1981

Beehive Medical Electronics Inc. And Soter's Inc. Plaintiffs-Appellants, v. Square D. Company, Defendant-Respondent : Brief of Plaintiffs-Appellants Beehive Medical Electronics, Inc. And Soter's, Inc.

IN THE SUPREME COURT

OF THE STATE OF UTAH

BEEHIVE MEDICAL ELECTRONICS INC. and SOTER'S INC.

Plaintiffs-Appellants,

vs. Case No. 17546

SQUARE D COMPANY,

Defendant-Respondent.

BRIEF OF PLAINTIFFS-APPELLANTS BEEHIVE MEDICAL ELECTRONICS, INC. and SOTER'S, INC.

Appeal from the Order of the Third Judicial District Court
Denying Plaintiffs' Motion for New Trial
Honorable David B. Dee, Presiding

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BRIEF OF PLAINTIFFS-APPELLANTS
BEEHIVE MEDICAL ELECTRONICS, INC. and SOTER'S, INC.

NATURE OF THE CASE

This is an action sounding in negligence and strict products liability alleging that a fire at premises owned by plaintiff, Sotor's Inc., and leased by Beehive Medical Electronics, Inc., was caused by a defective circuit breaker manufactured by defendant, Square D Company.

DISPOSITION IN THE LOWER COURT

After a trial to a jury, the Third Judicial District Court, the Honorable David B. Dee, Judge, denied plaintiffs-appellants Motion for New Trial.

RELIEF SOUGHT ON APPEAL

Appellants, Beehive Medical Electronics, Inc., and Soter's, Inc., seek remand of this matter to the District Court for a new trial.

STATEMENT OF FACTS

This action arises out of a fire which occured on March 17, 1974, at premises in Salt Lake County, leased by appellant Beehive Medical Electronics, Inc. (hereafter "Beehive") and owned by appellant, Soter's, Inc. (hereafter "Soter's"). The fire resulted in damages to Beehive and Soter's together of over $1,000,000.

The matter was tried to a jury in the Third Judicial District Court from June 2 through June 10, 1980. The fire was alleged to have occured because of a defective circuit breaker manufactured by respondent, Square D Company (hereafter "Square D"). The theories of liability asserted against Square D were negligent manufacture and strict products liability. The jury returned a verdict of no cause of action against Beehive and Soter's.

Thereafter, appellants moved the District Court for a new trial pursuant to Rule 59(a)(6) and (7) (R.1051-1052). Coupled with this motion was a motion for judgment notwithstanding the verdict, the disposition of which is not an issue on this appeal. The District Court denied the motions. (R.1141-1142).

This appeal presents issues of law relating to the District Court's denial of the motion for new trial only. A detailed analysis of the facts of the case is therefore not presented.

ARGUMENT

POINT I: THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL BASED ON INACCURATE AND INCONSISTENT INSTUCTIONS GIVEN TO THE JURY AND WHICH WERE PREJUDICIAL TO PLAINTIFFS.

POINT II: THE DISTRICT COURT ERRED IN REFUSING TO GRANT A NEW TRIAL BASED UPON THE FACT THAT COUNSEL FOR SOTER'S, INC. WAS NOT PERMITTED TO MAKE HIS FINAL REBUTTAL ARGUMENT TO THE JURY.

POINT I

The granting of a new trial rests within the sound discretion of the District Court and the refusal of the Court to grant a new trial will be reversed on appeal only upon a showing of an abuse of that discretion. Appellants submit that the refusal of the District Court to grant a new trial based upon inaccurate and inconsistent instructions constituted an abuse of discretion which requires a remand for new trial. Rule 59(a)(7) permits the granting of a new trial based on error in law. Such error was committed in this case by the giving of instructions which were inaccurate and inconsistent with other correct instructions such that it was impossible for the District Court or the parties to know which instructions were followed by the jury. This error was prejudicial to appellants and can only be cured

by the granting of a new trial. The instructions complained of here are numbers 8, 9, 10, 12, 13, 14 and 15 (R.1076, 1077, 1078, 1080, 1081, 1082, 1083 respectively). Each was proposed by respondent and each is, in whole or in part, a misstatement of the law of strict products liability as that doctrine is applied in Utah. Furthermore, the inconsistency between instruction 8 and instruction 26 (R.1094), instruction 10 and instruction 27 (R.1095) and instruction 15 and instruction 25 (R.1093) are such that it is impossible to determine whether the jury followed the correct or the incorrect statement of the law. The only way to cure such error is by granting a new trial.

Instruction 8 purports to set down the defenses available in a strict products liability action. That instruction states:

> Even if a cause of action in strict liability has been established by the evidence, the plaintiffs cannot recover if one or more of the following defenses to the action are approved:
>
> 1. That the plaintiffs used the article in an improper manner which resulted in their injury, or
>
> 2. The plaintiffs disregarded the obvious safety requirements of use of the article and such disregard was a contributing cause of their injury.
>
> The defendant has the burden of proving such defenses.

Of particular concern is paragraph two of the instruction which speaks of disregard of "obvious safety requirements of use of the article" by plaintiffs. This statement must be compared with instruction 26 which was requested by appellants and which correctly states the law. Instruction 26 reads:

> You are instructed that the only defenses available to defendant, Square D Company, if it is to aviod strict products liability as previously defined are:
>
> (1) Misuse of the load center and circuit breakers by the plaintiffs, or
>
> (2) Knowledge of the defect by the plaintiffs who were aware of the danger and yet unreasonably proceeded to use the load center and circuit breakers.
>
> Either defense must be proved by defendant by a preponderance of the evidence.
>
> Furthermore, each defense must relate to the load centers and circuit breakers and cannot be extended to other conduct by the plaintiffs unrelated to the load center and circuit breakers.

Instruction 26 was taken from the leading Utah case on strict products liability, Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (1979). There this Court stated:

> We hold there are two defenses to strict products liability, namely, (1) misuse of the product by the user or consumer (See comment "g" to Sec. 402A); and (2) knowledge of the defect by the user or consumer, who is aware of the danger, yet unreasonably proceeds to make use of the product, i.e., assumption of risk. (See comment "n" to Sec. 402A). We further hold that the defenses of misuse and assumption of risk must relate to the defective product and

cannot be extended to cover conduct by the user or consumer unrelated to that product. (Foot notes omitted) 601 P.2d at 158.

Instruction number 9 states:

> If you find that the fire in question resulted from the manner in which the breaker box was being used at the time of the accident, rather than from any unreasonably dangerous or defective condition of the breaker box, then your verdict should be in favor of the defendant, no cause of action on plaintiff's complaint.

This instruction focuses the jury's attention only on the "breaker box" (the box which holds circuit breakers or, as referred to in appellants' instructions, a "load center"). The instruction fails to mention the allegedly defective circuit breaker at all and invites the jury to return a verdict of no cause of action based solely on the way the box was being used. Both the load center and the circuit breaker were alleged to be defective.

Instruction 10 has multiple defects. It states:

> If you find that there was a defect in the breaker box and if you find that after the same had been delivered to Soter's, Inc. and Beehive Medical Electronics, that agents or employees of either plaintiff failed to properly set up or inspect the breaker box prior to its use on the date of plaintiffs' accident, such conduct on the part of the agents or employees of either plaintiff would be an independent intervening proximate cause of the accident and plaintiffs' damages. If you so find the facts to be, Square D Company may not be held responsible to the plaintiffs and your verdict must be in favor of Square D Company against the plaintiffs. (Emphasis added)

As with instruction 9, this instruction refers only to the "breaker box" and in no way refers to the circuit breaker. Furthermore, instruction 10 charges that if agents or employees of either appellant fail to properly inspect the "breaker box" in question, a verdict must be returned in favor of Square D. This instruction is in palpable conflict with instruction 27 which was requested by appellants and which correctly informs the jury that Square D admitted that it sells its products intending that they be installed and otherwise used by the consumer without any inspection for defects. (R. 1095)

Finally, instruction 10 charges the jury that the failure to inspect--which is not required--"would be an independant, intervening proximate cause of the accident" requiring a verdict in favor of Square D. Besides requiring a verdict for respondent upon a finding of a failure to inspect, the reference to "independent, intervening proximate cause" is completely irrelevant to the trial of this matter and is misleading to the jury. The most recent case out of this Court dealing with independent intervening cause is Jensen vs. Mountain States Telephone & Telegraph Company, 611 P.2d 363 (1980). A rudimentary knowledge of the doctrine of independent intervening cause reveals that the concept

is not even applicable in a situation such as the one presented here. The doctrine requires three actors, two of which are negligent. The negligence of the first is, in an appropriate circumstance, attenuated by the second, such that the negligence of the first is not a proximate cause of the injury sustained by the third actor. Here the defendant's instruction treats the plaintiffs as a single actor. Hence there are effectively only two parties and so the most that can be said is that principles of comparative fault apply. (See Mulherin v. Ingersoll-Rand Co., ____ P.2d ____, Supreme Court No. 17027, filed May 4, 1981.)

It is respectfully submitted that the error in giving instruction 10 is so manifest that it alone is sufficient basis for granting a new trial, and the refusal of the District Court to so order was an abuse of discretion.

Instruction 12 is likewise defective. It states:

> The defendant contends that the plaintiffs' damages occurred as the proximate result of the plaintiffs' or some third party's negligent use or installation of the breaker box in question. A manufacturer is entitled to expect a normal use of its product. If the plaintiffs' damages occurred because of the use of the product in a manner for which the product is not adapted and not reasonably foreseeable to the defendant, then the plaintiff cannot recover. You must determine whether the product is being used at the time of the accident in a manner for which the product was adapted and manufactured and which was reasonably foreseeable to the defendant.

The term "normal use" is nowhere defined and such term was never used in the presentation of any evidence either by appelants or respondent. This instruction also injects the issue of reasonable foreseeability of appellant's use of the Square D products. Neither the Hahn case nor Section 402A of the Second Restatement of Torts, which was adopted in Hahn, makes foreseeability an element of a strict products liability case. Indeed, a requirement of a reasonable foreseeability would be counter to the basic policy considerations underlying strict products liability. That policy is, of course, that the societal costs associated with injury suffered because of a defective product should be borne by the manufacturer of the product and not the injured party. In addition, the problem of foreseeable use of the product is adequately allowed for through the defense of misuse. Therefore, instruction 12 injucts another spurious and milseading issue into this case which could only have served to confuse the jury to appellants' prejudice.

Instruction 13 again focuses on foreseeability, speaks of "normal use" and "normal user" without reference to any articulable standard and goes on to inject the further undefined concept of "unusual" use.

Instruction 14 refers to a manufacturer not being a guarantor of its product and states in full:

> The manufacturer or seller of a product is not a guarantor that one will not be injured while using the product manufactured or sold by him. All that a manufacturer is required to [do] is to make a product which is free from defects which would be unreasonably dangerous to the ultimate consumer or user.

The issue of guarantee or warranty is, again, irrelevant to this action and misleading to the jury.

Finally, instruction 15 is an improper definition of the term "unreasonably dangerous" as that term is used in Section 402A. Instruction 15 states:

> A product is in a defective condition unreasonably dangerous to a consumer when it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchased it who had the ordinary knowledge common to the foreseeable class of users as to its characteristics. A product is not defective or unreasonably dangerous merely because it is possible to be injured while using it.

Besides being virtually unintelligible, this instruction does not correctly define "unreasonably dangerous". Instruction 25, which was requested by appellants, properly defines the term. Instruction 25 states:

> As used in these instruction, the term "unreasonably dangerous" means that the article sold is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics. (Restatement, Torts; 2d, Comment i, Section 402A)

Not only does instruction 15 misstate the definition, but is further erroneous in that the final sentence thereof--"a product is not defective or unreasonably dangerous merely

because it is possible to be injured while using it"--is totally unsupported by the law of strict products liability.

Each of respondent's requested instructions noted above was excepted to, but each was given. The fact that proper instructions were also given, that is, instructions 25, 26, and 27, does not cure the giving of the erroneous instructions. It has long been recognized in Utah that the danger in giving both proper and improper instructions to the jury is that even though the proper instructions when read together correctly state the law, the existence of the improper instructions makes it impossible to determine which the jury may have followed in reaching a verdict. Most recently in the case of Watters v. Querry, 588 P. 2d 702, 704 (Utah 1978), this Court stated:

> The fact that other instructions were given inconsistent with the one in question and consistent with the law, cannot properly be regarded as curing the misconception the jury might have formed from the erroneous instruction complained of. The jurors would not know which instruction was correct and which one was in error and thus would simply be in the position of not knowing which instruction to follow; and neither the parties nor the court would know which they did follow. (Citing Ivie v. Richardson, 9 Utah 2nd 5, 336 P.2d 781 (1959); and Hall v. Corporation of Catholic Archbishop of Seattle, 498 P.2d 844 (Wash. 1972).

Accord, State v. Green, 79 Utah 580, 596, 6 P.2d 177, 183 (1931); Jensen v. Utah Railway Co., 72 Utah 366, 381, 270 P. 349, 355 (1927); 58 Am.Jur. 2d, New Trial, Sec. 125; 75 AmJur 2d, Trial, Secs. 628 and 920.

An appellant who seeks to overturn the verdict of the jury always bears a heavy burden. However, in this case, appellants are not focusing on what the jury might have done had it been properly instructed. Instead, appellants have focused on the discretion vested in the District Court to order a new trial. Appellants respectfully submit that a careful review of the instructions to the jury, with particular emphasis on those instructions pointed out in the argument above, shows that the error in those instructions was and is manifest. The District Court should have cured the error in the instructions by granting a new trial. Because of the peculiar nature of the instructions here, that is, the fact that correct instructions on the law of strict products liability were given virtually alongside incorrect instructions, it was an abuse of discretion for the District Court to refuse to order a new trial and therefore, this Court should so order.

POINT II

The second error of law warranting the granting of a new trial was the denial, of the District Court, of the opportunity for counsel for plaintiff, Soter's, Inc., Mr. Spafford, to present his rebuttal argument to the jury. The affidavit of Earl S. Spafford in support of plaintiffs' motion for judgment notwithstanding the verdict, for new

trial and motion to tax defendant's costs (R. 1053-1054) shows that lead counsel for both plaintiffs sought to coordinate their closing arguments to the jury in such a way that a single coherent argument would be made. On rebuttal, counsel for plaintiff, Beehive, took pains to insure that sufficient rebuttal time would be left to permit Mr. Spafford to reemphasize the main components of the argument as well as to comment on the instructions. At the end of Mr. Child's argument, Mr. Spafford rose to speak, but the judge had already directed his attention to the jury and was submitting the case to them. Mr. Spafford was faced with the uncomfortable choice of either interrupting the judge to point out that he had further argument to make, or waiting until the jury had retired to advise the court that he wished to argue further. He chose the latter. As soon as the jury had retired, Mr. Spafford approached the judge in chambers and informed the judge that he had further argument to make. The judge thereupon refused to reconvene the jury and permit Mr. Spafford to proceed.

Some courts have recognized an absolute right to argue to the judge or jury prior to judgment being rendered. Callan v. Bierman, 398 P.2d 355 (Kan. 1955). Boucher v. Roberts, 359 P.2d 830 (Kan. 1961); Hammons v. Schrunk, 305 P.2d

405 (Ore. 1956). Another court characterized the right to argue to the jury as necessary to insure the constitutional right to representation by an attorney in a civil trial, Turley v. Kotter, 398 A.2d 699 (Pa.Super. 1979), and another court stated that it is not in the discretion of a trial court to deny the right to fully address the jury in either criminal or civil cases, State v. Mann, 361 A.2d 897 (Me. 1976). It is respectfully submitted that in the interests of fairness and to insure that cases are fully litigated, this Court should adopt the rule that, in the absence of waiver, parties to a controversy should have an absolute right to fully argue the evidence and the law to the jury. There was no waiver of such right in this case.

Should this Court opt for the alternative rule that whether argument should be allowed to the jury is a matter resting within the sound discretion of the trial court, it is respectfully submitted that the instant case represents an abuse of that discretion warranting remand for a new trial. The trial of this matter consumed almost seven full days of trial time. It would have been a simple matter for the trial judge to reconvene the jury so that Mr. Spafford could finish his final argument. The situation involved here is similar to that surrounding the errors in instructing

the jury in that it is impossible to tell how the jury might have decided had the final argument been made. To require a party, who was denied its final argument, to prove that it was prejudiced thereby, would be to place an insurmountable burden on that party. It is respectfully submitted that any doubt respecting the possible outcome of the trial, had final argument been allowed, should be resolved in favor of appellants here being granted a new trial.

CONCLUSION

This appeal presents two issues central to the question of when parties to a civil jury trial can accept the verdict of the jury confident in the knowledge that the jury fully understood how to apply the facts, as shown by the evidence, to the law. It is respectfully submitted that when, as here, incorrect statements of the law are given to the jury alongside correct statements of the law, it is unreasonable to assume that the jury will have any basis upon which to ignore the incorrect statements and apply only the correct ones. This court recognized in Watters v. Querry, supra, and other cases, that it is impossible for a jury to do so. A trial court should be every bit as cognizant of this fact as an appellate court and it is therefore an

abuse of discretion for the trial court to refuse to rectify the error by granting a new trial.

Likewise, with respect to the right of parties litigant to argue their case to the jury, it was an abuse of discretion here for the trial court to refuse to permit Mr. Spafford to make his closing argument to the jury.

The prejudicial effect of either of these situations is difficult to prove. However, in each situation the prejudice is so manifest that it can and should be presumed.

For the foregoing reasons it is respectfully submitted that the District Court's denial of appellants' motion for new trial should be reversed and that the matter be remanded for new trial.

Respectfully submitted this 26 day of May, 1981.

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Brief of Plaintiffs-Appellants was mailed to William J. Cayias at 1558 South 1100 East, Salt Lake City, Utah 84105 this 26 day of May, 1981.

Lou Haslam