than the graphics and placement of its logo. Defendant PepsiCo set standards for the processing of the Diet Mountain Dew syrup into a carbonated beverage, and it retained some inspection rights over defendant Pepsi Cola's production of Diet Mountain Dew. There was no evidence the syrup sold by PepsiCo for processing by Pepsi Cola was defective at the time of sale.

There is support for the conclusion the manufacturer of syrup or extract does not have a sufficient role in manufacturing a bottle of soda so as to subject it to liability for the subsequent explosion of a bottle, *see Tyler v. PepsiCo, Inc.*, 198 Ga. App. 223, 400 S.E.2d 673 (Ga. Ct. App. 1990); *Better Beverages, Inc. v. Meschwitz*, 643 S.W.2d 502 (Tex. Ct. App. 1982); *Poulos v. Cock 'N Bull Beverage, Inc.*, 83 N.M. 45, 487 P.2d 1350 (N.M. Ct. App. 1971), even if it furnished guidelines or instructions for the processing of the product, retained authority to approve the supplier of the bottles, or had the right to inspect the bottler's manufacturing and

distribution processes. *See Tyler*, 198 Ga. App. at 224 , 400 S.E.2d at 674-75; *Better Beverages, Inc.*, 643 S.W.2d at 504.

Defendant Pepsi Cola claims the trial court erred in failing to grant its motion for directed verdict. Plaintiff bore the burden of proving the elements of a claim based on strict liability. *See Kleve v. General Motors Corp.*, 210 N.W.2d 568, 571 (Iowa 1973).

Defendant Pepsi Cola first advances, because plaintiff was not able to produce the bottle that injured him, there is not sufficient evidence to support a finding the soda bottle was ever defective.

Proof can be established by direct or circumstantial evidence. *See id.* If a plaintiff uses circumstantial evidence to prove the existence of a product defect, the evidence "must be sufficient to make the theory reasonably probable, and more probable than any other theory based on the evidence." *Wernimont v. International Harvestor Corp.*, 309 N.W.2d 137, 141 (Iowa App. 1981). It is for the jury or other trier of fact to say whether circumstantial evidence meets this test. *Osborn v. Massey-Ferguson, Inc.*, 290 N.W.2d 893, 901 (Iowa 1980). The fact the bottle that injured plaintiff [redacted] available is not fatal to plaintiff's claim based on strict liability if he can prove the necessary elements by other means. *See Centrone v. C. Schmidt & Sons, Inc.*, 114 Misc.2d 840, 847, 452 N.Y.S.2d 299, 304 (N.Y. Sup. Ct. 1982) (bottle fragments are frequently unavailable in exploding bottle cases, having been swept up and discarded, but their unavailability is not fatal to the lawsuit).

In strict liability, plaintiff takes the design as it was finalized in the finished product and shows it was both dangerous and it was unreasonable to subject the user to this danger because the user would not contemplate the danger in the normal and innocent use of the product or consumption of the product. *Fell*, 457 N.W.2d at 918; *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 835 (Iowa 1978). Such proof does not necessarily rest on direct evidence. *Aller*, 268 N.W.2d at 834. A plaintiff may, and usually does, establish a product is unreasonably dangerous by circumstantial evidence. *Id.*

Plaintiff testified the bottle exploded. He provided evidence from an expert in the field of glass. The expert had studied the bottling of carbonated beverages and testified glass can fail due to a loss of strength caused by repeated use of bottles. The expert explained the potential for explosion when a carbonated beverage is put in a defective bottle. Based on plaintiff's injuries and statements regarding the accident and drawings and statements made by witnesses who saw the broken bottle fragments, it was the expert's opinion the bottle that injured plaintiff exploded. There is evidence from which a fact finder could determine the bottle exploded.

Defendant Pepsi Cola claims there is not evidence to show the defect that caused the bottle to explode was present when the bottle left the factory, or that the bottle was unreasonably dangerous. The expert did not identify the manufacturer of the bottle. There was no proof of a specific defect. There was evidence of improper handling by defendant Joyce's Incorporated. There was evidence of improper

handling by plaintiff. Circumstantial evidence must show a probability, not a mere possibility, the product was defective when it left the manufacturer's hands.

Furthermore, the allegation of fault to the plaintiff by the jury is not consistent with the finding of strict liability of defendant PepsiCo.

Plaintiff failed to meet his burden of offering circumstantial evidence from which it could reasonably be inferred it was more probable than not the product was defective when it left defendant Pepsi-Cola's control and the defective condition was unreasonably dangerous. Defendant Pepsi-Cola's motion for judgment notwithstanding the verdict should be granted.

Having so decided, we find it unnecessary to address the other issues raised on appeal.

REVERSED AND DISMISSED.