STATE OF MICHIGAN

COURT OF APPEALS

JON T. WARREN, Conservator of the Estate of TABATHA F. MARKS, Minor, ANTHONY P. MARKS, and TERESA MARKS,

UNPUBLISHED
September 3, 1996

Plaintiffs–Appellees,

v

No. 179350
LC No. 92-012079

TOSHIBA HEATING APPLIANCE CO., INC., TURCO MANUFACTURING CO., a/k/a TMC MANUFACTURING, INC., and K-MART CORPORATION,

Defendants–Appellants.

JON T. WARREN, Conservator of the Estate of TABATHA F. MARKS, Minor, ANTHONY P. MARKS, and TERESA MARKS,

Plaintiffs–Appellees,

v

No. 182857
LC No. 92-012079

SHINTOA KOEKI KAISHA, LTD.,

Defendant–Appellant.

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In this consolidated appeal, defendants Toshiba Heating Appliance Company, Incorporated, Turco Manufacturing Company, and K-Mart Corporation appeal of right the order entering judgment on the jury verdict for plaintiffs. Defendant Shintoa Koeki Kaisha appeals of right the order denying its motion to be declared a prevailing party. We affirm.

Defendants Toshiba, Turco, and K-Mart argue that the circuit court erred in denying their motion for directed verdict because plaintiffs failed to present a prima facie case of design defect. In reviewing a denial of a motion for directed verdict, this Court must consider the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in the nonmoving party's favor, to determine if the plaintiff established a prima facie case. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994); *Dep't of Transportation v McNabb*, 204 Mich App 674, 675-676; 516 NW2d 83 (1994). A court properly denies a motion for directed verdict where reasonable jurors could honestly have reached different conclusions based on the evidence. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995); *McNabb*, *supra* at 676.

Plaintiffs alleged that Tabatha Marks, then a thirteen-month-old toddler, was severely burned by a defectively designed heater manufactured and sold by defendants. At trial, plaintiffs argued that defendants were liable under a theory of negligent design, which involves a claim that the design chosen by the manufacturer renders a product defective. *Gregory v Cincinnati, Inc.*, 450 Mich 1, 11; 538 NW2d 325 (1995). A manufacturer has a duty to design its product to eliminate any unreasonable risk of foreseeable injury. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995). "In determining whether a defect exists, the trier of fact must balance the risk of harm occasioned by the design against the design's utility." *Id.* Under this risk-utility analysis, the trier of fact must consider alternative safer designs and the accompanying risk, as compared with the risk and utility of the chosen design to determine whether the manufacturer knew or should have known of the "design's propensity for harm." *Gregory*, *supra* at 13. A plaintiff has the burden of providing evidence of the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of a design's risk. *Haberkorn*, *supra* at 364.

Plaintiffs' experts testified that the type of heater at issue was unreasonably dangerous for its intended use because it lacked a guard over the hot surface at the top of the heater. The top of the heater was within the reach of small children. Plaintiffs' experts further testified that a guard was both technically feasible and economically practical and that it would have eliminated or minimized the risk of serious injury to Tabatha. The evidence reflected that the heater was to be used as a source of heat in the home; thus, it was foreseeable that small children could be exposed to the heater. The evidence was sufficient to support a finding that the subject heater presented an unreasonable risk of foreseeable injury which rendered the design defective.

Defendants next argue that the circuit court should have granted their motion for directed verdict because plaintiffs failed to prove that the absence of a guard over the top of the heater was the proximate cause of Tabatha's injury. A prima facie case of products liability requires that a plaintiff prove a causal connection between the defect and the injury. *Skinner v Square D Co*, 445 Mich 153, 159; 516 NW2d 475 (1994). A plaintiff's evidence is sufficient if it establishes a logical sequence of

cause and effect, even where other plausible theories exist and have evidentiary support. *Id.* at 159-160. Evidence of a theory of causation is not sufficient, however, if another theory of causation is equally as possible. *Id.* at 164. A plaintiff may show the requisite causal link between the product's defect and the complained of injury by utilizing circumstantial evidence, so long as it gives rise to reasonable inferences of causation, and not mere speculation. *Id.* at 163-164. A plaintiff must produce substantial evidence from which a jury may conclude that more likely than not, but for the defect in defendant's product, the plaintiff's injuries would not have occurred. *Id.* at 164-165, 171.

Testimony reflected that Tabatha's burns were consistent with the palms of her hands contacting a hot metal surface, and that the subject heater was the only item in the room hot enough to cause burns. Because Tabatha was a toddler, it was possible that she had put her hands on the heater because she was looking for something to hold onto. Defendants stated at trial that they were not claiming that Tabatha had burned her hands on the side of the heater, which was the only other possible cause of injury. Plaintiffs' experts testified that any guard would have eliminated or minimized the risk of serious injury to Tabatha. Because no other plausible explanation existed as to how the injury could have occurred, the jury could have concluded from the evidence that it was more likely than not that the injury was caused by Tabatha's hands coming into contact with the unprotected top of the heater.

Defendants next argue that the circuit court erred in denying their motion for directed verdict as to K-Mart because plaintiffs' breach of warranty claim was based on a failure to warn of the UL standards change, which occurred after the heater was manufactured. Defendants assert that they had no duty to warn arising from knowledge acquired after the time of the sale. Defendants mischaracterize plaintiffs' claim against K-Mart. Plaintiffs' claim against K-Mart was actually based on breach of implied warranty of fitness for the intended use. Because this type of claim is valid under Michigan law, the court did not err in denying defendants' motion for directed verdict as to defendant K-Mart. *Prentis v Yale Mfg Co.*, 421 Mich 670, 693; 365 NW2d 176 (1984).

Defendants complain that the circuit court erred in allowing plaintiffs' expert, William Kitzes, to be present during the testimony of defendants' expert, William Baynes, following its original order that all witnesses, other than the principals in the case, be sequestered. This Court will not overturn a decision regarding whether to sequester a witness unless the lower court abused its discretion, which resulted in prejudice to a party. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Because Baynes was a representative of both defendant Toshiba and defendant Turco, he was a principal in this matter. Thus, he was entitled to be present despite the court's sequestration order. Defendants cannot argue that they were prejudiced by the order when Baynes could have been present. Defendants further argue that they were prejudiced because they honored the order by sequestering their expert witnesses, Baynes and Harold Franklin Smith, during the testimony of Neal Hepner, another of plaintiffs' experts. Defendants were not prejudiced because, before testifying, Smith reviewed Hepner's deposition testimony and trial testimony. Therefore, defendants' argument on this issue is without merit.

Next, defendants argue that the circuit court erred in allowing plaintiffs' expert Hepner to testify for plaintiffs, while denying defendants the opportunity to comment on the fact that he was originally

retained as an expert witness for Tabatha's grandparents, Leonard and Ruth Marks, who settled with plaintiffs prior to trial and are not parties to this appeal. Defendants claim that this fact goes toward Hepner's credibility. Defendants failed to preserve this issue for appellate review by making an offer of proof. Therefore, our review is limited to taking notice of plain error that affects a substantial right. MRE 103(a)(2); *Wischmeyer v Schanz*, 449 Mich 469, 483; 536 NW2d 760 (1995).

Defendants' counsel questioned Hepner regarding his history of testifying in heater cases, his experience with the kerosene heater, and why he was retained. Hepner's trial testimony demonstrated that he was hired to provide testimony adverse to defendants. Defendants fail to explain how the fact that Hepner was originally retained by the Marks was relevant to Hepner's credibility. Therefore, we conclude that no error requiring reversal arose. MRE 103(a); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 329; 454 NW2d 610 (1990).

Defendants next argue that the circuit court erred in failing to instruct the jury as requested. Whether a jury instruction applies and accurately states the law is within the lower court's discretion. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990). This Court reviews jury instructions in their entirety, rather than piecemeal, and will not reverse if the theories of the parties and applicable law are, on balance, adequately and fairly presented to the jury. *Id.*

Defendants claim that the circuit court erroneously instructed the jury pursuant to SJI 2d 10.07: Conduct Required for Safety of Child. Defendants argues that this instruction, in conjunction with SJI 2d 25.31: Negligent Design and/or Manufacture-Definition, imposed on them the duty to childproof the heater. Read as a whole, however, the jury instructions as given merely conveyed the proposition that a defendant manufacturer has the duty to act reasonably to eliminate unreasonable risks of foreseeable harm. Also, the instructions reflected that whether children were expected users of the product was a factor in determining whether a defendant acted reasonably because the risks of foreseeable harm might be different for children than for adults. This is an accurate statement of a defendant manufacturer's duty under Michigan law. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982); *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977); *Haberkorn*, *supra* at 364. Therefore, reversal is not required. *Wiegerink*, *supra* at 548.

Defendants also claim that the circuit court erred in instructing the jury pursuant to SJI 2d 6.01: Failure to Produce Evidence or a Witness, because it did not establish the necessary foundation. The court gave version "c" of SJI 2d 6.01, which is appropriate where the evidence was under the defendant's control, was material, and where a question of fact exists whether the party had a reasonable excuse for failing to produce the evidence. The facts support giving the instruction. Defendants' expert Baynes testified that the requested documents, which related to the manufacture of the subject kerosene heater, could not be produced because most had been destroyed. Baynes stated that the records were destroyed during the normal course of business, but admitted that at the time the documents were destroyed, numerous lawsuits were pending against Turco and Toshiba relating to their kerosene heaters. Therefore, the circuit court did not abuse its discretion in giving the instruction. *Wiegerink*, *supra* at 548.

Defendants further claim that the circuit court erroneously instructed the jury on future disability and loss of earning capacity pursuant to SJI 2d 50.07 because no expert testified on the permanency of Tabatha's disability beyond mere speculation. We disagree. Tabatha's plastic surgeon testified that her burns, which were on the functional portion of her hand, were "very extensive." He stated that Tabatha may need future surgeries, because of both functioning and appearance. In his opinion, Tabatha's hand will never be the same as it was before the burn. Tabatha's physical therapist testified that Tabatha was experiencing some deformity in her right index finger. She noted that the finger was bent and could interfere with Tabatha's ability in the future to type, play the piano or dial a telephone. If Tabatha did not use the finger in the future, her coordination would diminish and her tendons might tighten, which may require a joint replacement. The physical therapist said that Tabatha would need more skin applied to her right palm as she grew and that Tabatha would never normally perspire on that hand. Therefore, the circuit court did not abuse its discretion in giving the future disability instruction. *Wiegerink*, *supra* at 548.

Defendants also assert that the circuit court erred in failing to give a supplemental instruction stating that K-Mart did not owe plaintiffs a duty to advise of a change in the UL standard applying to kerosene heaters. "A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge and would not enhance the ability of the jury to decide the case intelligently, fairly, and impartially." *Mull v Equitable Life*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992). Plaintiffs' claim against K-Mart, however, was based on breach of implied warranty of fitness for the intended use, not on failure to warn. The instruction would have added nothing to the otherwise fair jury charge and the circuit court did not err in failing to give the instruction.

Finally, defendant Shintoa argues that the circuit court improperly ruled that its dismissal of Shintoa during the trial was the result of the parties' agreement. This is a finding of fact, which this Court reviews for clear error. MCR 2.613(C); *Arco Industries Corp v American Motorist Ins Co.,* 448 Mich 395, 410; 531 NW2d 168 (1995). Under this standard, this Court may not substitute its own judgment for that of the circuit court unless the facts clearly preponderate in the opposite direction. *Arco*, *supra* at 410. In dismissing Shintoa from the case, the circuit court asked plaintiffs' counsel if he was "thrilled about Shintoa" and whether he really needed Shintoa in the suit. Plaintiffs' counsel responded by saying "no." Thereafter, the court dismissed Shintoa. The court did not clearly err in finding that the dismissal of Shintoa was based on an agreement; therefore, Shintoa could not be declared a prevailing party.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan