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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

VINCENT E. HUGHES,)
Plaintiff-Appellant,)
vs.)
MAGIC CHEF, INC.)
Defendant-Appellee.)

Filed January 26, 1982

1-373
2-66115

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Appeal from Polk District Court - James P. Denato, Judge.

Plaintiff appeals from judgment for defendant in a products liability action asserting that: (1) an instruction should have been given defining unreasonably dangerous defect; (2) an instruction should have been given specifically stating that failure to adequately warn constitutes an unreasonably dangerous defect; and (3) the evidence was insufficient to support giving an instruction on assumption of risk. REVERSED AND REMANDED.

Raymond J. Gazzo and Carol L. Coppola, Des Moines, for plaintiff-appellant.

Ronald A. Riley and David L. Brown of Hansen, McClintock & Riley, Des Moines, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Plaintiff appeals from judgment for defendant in a products liability action asserting that: (1) an instruction should have been given defining unreasonably dangerous defect; (2) an instruction should have been given specifically stating that failure to adequately warn constitutes an unreasonably dangerous defect; and (3) the evidence was insufficient to support giving an instruction on assumption of risk.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. We reverse and remand for a new trial.

I.

Plaintiff was injured when a stove manufactured by defendant exploded. The explosion was caused by a build up of propane gas due to failure to re-ignite one of three pilot lights when the propane tank was refilled two days before. Plaintiff had helped to relight the furnace when the serviceman arrived to refill the propane tank and knew about the third pilot light on the stove, but stated he had forgotten about it.

The first trial in this products liability action resulted in a jury verdict adverse to plaintiff. This result was reversed and remanded on issues not raised in this appeal in Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980). In the instant case, both parties requested an instruction defining "unreasonably dangerous defect" but no such instruction was given. Plaintiff also requested an instruction specifically stating that failure to adequately warn will constitute an unreasonably dangerous defect. The trial court denied plaintiff's requested instructions. The instructions as given stated that plaintiff claimed defendant's stove was defective in several respects, including failure to adequately warn of a potential hazard.

Prior to trial, plaintiff submitted a proposed instruction on assumption of

risk. Plaintiff later unsuccessfully argued that the evidence produced at trial did not support giving any instruction on that issue. The jury returned a verdict for defendant, judgment was entered, and plaintiff's motion for a new trial was denied.

II.

Plaintiff asserts that in a products liability case, the trial court must instruct the jury on the legal definition of "unreasonably dangerous defect" and that failure to so instruct was reversible error when such an instruction was requested by both parties. We disagree.

Our review is guided by well-recognized principles. We recognize that a trial court may choose its own language in drafting instructions and is not bound to use wording preferred by counsel so long as the instructions cover all legal principles involved. Turner v. Jones, 215 N.W.2d 289, 292 (Iowa 1974); Osterfoss v. Illinois Central Railroad, 215 N.W.2d 233, 235 (Iowa 1974). Instructions are to be read and considered as a whole, not piecemeal or in artifical isolation. Greninger v. City of Des Moines, 264 N.W.2d 615, 617 (Iowa 1978); Wiedenfeld v. Chicago & N.W. Transp. Co., 252 N.W.2d 691, 698 (Iowa 1977); Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 464 (Iowa 1974).

The instructions given in this case did properly cover the legal principles involved in a products liability action. The fact that the court decided not to define "unreasonably dangerous defect," when such an instruction was requested by both parties, is not reversible error.

III.

Plaintiff next asserts that the trial court erred in refusing to instruct the jury that the failure of a manufacturer to provide adequate instructions and warnings could be an unreasonably dangerous defect in a product. We agree. Defendant concedes that under certain circumstances Iowa law does provide that

the failure of a manufacturer to warn of potential hazards is a defect as the term is defined by Restatement, Torts 2d § 402A. We find the present products liability claim to be of the type to which this rule applies.

The issue presented in plaintiff's challenge to the trial court's instructions is not the extent to which a duty to warn exists but rather whether the jury was told that under the law proof of a failure to warn was one of the methods which the plaintiff might use to establish a product defect. We find the trial court's marshalling instruction (no. 9) somewhat lacking on this point. It tells the jury that plaintiff must prove the existence of a defect, that plaintiff claims the defect was a failure to issue an adequate warning as to product use, and that if the plaintiff proved the existence of a defect along with other elements required by the marshalling instruction, he could recover. The vice in this instruction is that while it tells the jury that plaintiff claims a defect in the product existed by reason of a failure to give an adequate warning of the potential hazards in using the product, it does not also inform the jury that under the law, such failure might amount to a defect. This is left to be inferred by the jury in its application of the court's instruction to the evidence in the case. This was reversible error.

IV.

Plaintiff's final assertion is that the facts in this case did not support the submission of an instruction on assumption of risk and, therefore, the trial court erred by submitting such an instruction. We agree.

We first comment on defendant's assertion that plaintiff waived the issue by submitting an instruction on assumption of risk over a month prior to trial. While it is true that a party cannot ordinarily object to the giving of an instruction he requested, Tilghman v. Chicago & North Western Railway Company, 253 Iowa 1339, 115 N.W.2d 165 (1962), we can see no reason to apply this rule to the instant case. The fact that plaintiff routinely submitted a proposed instruction on

assumption of risk over a month before trial should not act to bar his future objection to that instruction. In this case, plaintiff made a proper and timely objection to the proposed instruction after the presentation of all the evidence clearly indicated that the giving of such an instruction would be inappropriate. We find that giving such an instruction over plaintiff's objection was error.

The assumption of risk defense requires that the user or consumer discover the defect, be aware of the danger, and nevertheless, proceed unreasonably to make use of the product. Hughes v. Magic Chef, 288 N.W.2d 542, 544 (Iowa 1980). There was not sufficient evidence to show any of the following: that plaintiff discovered the defect, that plaintiff was aware of the danger, or that plaintiff then proceeded to unreasonably make use of the product. Therefore, we find that the record in this case was clearly devoid of evidence to support giving an instruction on assumption of risk.

V.

We disagree with the dissent's assertion that this case should not be reversed and remanded for a new trial. While it is true that it is to the interest of both the parties and society that litigation not be unduly prolonged, we believe a third trial is warranted in this case. The second trial was held before the same judge as the first trial and on remand the trial judge gave essentially the same instructions in the second trial as he did in the first. He only corrected the errors in instructions that were specifically mandated by the Supreme Court. We find that the errors in the second trial reasonably appear to have been prejudical to the losing party and, therefore, reverse and remand for a new trial. See Lawson v. Fordyce, 237 Iowa 28, 67, 21 N.W.2d 69, 89 (1945).

We reverse and remand for a new trial.

REVERSED AND REMANDED.

All judges concur, except Oxberger, C.J., who dissents.

OXBERGER, C.J., dissenting.

I dissent. Plaintifff has lost two trials. In Jones v. Iowa State Highway Commission, 185 N.W.2d 746 (Iowa 1971), the court said there should only be a third trial if the error is such that a "failure of justice will occur if we do not again interfere." Any error in this case does not reach such magnitude.

Additionally, I would not permit the plaintiff piecemeal his appeals. In the last appeal the plaintiff did not challenge the submission of the assumption of risk instruction. The evidence on retrial was the same on this issue. I would hold that failure to raise the issue on the first appeal established the issue as the law of the case.

I would affirm.