IN THE COURT OF APPEALS OF IOWA

227

No. 0-488 / 89-1366

CLARA L. PERDUE, Executor of the LLOYD O. PERDUE Estate,

Appellee,

vs.

BIC CORPORATION,

Defendant-Appellee/Cross-Appellant,

and

THE FARNER CO., INCORPORATED,

Defendant.

FILED
JAN 2 9 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, Richard J. Vogel, Judge.

Plaintiff appeals district court order granting defendant Bic Corporation's motions for directed verdict and judgment notwithstanding the verdict and a conditional new trial. **REVERSED.**

John N. Moreland and Timothy J. McKay of McKay, Moreland & Webber, P.C., Ottumwa, for appellant.

Robert T. White and William L. Moran of Murnane, Conlin, White, Brandt & Hoffman, St. Paul, Minnesota, and Kenneth Keith of Keith, Osborne, Bauerle & Milani, Ottumwa, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ. Schlegel, J., takes no part.

OXBERGER, C.J.

On February 16, 1986, Lloyd Perdue was severely burned and on March 5, 1986, he died as a result of the burns. Lloyd's wife, Clara Perdue, as executor of Lloyd's estate, sued BIC Corporation, The Farner Company, and Paxton Grocery alleging Lloyd's fatal burns resulted from the explosion of a cigarette lighter manufactured by BIC. The petition named Farner as the wholesaler and Paxton as the seller of the lighter. Paxton settled prior to trial. Farner was dismissed at the close of the plaintiff's evidence.

The case was submitted to the jury on the theories of specific and general negligence, strict liability, and implied warranty of merchantability. The jury found BIC eighty percent at fault and the decedent twenty percent at fault. The jury awarded $90,000 in damages. The jury did not receive a differential instruction so as to determine under which theory the verdict was rendered.

Following trial, the district court sustained BIC's motion for directed verdict and judgment notwithstanding the verdict (judgment n.o.v.). Clara filed a notice of appeal. BIC filed a notice of cross-appeal. The case was remanded for the limited purpose of ruling on BIC's motion for new trial. The district court granted a new trial conditioned upon the reversal or vacating of the directed verdict and judgment n.o.v.

On appeal, Clara contends the district court erred in sustaining BIC's motions for directed verdict and judgment n.o.v. She claims substantial evidence supported her claim of negligent failure to warn. The facts at trial showed the lighter allegedly causing the fire was not in the cellophane package which carried a warning when the Purdues purchased it. Clara argues BIC's warning on the cellophane packaging did not reasonably assure the warning would reach users.

Clara also claims substantial evidence supported her claims of negligent design defect, negligent manufacturing defect, general negligence based on the doctrine of res ipsa loquitur, strict liability, and breach of implied warranty of merchantability. She also contends substantial evidence of proximate cause existed to support submission of her claims to the jury.

Finally, Clara argues the district court erred by conditionally granting BIC's alternative motion for new trial. She argues sufficient evidence supported her claims and the district court's conclusion it improperly admitted a hearsay statement as a dying declaration cannot serve as the basis for a new trial.

On cross-appeal, BIC contends the district court properly granted a new trial based on errors committed during the trial. The errors claimed by BIC include: 1) admitting into evidence certain portions of the Iowa Incident Report regarding opinions about the exploding

lighter; 2) submitting multiple theories of recovery to the jury; 3) admitting evidence of subsequent remedial measures; 4) allowing plaintiff's expert to testify and admitting his report into evidence; 5) allowing plaintiff to inquire into recall evidence; 6) refusing to give BIC's requested reliance, assumption of risk and speculation instructions; 7) restricting the testimony of BIC's reconstruction expert; and 8) allowing plaintiff to present rebuttal testimony and rebuttal exhibits. BIC further urges the cumulative effect of prejudicial conduct by plaintiff's counsel necessitates a new trial.

DIRECTED VERDICT AND JUDGMENT N.O.V.

Clara argues BIC failed to raise any claims other than failure to warn and breach of implied warranty in its motion for directed verdict at the close of all of the evidence. We disagree, although BIC's motion for a directed verdict lacked clarity, it did notify the court the motion included all the claims asserted in the previous motion for directed verdict. Therefore, we find the issues preserved and will address them.

The Suss v. Schammel, 375 N.W.2d 252, 255 (Iowa 1985), court discussed the standard of review for a trial court's grant of a judgment notwithstanding the verdict:

> The question is whether evidence, taken in the light most favorable to the party resisting the motion, regardless whether the evidence was contradicted, and taking every legitimate inference that might be fairly or reasonably deducted therefrom, showed that the movant was entitled to a directed verdict at the close of all evidence. [citation omitted]. If reasonable

> minds could differ on the issue a jury question existed and summary judgment was inappropriate. [citation omitted].

Each element of a theory of recovery must be established by substantial evidence or evidence a "reasonable mind would accept as adequate to reach a conclusion" to withstand a motion for directed verdict or judgment n.o.v. Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866, 873 (Iowa 1989)(citations omitted). "On appeal, we consider the evidence in a way most favorable to upholding the verdict." Id.

FAILURE TO WARN. The trial court found the uncontroverted evidence showed BIC packaged every lighter of the type alleged to have caused the fire in packages of cellophane with a warning on the package. The uncontroverted evidence also showed the Perdues received the lighter in a brown paper bag without the packaging or the warning.

"The duty to warn is not absolute. Whether a warning is required and to whom it must be given, are questions to be decided by standards of reasonable care." Cooley v. Quick Supply Company, 221 N.W.2d 763, 771 (Iowa 1974). The law demands "reasonable assurance that the information will reach those whose safety depends upon their having it." Id. at 772. The West v. Broderick & Bascom Rope Company, 197 N.W.2d 202, 211 (Iowa 1972), the court stated:

> Whether reasonable care requires warning beyond the manufacturer's immediate vendee in a particular case depends upon various factors. . . . Among them are the likelihood or

> unlikelihood that harm will occur if the vendee does not pass on the warning to the ultimate user, the trivial or substantial nature of the probable harm, the probability that the particular vendee will pass on the warning, and the ease or burden of the giving of warning by the manufacturer to the ultimate user.

Likewise, in this case, whether reasonable care required more than a warning on the cellophane packaging depended on various factors. We find the question of whether BIC failed to assure its warning reached the users of its lighters created a jury question and therefore a directed verdict on this claim was improper. The jury was the appropriate party to decide whether the warning provided was reasonable in the circumstances.

DESIGN AND MANUFACTURING DEFECTS. The trial court found "[t]he only evidence of design defect came from plaintiff's expert, John O. Geremia, and to accept his theory, the jury must disbelieve defendant's experts and the greater weight of opposing evidence." The trial court also finds the same problem with the plaintiff's manufacturing defect claim.

BIC argues that Mr. Geremia's testimony was based on speculation because inadmissible hearsay provided by Clara about the fire being caused by a BIC lighter exploding served as the basis for his testimony. We disagree. Mr. Geremia testified generally about tests he conducted about BIC lighters' potential for exploding due to design and manufacturing problems. Mr. Geremia then related the evidence from the scene of the fire and pictures of Lloyd's

burns to the expected results from an explosion of a BIC lighter. We do not find Mr. Geremia's testimony based only on speculation.

"The weight and credibility of testimony are matters for the jury." Becker v. D & E Distributing Co., 247 N.W.2d 727, 730 (Iowa 1976)(authorities omitted). Allowing every legitimate inference from the evidence introduced by the plaintiff we find jury questions were created with respect to whether design or manufacturing defects of a BIC lighter caused the fire which caused Lloyd's fatal injuries. We find a directed verdict on these two issues improper.

GENERAL NEGLIGENCE. The trial court concluded that since the plaintiff had to show lack of ordinary care in the manufacture or design of the lighter to prevail on her general negligence claim, the claim could not go to the jury because she failed to produce evidence of any lack of ordinary care. We agree with the court's first assumption, but in light of the previous section of this opinion we disagree that the plaintiff failed to engender a jury question on the issue of general negligence. We find a directed verdict on the issue of general negligence improper.

STRICT LIABILITY. The district court found:

> the jury would have to have found a design or manufacturing defect, that a defect was unreasonably dangerous, that there was no change in condition and the other elements of strict liability. There was insufficient evidence presented for the jury to have found BIC negligent under this theory with regard to several elements.

In Hawkeye - Security Insurance Company v. Ford Motor Company, 174 N.W.2d 672, 683 (Iowa 1970), the court listed requirements a consumer must show when claiming strict liability:

> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(quoting from Restatement, Second, Torts, §402A).

In light of our prior findings in this case we find the plaintiff presented sufficient evidence to generate a jury question on her theory of strict liability. Therefore, the trial court incorrectly entered a directed verdict and judgment n.o.v.

IMPLIED WARRANTY OF MERCHANTABILITY. The trial court determined the jury could not have found the lighter not merchantable as defined by the jury instructions. The jury instructions defined merchantable goods as:

> a. Passed without objection in the trade under the contract description; and

> b. are fit for the ordinary purposes for which such goods are used; and
> c. run within the variation permitted by the agreement, of an even kind, quality and quantity within each unit and among all units involved; and
> d. are adequately contained, packaged and labeled as the agreement may require; and
> 3.(sic) conform to the promises or affirmations of fact made on the container or label, if any.

Again, the underlying premise for the directed verdict seemed to be plaintiff's failure to provide substantial evidence of a design or manufacturing defect. As previously stated, we find substantial evidence did exist such that a jury question was engendered about a design or manufacturing defect. Further, we find substantial evidence for the jury to have found the lighter not merchantable as defined by the jury instructions. Ordinarily, strict liability is pled in lieu of one or more of the implied warranty theories, but the submission of both theories, although exceptional, is not foreclosed. See Hawkeye - Security Insurance Company v. Ford Motor Company, 174 N.W.2d at 684-85. Therefore, a directed verdict on this issue was improper.

PROXIMATE CAUSE. Generally, proximate cause is a question of fact which may be taken from the jury only in exceptional cases. Johnson v. Junkmann, 395 N.W.2d 862, 865 (Iowa 1986). Johnson stated:

> An exceptional case is one in which after construing the evidence in its most favorable light and resolving all doubts in favor of the party seeking to establish proximate cause, the relationship between cause and effect nonetheless is so unrelated to defendant's conduct that no reasonable jury could conclude defendant's fault was a proximate cause of plaintiff's injuries.

Id. (authorities omitted). 236

We do not find this such an exceptional case. The jury certainly could have found a defect, either in the design or manufacture of a BIC lighter caused the fire. We do not find the inability to produce the actual lighter after the fire significant.

The plaintiff presented plausible explanations for the inability to find the lighter after the fire. The jury did not have to, but could have believed one of the explanations. It seems plausible where (1) a lighter was seen next to the victim shortly before the fire; (2) in the event of a fire caused by a defective lighter, the lighter would consume itself except for a small metal piece; (3) at, and immediately after the fire, people were concerned with providing medical treatment to a badly burned man therefore, no one searched for any small metal objects, that the metal piece would be lost either at the fire site or in the clothing removed from the victim in the emergency room.

We do not find a lack of evidence in this case such as to warrant a directed verdict on the issue of proximate cause.

CONCLUSION. We find the trial court improperly granted defendant BIC's motion for directed verdict and judgment n.o.v. We reverse the trial court's grant of a directed verdict and judgment n.o.v. in favor of BIC. We next address whether the verdict should be reinstated or a new trial conducted.

CONDITIONAL NEW TRIAL.

The trial court order conditionally granting defendant BIC's motion for a new trial did not state why the motion was granted, so we turn to the court's previous ruling on the motion for a judgment n.o.v. In the prior ruling the court stated:

> One further consideration is the purported "dying declaration" of Lloyd Perdue that "the goddamned lighter exploded." The Court should have not admitted that statement. The evidence does not support the admission of the statement under Evidence Rule 804(b)(2) because there is no evidence in the record that the declarant believed his death was imminent at the time the statement was made. It was error to admit the statement under any of the rules of evidence under the facts and circumstances of this case. (emphasis in original).

We are much slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P 14(f)(4). A trial court can grant a new trial if a jury verdict is not sustained by sufficient evidence or if the verdict fails to effectuate substantial justice. Houvenagle v. Wright, 340 N.W.2d 783, 785 (Iowa App. 1983). Houvenagle stated:

> Generally, a trial court has broad discretion in passing on motions for new trials and only when there is a clear abuse of that discretion will we interfere with a ruling upon the motion. [citation]. However, a court has no right to set aside a verdict just because it might have reached a different conclusion. [citation]. When a trial court grants a new trial in the interest of justice, there must be some reason that fairly appears in the record.

Id.

For a hearsay statement to be admissible under the Iowa Rule of Evidence 804(b)(2) as a "dying declaration", it

must satisfactorily appear from the declarant's express language or inferences fairly drawn from his condition that his sense of impending death was so certain he was without hope or expectation of recovery. Bratton v. Bond, 408 N.W.2d 39, 45 (Iowa 1978)(citations omitted). The evidence clearly showed that Lloyd via Clara decided to forgo all lifesaving measures because his case was hopeless and to rely only on comfort measures to ease his pain prior to death. The medical records and testimony of the doctor involved in the case verify that after Clara ascertained Lloyd's wishes, all heroic measures were curtailed. The doctor also testified he approached Clara soon after her initial arrival at the hospital following Lloyd's admission and shortly thereafter the decision to curtail heroic measures was made.

In contrast to this evidence Lloyd knew he was dying from his injuries, the only evidence presented that Lloyd had not lost hope of recovery was a joking conversation with a friend, on an indeterminate date, that he was anxious to get home and into his garden. Even if the conversation occurred after Lloyd's statement "the goddamned lighter exploded" the inferences fairly drawn from Lloyd's condition was that he knew he was dying. A person's feelings about their impending death are very intimate matters. We do not find it difficult to believe that Lloyd would not discuss the matter with a friend who was telling him to get well. We do not find the admission

of Lloyd's statement about the cause of the fire to Clara clearly in error in light of the evidence in the record.

The trial court did not discuss any of the other issues set forth by the defendant in its motion for a new trial and appeared to find the admission of Lloyd's "dying declaration" as sufficient to warrant reversal. We do not agree and upon evaluating the record as a whole we do not find the other errors claimed by defendant to warrant a new trial. Therefore, we reverse the trial court's grant of a new trial.

CONCLUSION.

We find the grant of a directed verdict and judgment n.o.v. improper and the grant of a new trial an abuse of discretion. We reverse the directed verdict and judgment notwithstanding the verdict in favor of BIC and reverse the grant of a new trial and reinstate the jury verdict in favor of the plaintiff.

REVERSED AND JURY VERDICT REINSTATED.

Donielson, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court's order granting the judgment notwithstanding the verdict.