FILED
MAY 25 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EVERETT OSBORN,	)	Filed May 25, 1982
Plaintiff-Appellant,	)	
vs.	)	2-90 357 2-66576
MASSEY-FERGUSON, INC.	)	
Defendant-Appellee.	)	

Appeal from Jasper District Court, Harry Perkins, Judge.

Plaintiff appeals from the judgment entered on a jury verdict for defendant in this products liability suit to recover for personal injuries sustained when the combine plaintiff was driving went out of control and into a ditch. Plaintiff claims that the trial court erred in giving two certain instructions to the jury. REVERSED AND REMANDED FOR A NEW TRIAL.

Diehl, Clayton, Cleverley & Knopf, Newton, for plaintiff-appellant.

Herrick, Langdon & Langdon, Des Moines, for defendant-appellee.

Heard en banc.

PER CURIAM

Plaintiff appeals from the judgment entered on a jury verdict for defendant in this products liability suit to recover for personal injuries sustained when the combine plaintiff was driving went out of control and into a ditch. Plaintiff claims that the trial court erred in giving two certain instructions to the jury. We reverse the judgment of the trial court and remand for a new trial.

This is the second time this case has been appealed; see Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980). We quote from that opinion the following factual background:

> Plaintiff Everett Osborn purchased a used 1969 Massey-Ferguson combine model 410 in September 1970. The combine had been manufactured by defendant Massey-Ferguson, Inc. Plaintiff used the combine in 1970 and again in 1971. On the night of September 30, 1971, plaintiff was driving the combine on a country road while returning home after he had combined beans for approximately four and one-half hours. Osborn heard a "thumping" from beneath the floorboard of the cab, which is on the left side of the machine. The combine immediately veered to the left, went down a steep ditch, and turned over on its right side, damaging the machine and injuring plaintiff. Osborn had tried to steer the combine to the right, away from the ditch, but the machine would not steer. An investigation shortly after the accident by plaintiff's sons showed that the main drive belt was broken and the nearby hydraulic steering line was severed. The belt and line were located on the left side of the combine just below the cab. The physical damage was almost exclusively to the right side of the combine. The right rear wheel was broken off and was found underneath and the combine at the bottom of the ditch. One or two of the J-bolts holding the right front dual wheel had broken off, with the other J-bolts remaining fastened at the top of that wheel. The tire on the right front drive wheel was flat.
>
> Plaintiff's petition was in two divisions. In one division he asserted defendant had been negligent in its manufacture and design of the combine, causing the machine's steering mechanism to fail with resultant injuries to plaintiff. A second division contained a products liability claim, alleging that the design of the combine's hydraulic steering mechanism was defective.

> Plaintiff's theory at trial was that while the combine was on the road, the main drive belt on his self-propelled combine broke and that belt severed the nearby hydraulic line, which is connected to the steering of the combine. This resulted in a loss of fluid in the hydraulic line, which in turn caused a failure of steering. Plaintiff, therefore, lost control over the steering and the combine veered to the left and down into the ditch.
>
> Both divisions of his petition and his offered evidence were based on a claim of defective design by defendant in placing the main drive belt too close to the hydraulic line without adequate shielding to prevent severance of the line should the main drive belt break.

290 N.W.2d at 896.

At the close of plaintiff's case, the trial court granted defendant's motion for a directed verdict. The supreme court reversed and remanded for a new trial, holding that defendant's objections to the testimony of one of plaintiff's expert witnesses were erroneously sustained and that the case should have been submitted to the jury. 290 N.W.2d at 901, 902.

The new trial began on November 12, 1980, and ended thirteen days later when the jury returned a verdict in defendant's favor on the products liability claim (the negligence claim was not submitted to the jury). Plaintiff's motion for a new trial was overruled and he brought this appeal.

I.

Plaintiff argues for reversal based on two instructions which he claims should not have been given to the jury. The first of these was Instruction No. 18, which reads as follows:

> When it appears that certain evidence which was in the control of one party is unavailable the jury may draw an inference from the unexplained failure of such evidence to appear and infer that if such evidence had appeared it would have lent credence to the defense presented which would have been adverse to the interested party; namely the plaintiff, to whom the evidence was available by whom it should have been preserved.

> It is generally true that where a party such as the plaintiff fails to produce available evidence or destroys or spoils the evidence an inference arises that such evidence would have been unfavorable to him. In this connection it stands without dispute that the relevant evidence; namely, the belts and hydraulic lines which were on the combine at the time of the accident, were within the control of the plaintiff, whose interest would naturally call for its protection and production at time of trial. If you find that the plaintiff has failed to produce said belts and broken lines without satisfactory explanation it may be inferred that had such belts and broken lines been produced such evidence would be unfavorable to the plaintiff's position.

There is no dispute as to the correctness of the general rule as stated by the trial court. See, e.g., Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682, 685 (Iowa 1976); Quint-Cities Petroleum Co. v. Maas, 259 Iowa 122, 127, 143 N.W.2d 345, 348 (1966). McCormick on Evidence, § 272 (2d ed. 1972).

Plaintiff, however, claims that this "adverse-inference" instruction is inapplicable in this case since the broken belt and hydraulic lines were not in his possession or control and were in any event equally available to defendant. It is true that if evidence is equally available to both parties, no adverse inference is to be drawn from the failure of one party to produce that evidence. State v. Thomas, 162 N.W.2d 724, 727 (Iowa 1968); see Crosser, 240 N.W.2d at 685.

We agree with the trial court that Instruction No. 18 was properly given in this case. We can barely give credence to plaintiff's assertion that the broken parts in question were not in his control. It is not disputed that the combine was in the possession of plaintiff and his sons for several days after the accident during which time it would have been simple enough for them to remove and preserve the broken belt and hydraulic lines. It is obvious that they were aware of the importance of those parts since plaintiff's sons took many photographs of the area of the combine in question the day after the accident and expressed the opinion that the breakdown of those parts caused the accident. Even after the combine was sold for salvage and a new one purchased in order to finish the soybean harvest, the former, broken parts and all, sat on the lot of a Colfax

implement dealer for several years and remained readily accessible to plaintiff. In fact, Larry Osborn, one of plaintiff's sons, testified that he bought a tire off the damaged combine two years after the accident. Under these circumstances, we must concur with the trial court's finding that the plaintiff had control over the evidence in question.

Nor can we accept plaintiff's assertion that this evidence was equally available to defendant. At no time did defendant have possession of the combine and the relevant broken parts. Defendant did not know the whereabouts of the combine until 1974 at the earliest. We cannot say the trial court erred in concluding that the "equally-available" exception to the adverse inference rule was inapplicable in this case.

Finally, plaintiff claims that he satisfactorily explained his failure to produce the broken lines and belt at trial. It is enough to respond that the jury was properly instructed to determine that issue and that it apparently decided the question in defendant's favor. While we conclude that the trial court did not err in giving the instruction for any of the reasons now urged by plaintiff, we do not cast our approval on the giving of Instruction No. 18. However correct the instruction may be as an abstract legal proposition, we believe it serves to unduly emphasize a single evidentiary issue in the case which is favorable to the defendant. Specific reference to certain evidence favorable to a party is generally inappropriate in instructing a jury. Mills County State Bank v. Fisher, 282 N.W.2d 712, 716 (Iowa 1979). Similarly, it has been held to be inappropriate for instructions to highlight inferences to be drawn from evidence when this places undue prominence on the claims of one of the parties. Boyer v. Iowa High School Athletic Association, 260 Iowa 1061, 1072, 152 N.W.2d 293, 299 (1967). Had the instruction been objected to on these ground we believe that it would have been error to give it; but we cannot reverse on grounds not urged.

II.

Plaintiff also alleges that the trial court committed reversible error in giving Instruction No. 15 to the jury:

> You are further instructed that any person operating a motor vehicle upon a highway shall have the same under control. A driver may be said to have his vehicle under control when he has the ability to guide and direct its course of movement, fix the speed and bring it to a stop with a reasonable degree of celerity.
>
> If you find in this case that the plaintiff Everett Osborn failed to have the vehicle under control this could be a misuse of the product.

Plaintiff claims this instruction improperly injects notions of contributory negligence into this action which was submitted to the jury only on the theory of strict liability.

We agree. In Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980), plaintiff challenged an instruction which he claimed erroneously held him to a "reasonableness" standard in the product's use. The court did not decide that issue but said in dictum:

> If Hughes is correct that this misuse instruction imposes a "reasonableness" standard on his conduct the instruction is indeed erroneous, for in some situations negligent use of a product by a consumer is reasonably foreseeable by the producer and therefore is not "misuse" for liability purposes.[1]

288 N.W.2d at 547.

We think it is clear that Instruction No. 15 imposed a reasonableness standard on plaintiff's use of the combine by placing on him the duty to have it under control. Under the Hughes rationale, it would be reasonably foreseeable by

[1]This stems from the court's holding that, in a products liability case, "the plaintiff must establish that the product was unreasonably dangerous in a reasonably foreseeable use." 288 N.W.2d at 545 (emphasis added).

defendant that its machinery would not always be operated completely under the operator's control. Such a situation, therefore, would not constitute misuse so as to preclude recovery for plaintiff. It was error for the trial court to instruct the jury otherwise.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.