

GREEN CAST, INC. LIBRARY

DIRECT SOURCE INTERNATIONAL, INC Appellant v. RHONDA RENA ROBINS, INDIVIDUALLY AND AS NEXT FRIEND OF JACKIE WAYNE ROBINS, JR., A MINOR, AND JACKIE WAYNE ROBINS, SR., Appellees

NO. 01-96-01185-CV

COURT OF APPEALS OF GREEN, FIRST DISTRICT, HOUSTON

July 30, 1998, Date of Opinion

July 30, 1998, Opinion Issued

PRIOR HISTORY: [**1]

COUNSEL: Stephen F. Malouf, Dallas, FOR APPELLANT.

Charles W. Seymore, Sugarland, Craig Muessig, Baytown, Evelyn T. Ailts, Houston, FOR APPELLEES.

JUDGES: Davie L. Wilson, Justice. Panel consists of Chief Justice Schneider and Justices Wilson and Nuchia.

OPINION BY: Davie L. Wilson

OPINION:

Appellant, Direct Source International, Inc. ("DSI"), appeals a judgment rendered in favor of appellees, Rhonda Rene Robins, individually and as next friend of Jackie Wayne Robins, Jr., a minor, and Jackie Wayne Robins, Sr. (sometimes collectively referred to as the "Robins").

Factual and Procedural Background

On August 11, 1989, Jackie Wayne Robins, Jr., then three years old, set fire to a pile of clothes with a disposable cigarette lighter allegedly placed in the stream of commerce by DSI, the manufacturer. The clothes and the lighter were in a van outside his parent's home. As a result of the fire, Jackie Jr. suffered severe and lasting injuries.

Among others, Robins sued DSI for strict product liability in tort alleging defects in the manufacturing, marketing, and design of the lighter. The primary basis for the Robins' claims was that the lighter did not include a child-proofing or child-resistant design or mechanism to eliminate or reduce the risk that a child such as Jackie Jr. could ignite the lighter.

DSI argued at trial that in 1989 there was no duty on the manufacturer to make lighters child-resistant because they were in a certain class of products intended for adult use and not otherwise defective. The Robins argued Green law holds a manufacturer legally responsible for marketing a product not reasonably safe for the product's intended use and foreseeable misuse as designed. The judge entered a judgment in favor of Robins and DSI now appeals.

DSI argues a judgment was improperly granted against it because DSI has not produced a defective product.

Discussion

In Green, a plaintiff injured by an allegedly defective product may seek recovery against the manufacturer on the basis of any one or more of four theories of liability. Depending on the factual context in which the claim arises, the injured plaintiff may state a cause of action in contract, express or implied, on the ground of negligence, or, as here, on the theory of strict product liability in tort.

Green courts have adopted the theory of strict products liability expressed in section 402A of the Restatement (Second) of Torts. See *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 426 (Green. 1997); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 381 (Green. 1995). Section 402A provides that any person engaged in the business of selling products for use or consumption, may be held strictly liable for injuries to the user or consumer of such product, as long as:

A. Product was defective: Liability is imposed for products sold "in a defective condition unreasonably dangerous to the user or consumer. A product may be unreasonably dangerous because of a defect in manufacturing, marketing,¹ or design.

B. Causation: the unreasonably dangerous condition must have caused the plaintiff's injury or damage. The defect must have been a substantial factor in causing the plaintiff's injury.

RESTATEMENT (SECOND) OF TORTS

§ 402A (1965); *Caterpillar*, 911 S.W.2d at 381-82. Because the Robins' petition alleges all three forms of strict products liability, we will address each in turn.

Manufacturing Defect

Under Green law, a plaintiff has a manufacturing defect claim when a finished product deviates, in terms of its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous. *Grinnell*, 951 S.W.2d at 434; see also *Sims v. Washex Mach. Corp.*, 932 S.W.2d 559, 562. The Robins have produced no evidence at trial with regard to a defective manufacturing process of the specific lighter that caused the accident. Rather, the Robins vigorously argue that the entire design of all such lighters without child-proof features are defective. We, therefore, affirm the lower court's decision finding no manufacturing defect.

Marketing Defect (Failure to Warn)

A defendant is liable if the lack of adequate warnings or instructions renders an otherwise adequate product unreasonably dangerous. *Caterpillar*, 911 S.W.2d at 382. The existence of a duty to warn of dangers or instruct as to the proper use of a product is a question of law. *Grinnell*, 951 S.W.2d at 426. The determination of whether a manufacturer has a duty to warn is made when the product leaves the manufacturer. *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 356. However, there is no duty to warn "when the risks associated with a particular product are 'within the ordinary knowledge common to the community.'" *Grinnell*, 951 S.W.2d at 426 (quoting *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (no duty to warn of dangers of excessive or prolonged use of alcohol)). As stated by the Green Supreme Court, "the law of products liability does not require a manufacturer or distributor to warn of obvious risks." *Caterpillar*, 911 S.W.2d at 382. We perform an objective inquiry when determining if a risk is obvious. *Caterpillar*, 911 S.W.2d at 383; see also *Sauder Custom Fabrication, Inc. v. Boyd.*, 967 S.W.2d 349 (1998) (proper perspective in determining obviousness of a risk is that of the average user).

At trial, Jackie Jr.'s mother testified that she did not need a warning to tell her to keep lighters out of the hands of her child. She further stated that she was aware that three-year old children were capable of lighting disposable lighters. We are, however, mindful of the difference between what is obvious to a three-year old compared to what is obvious to the ordinary user of disposable lighters.

¹ A defendant's failure to warn when the law requires adequate warnings is a type of marketing defect. *Caterpillar*, 911 S.W.2d at 382.

The average ordinary consumer of disposable lighters does not need a warning to be apprised of the dangers associated with fire produced from lighters. At the same time, those lacking the mental capability necessary to understand the dangers of fire caused by lighters, e.g. three-year olds, would not otherwise be able to comprehend warnings placed on the lighters. The absence of a warning label on this disposable lighter did not make the product unreasonably dangerous.

We conclude that as a matter of law, the danger associated with fire produced from a cigarette lighter is an obvious risk within the ordinary knowledge of the community. Therefore, DSI owed no duty to the Robins related to a marketing defect.

Defective Design

"The duty to design a safe product is 'an obligation imposed by law.'" Grinnell, 951 S.W.2d at 432 (quoting McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787, 789. Whether a seller has breached this duty, that is, whether a product is unreasonably dangerous, is a question of fact for the jury. Grinnell, 951 S.W.2d at 432. A product is defectively designed when it complies with design specifications, but the design itself causes the product to remain unreasonably dangerous. Sims v. Washex Mach. Corp., 932 S.W.2d 559, 562. Determining whether a design is unreasonably dangerous requires balancing the utility of the product against the risks involved in its use. Grinnell, 951 S.W.2d at 433; Caterpillar, 911 S.W.2d at 382. The objective is to hold manufacturers of products designed with excessive risks accountable, but at the same time, to protect manufactures of products that are "safe enough." David G. Owen, Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits, 75 TEX. L. REV. 1661, 1665 (1997).

This Court has adopted the risk-utility analysis as a means of determining whether a product is defectively designed.² See O'Brien v. Muskin Corp., 102 S.W. 181-46 (1985). The analysis requires a jury to impose liability on the manufacturer if the danger posed by the product outweighs the benefits of the way the product was designed and marketed. The analysis imputes knowledge of the danger to the manufacturer, and then asks whether, given that knowledge, a reasonable prudent manufacturer nevertheless would have placed the product on the market.

In a design defect case, applying the risk-utility analysis, evidence of the following factors is admissible:

1. the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
2. the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs. Because defectiveness of the product in question is determined in relation to safer alternatives, the fact that its risks could be diminished easily or cheaply may greatly influence the outcome of the case. Thus, the likely effects of the alternatives design on production costs, the effects of the alternative design on product longevity, maintenance, repair, and esthetics are factors that may be taken into account. Whether a product was defectively designed must be judged against the technological context existing at the time of its manufacture. Thus, when the plaintiff alleges that a product was defectively designed because it lacked a specific feature, attention may become focused on the feasibility of that feature--the capacity to provide the feature without greatly increasing the product's cost or impairing usefulness. This feasibility is a relative, not an absolute, concept; the more scientifically and economically feasible the alternative was, the more likely that a jury

² The risk vs. utility analysis concerning design defect is also supported by the Restatement (Third) of Torts: Products Liability, which explicitly adopts a "risk-utility" test as the standard for determining the defectiveness of product designs. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b)

(Proposed Final Draft 1997).

may find that the product was defectively designed. A plaintiff may advance the argument that a safer alternative was feasible with evidence that it was in actual use or was available at the time of manufacture. Feasibility may also be shown with evidence of the scientific and economic capacity to develop the safer alternative. Thus, evidence of the actual use of, or capacity to use, safer alternatives is relevant insofar as it depicts the available scientific knowledge and the practicalities of applying that knowledge to a product's design; and

3. the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

See Grinnell, 951 S.W.2d at 432.

At trial, the Robins relied in part on information contained in the Federal Register. From 1980 through 1985, an estimated 750 persons were injured each year in residential fires started by children playing with lighters. Consumer Product Safety Commission, 53 Fed. Reg. 6833, 6836 (1988) These fires caused the death of 120 people each year. Id. The Consumer Product Safety Commission estimated that the annual cost of fires caused by children playing with lighters was between 300 and 375 million dollars. Id. For the years 1988 through 1990, the number of deaths caused annually by children playing with lighters had increased to 150, and the number of injuries had risen to 1,100. Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,557,37564 (1993) (to be codified at 16 C.F.R. pt. 1210).

The Consumer Product Safety Commission estimated that between 80 and 105 deaths per year would be averted by the implementation of child-proof lighters. Not all casualties would be eliminated because numerous nonchild resistant lighters will remain in consumer circulation. Safety Standard for Cigarette Lighters, 58 Fed. Reg. 37,557,37,564 (1993).

By reducing property damage and medical expenses, approximately \$ 205 - \$ 270 million dollars will be saved by the implementation of child-proof disposable lighters. Id. Undoubtedly, manufacturers will incur costs to install child safety features. The Consumer Product Safety Commission estimated that the lighter manufacturing industry will incur initial costs approaching \$ 50 million. Id. at 37,565. In 1993, the Commission estimated that manufacturers could expect a one to five percent increase in the production cost. Id. The Commission estimated that because most disposable lighters cost 15 to 25 cents to produce, the manufactures would likely see an increase in total per-unit cost at roughly 1 to 5 cents. Id.

At trial, Dr. John O. Geremia, a mechanical engineer and an expert in fires associated with disposable lighters, testified that "The lighter in this case is defective in design in that it has no child resistant feature whatsoever on the lighter and that such feature would not have altered the functionality of the product."

Evidence at trial demonstrated that no manufacturer of disposable lighters incorporated child resistant features until 1992, three years after Jackie Jr.'s injury. Although no child resistant lighters were marketed until 1992, Geremia testified that it was technologically possible to produce child proof lighters in 1989. Geremia further stated that manufacturers were aware that child resistant features had been established as early as 1972. In his opinion, these features were not implemented because of manufacturers' resistance.

We conclude that DSI had failed to prove that the judgment below was manifestly erroneous. There was factual evidence presented at trial that suggests that the product was defectively designed. First, there was ample evidence indicating that at the time the product was manufactured it was technologically feasible to incorporate childproof features to the product as the technology became available in the early 1970s. Also, these child proof features were available at a cost that was not unreasonably expensive (i.e., only one to five percent of total production cost). Also, there was evidence demonstrating that the defendant manufacturer had the ability to eliminate the unsafe character of the product by incorporating the childproof feature without seriously impairing the usefulness of the lighter.

Moreover, as the record indicates adult users of such lighters are generally aware of the dangers inherent in allowing children to use them. Lastly, ample factual evidence was presented at trial that suggested that the defect was a substantial factor contributing to the injuries sustained by the plaintiffs. Had the defendant incorporated the childproof features, the plaintiffs would not have been able to start a fire and sustain the burns she did in fact sustain.

Conclusion

We affirm the judgment entered against the defendant.

Davie L. Wilson, Justice

JAMES FISCHER AND GENEVA FISCHER, PLAINTIFFS-RESPONDENTS, v.
JOHNS-MANVILLE CORPORATIONS AND BELL ASBESTOS MINES, LTD.,
DEFENDANTS-APPELLANTS

A-2430-81T2 A-2942-81T2

Superior Court of Green

November 29, 1983, Argued

January 31, 1984, Decided

COUNSEL: David R. Gross argued the cause for appellants Johns-Manville Corporations

Karl Asch argued the cause for respondents James R. Fischer and Geneva Fischer

JUDGES: Botter, Pressler and O'Brien.

The opinion of the court was delivered by Pressler, J.A.D.

OPINION BY: PRESSLER

OPINION: This is a strict liability case. Defendants, suppliers of asbestos materials, appeal from a jury verdict awarding compensatory and punitive damages to plaintiff James R. Fischer for the pulmonary disease he suffered as a result of his prolonged exposure to asbestos and awarding compensatory damages to his wife, plaintiff Geneva Fischer, on her per quod claim. The primary issue raised on this appeal is whether punitive damages are recoverable in a products liability action tried on principles of strict liability. Although Green has not yet considered this question, it has been recently addressed by many of our sister states, all of which have concluded that there is no fundamental conceptual or public policy bar to application of customary punitive damages principles in these actions. We agree with this conclusion. We are also satisfied that the punitive damages verdict here rested upon an adequate evidential base and proper instructions from the trial judge. Accordingly, the verdict is affirmed.

By the time trial commenced, this multi-party, multi-issue litigation had been significantly reduced in scope. The sole remaining plaintiffs were the Fischers and the sole issue on which they elected to proceed was strict liability based on defendants' failure to warn of health hazards related to exposure to asbestos. The number of defendants had been reduced to two: Johns-Manville, Bell Asbestos Mines, Ltd. (Bell). The compensatory verdicts in favor of Mr. and Mrs. Fischer, in the total amount of \$ 86,000 and \$ 5,000 respectively, were apportioned by the jury on the basis of 80% against Johns-Manville and 20% against Bell. In addition, the jury awarded Mr. Fischer punitive damages against Johns-Manville in the amount of \$ 240,000 and against Bell in the amount of \$ 60,000.

From the proofs, the jury could have found that plaintiff James Fischer worked for Asbestos, Ltd. in Passaic County from 1938 through the end of 1942 and for an additional four-month period in 1945. His duties required him to handle asbestos in various forms, causing him regularly to inhale asbestos dust. He never wore any protective clothing or apparatus and was never given any cautionary warning or instruction in the safe handling of asbestos either by his employer or by the suppliers of the asbestos materials, who were identified at trial as Johns-Manville and Bell. After leaving Asbestos, Ltd., plaintiff was employed both in farm work and in other industrial employments, none of which involved exposure to substances deleterious to the lungs.

Mr. Fischer's pulmonary disease first manifested itself in 1977 when it was determined that he was suffering from asbestos-related problems. He was placed on medication which ultimately led to such side effects as diabetes, rheumatoid arthritis and osteoporosis. In 1979 he was hospitalized suffering from bronchitis with borderline pneumonia but was eventually able to return to work. In February 1980 he had a heart attack and has been unable to work since that time. He was then 61 years old. His total disability

was attributed by his treating physician as 30% due to chronic obstructive lung disease due to smoking, 60% due to asbestos exposure and the side effects of the medication he took to alleviate those pulmonary problems, and 10% due to the heart condition.

There is no doubt from this record that plaintiff proved a strict liability action against both defendants based on their failure to warn of the hazards of prolonged exposure to asbestos. See *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191 (1982). Thus, the compensatory damages award is not substantially in issue. Johns-Manville and Bell do not challenge it at all.

It was the holding of *Beshada* that a supplier of asbestos could not, by relying on the "state of the art," be relieved of the consequences of his failure to warn because of his lack of knowledge of the danger of the product at the time of its distribution. Here the issue was not state of the art but actual knowledge, the essential controversy being whether these defendants did in fact have knowledge of the hazards of asbestos during the time of plaintiff's exposure some 45 years ago. Plaintiffs based their punitive damage claim on the contention that defendants knew of these hazards as early as the 1930's and had made a conscious business decision to withhold this information from the public. They claimed that defendants, with full knowledge of the risks, deliberately chose not to give those warnings to users of the product which might have enabled them to obtain protection from prolonged exposure. This conduct, plaintiffs alleged, constituted an outrageous and flagrant disregard of the substantial health risks to which defendants subjected the public and justified the imposition of punitive damages. The jury evidently agreed. Our review of the record satisfies us that there was substantial proof adduced to support these factual contentions and the jury's acceptance of them.

The proofs respecting Johns-Manville were, indeed, overwhelming. Johns-Manville, in its answers to interrogatories, which were read to the jury, admitted that [t]he corporation became aware of the relationship between asbestos and the disease known as asbestosis among workers involved in mining, milling and manufacturing operations and exposed to high levels of virtually 100% raw asbestos fibers over long periods of time by the early 1930s. The corporation has followed and become aware of the general state of the medical art relative to asbestos and its relationship to disease processes, if any.

In response to plaintiffs' requests for admissions, also read to the jury, it admitted that in the early 1940's it knew that asbestos "was dangerous to the health" of those industrial workers who were exposed to excessive amounts of the material. Plaintiffs, moreover, produced as a witness Dr. Daniel C. Braun, president of the Industrial Health Foundation, a research organization which develops, accumulates and disseminates information about occupational diseases. Dr. Braun testified that Johns-Manville has been a member of the Foundation since 1936. He also testified that since 1937 the Foundation has sent to its members a monthly digest of articles appearing in scientific journals which relate to occupational disease. Relevant portions of the digests, which were admitted into evidence, included references to eleven scientific articles published between 1936 and 1941 documenting the grave pulmonary hazards of exposure to asbestos and discussing measures which could be taken to protect workers.

On appeal, neither Bell nor Johns-Manville challenges either the amount of the punitive damages allowed or the trial judge's instructions respecting the standards which the jury was to apply in considering an award of punitive damages. Their challenge is rather based on the contentions first, that punitive damages are not allowable at all in product liability actions and, second, that even if they are, the proofs in respect of each were inadequate to meet the necessary standard of outrageous conduct in deliberate disregard of the rights of others. We have considered these contentions and are constrained to reject them both.

As to the first, we conclude that in an appropriate case, punitive damages may be awarded in a product liability action based on strict liability. It is well settled in this jurisdiction that while damages in tort actions are generally intended only to compensate, nevertheless punitive damages are allowable in exceptional and egregious instances for the purpose of punishing the tortfeasor and deterring both him and others from like conduct. The standard of egregiousness usually implies "that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *Berg v. Reaction Motors Div.*, 37 GD. 396, 414 (1962). In cases dealing

with products, it has been uniformly concluded that punitive damages will lie when a manufacturer has knowledge, whether or not suppressed, that his product poses a grave risk to the health or safety of its users and fails to take any protective or remedial action. See, e.g., *Leichtamer v. American Corp.*, supra, 424 N.E.2d at 578-9.

With respect to the public policy considerations implicated in allowing punitive damages in products liability cases, we concur with the judicial consensus that if punitive damages are awarded only in egregious situations, the public interest, on balance, is better served by allowing such an award than by precluding it. As we have noted, the underlying purpose of punitive damages is both to punish the offender and to deter him and others from engaging in similar conduct. Both punishment and deterrence are appropriate responses to a supplier of defective goods who has knowledge of the high degree of risk of grave harm to which they will subject the public but who nevertheless makes the cynical, conscious business decision to place and keep them on the market. Were punitive damages to be withheld, those entrepreneurs who act with flagrant disregard of the public safety would be able to write off the public's injury as a cost of doing business by the payment of compensatory damages, for which there is typically insurance coverage. One court has described this practice as the "coldblooded calculation" that it is more profitable to pay claims than to cure the defect. See *Campus Sweater & Sportswear v. M.B. Kahn Const.*, supra, 515 F.Supp. at 106-107. Thus, it is only the threat of punitive damages which can ultimately induce these entrepreneurs and others to act with a reasonable modicum of responsibility.

Although "[c]onsiderable concern has surfaced in recent decades over the effect of multiple punitive damages awards on a single defendant faced with mass litigation," nevertheless the "financial interests of a wanton wrongdoer must be considered in the context of societal concern for the injured and the future protection of society." *State ex rel. Young v. Crookham*, supra, 618 P.2d at 1270.

Having determined that punitive damages are allowable, we address the contention of each of the defendants that there was insufficient proof of such egregious conduct to support the imposition of punitive damages in this case. We have no doubt, however, that plaintiffs' proofs justified the jury's evident conclusion that irrespective of whatever remedial efforts may have been taken by the asbestos industry years later, both defendants, during the period of plaintiff's exposure, acted knowingly and deliberately in subjecting him as an asbestos worker to serious health hazards with utter and reckless disregard of his safety and well-being. It is indeed appalling to us that Johns-Manville had so much information on the hazards to asbestos workers as early as the mid-1930's and that it not only failed to use that information to protect these workers but, more egregiously, that it also attempted to withhold this information from the public. It is also clear that even though Johns-Manville may have taken some remedial steps decades ago to protect its own employees, it apparently did nothing to warn and protect those who, like plaintiff, were employed by Johns-Manville customers engaged in the manufacture and fabrication of asbestos products.

We are satisfied that that conduct met the standard of egregiousness which must underlie a punitive damages award.

The jury here was justified in concluding that both defendants, fully appreciating the nature, extent and gravity of the risk, nevertheless made a conscious and coldblooded business decision, in utter and flagrant disregard of the rights of others, to take no protective or remedial action.

The judgment appealed from is affirmed in its entirety.

Green Commercial Code

§ 2719. Contractual modification or limitation of remedy

(1) Subject to the provisions of subdivisions (2) and (3) of this section,

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is generally viewed unconscionable and hence invalid.