STATE OF MICHIGAN

COURT OF APPEALS

RONALD MINNICK

Plaintiff-Appellee,

v

HOLIDAY RAMBLER CORPORATION,

Defendant, Cross Defendant-Appellee,

KOHLER COMPANY,

Defendant, Cross Plaintiff-Appellant.

UNPUBLISHED
September 20, 1996

No. 180472
LC No. 91-10891-NO

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant, Kohler Company,[1] appeals the judgment entered following a jury verdict in favor of plaintiff in this products liability action. Plaintiff was injured when the flywheel on a generator, manufactured by defendant, in a Holiday Rambler motor home, broke into pieces and struck plaintiff as he tried to start the generator. Plaintiff alleged negligence and breach of warranty. The jury found in favor of plaintiff and awarded $20,529 in damages for lost earning capacity and medical expenses, and $12,920 in damages for pain and suffering. We granted leave to appeal. We affirm the verdict, reverse the award of attorney fees and remand.

I.

First, defendant claims that the trial court improperly allowed plaintiff to pursue a defective design theory based upon an inadequate guard on the generator. Defendant argues that because such a theory was not raised in the pleadings, pursuit of this theory was improper.

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

MCR 2.111(B) states that a complaint must contain a "statement of facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." In this case, plaintiff's complaint alleged breach of implied warranty and negligent manufacture theories regarding the generator. The complaint did not contain any specific allegations concerning the guard nor did it allege a design defect theory. However, the trial court ruled that plaintiff could pursue the issue of the guard because defendant had been placed on notice prior to trial, by way of interrogatories, that the guard would be at issue. We agree with the trial court.

Plaintiff's complaint did allege that he was injured when "portions of the fly wheel flew through the air." Although the guard is not specifically mentioned, the allegation is sufficient to inform defendant of the nature of the claim against him. One can reasonably infer that if a guard is in place to protect a person from, among other things, the flywheel, and a person is injured by the flywheel, that the guard may be at issue. In any event, any doubt defendant had about the guard being at issue should have been erased by plaintiff's answers to interrogatories in which the intent to pursue the issue of a defect in the generator guard was clearly stated. We find no abuse of discretion in the trial court allowing plaintiff to place the guard in issue.

Contrary to defendant's assertion, however, the trial court did not allow plaintiff to pursue the guard issue under a defective design theory. The trial court allowed questioning concerning the guard in relation to the negligence and breach of implied warranty claims. The trial court treated this as a manufacturing defect case. The trial court specifically stated that this was not a defective design case, and deliberately deleted any reference to design defects from the jury instructions. See SJI2d 25.31. Although plaintiff did assert, in his opening statement, that there was a design defect in the guard, we find that any impropriety in relation to the raising of the defective design theory is harmless in light of the lack of evidence in support of and absence of an instruction on a design defect theory. Under the circumstances of this case, allowing the verdict to stand would not be inconsistent with substantial justice. MCR 2.613(A).

II.

Next, defendant claims that the trial court erred in denying its motion for a directed verdict. Defendant argues that plaintiff presented insufficient evidence for the jury to find that a defect, attributable to defendant, existed in the generator.

On a motion for a directed verdict, the question is whether it is reasonable to infer from the evidence, direct or circumstantial, that there is a reasonable probability that the accident was caused by a defect attributable to the manufacturer. *Holloway v General Motors Corp (On Rehearing),* 403 Mich 614, 622; 271 NW2d 777 (1978). Where a failure is caused by a defect in a relatively inaccessible part integral to the structure not generally required to be repaired, replaced or maintained, it may be reasonable, absent misuse, to infer that the defect is attributable to the manufacturer. *Id*. at 624. A product can be proved defective by drawing reasonable inferences from circumstantial evidence

without specifically proving the existence of a demonstrable defect. *Kupkowski v Avis Ford, Inc*, 395 Mich 155, 166; 235 NW2d 324 (1975).

In this case, there was evidence presented which indicated that improper installation of the flywheel could result in injury, and that after the incident, a piece of the flywheel which had broken off appeared to have been rusted and broken for some time prior to the incident. There was also evidence which indicated that Holiday Rambler had received no reports of similar incidents. Although plaintiff did not prove the existence of a demonstrable defect, when this circumstantial evidence is looked at in a light most favorable to plaintiff, a reasonable person could have inferred that there was a defect in the manufacture of this particular flywheel, and because the defect was in a relatively inaccessible part of the generator not generally required to be repaired, replaced or maintained, it would be reasonable to infer that the defect is attributable to defendant, the manufacturer. The trial court properly denied defendant's motion for a directed verdict.

III.

Last, defendant claims that the trial court abused its discretion in its award of attorney fees by awarding fees from the date the mediation clerk sent out notices of each party's acceptance or rejection of the mediation award. Defendant argues that fees should be awarded from the expiration of the twenty-eight day reply period, nearly two weeks prior to the actual mailing of the notices.

MCR 2.403(L)(1) states that a party must file a written acceptance or rejection of the mediation panel's evaluation within twenty-eight days after service of the panel's evaluation. A party's decision regarding the mediation evaluation can not be disclosed until the expiration of the twenty-eight day reply period, at which time the mediation clerk is to send notice to the parties indicating each party's decision. MCR 2.403(L)(2). If a party rejects an evaluation and does not receive a verdict more favorable than the mediation evaluation, that party must pay the opposing party's attorney fees necessitated by the rejection of the mediation evaluation. MCR 2.403(O). Generally, the day after the twenty-eight day reply period expires serves as the starting point for measuring those attorney fees subject to reimbursement as a mediation sanction. *Taylor v Anesthesia Associates*, 179 Mich App 384, 387 n 1; 445 NW2d 525 (1989).

In this case, when the twenty-eight day reply period ended, the mediation clerk was on vacation. Therefore, the mailing of the notices was delayed until the clerk returned from vacation. The trial court held that plaintiff was liable for attorney fees from January 25, 1993, the day the notices were sent out.

We find that the delayed notice in this case should not change the general rule that the day after the twenty-eight day period expires is the starting point for measuring attorney fees subject to reimbursement. The key is not actual notice, but when the parties' decisions became ascertainable. *Id*. In this case, even though the mediation clerk was on vacation, the parties' decisions became ascertainable when the prohibition against disclosure expired at the end of the twenty-eight day period.

MCR 2.403(L)(2). The trial court erred by not imposing sanctions from the date the decisions became ascertainable. Therefore, we must remand and direct the trial court to modify its award to reflect reasonable attorney fees incurred from the day after the twenty-eight day reply period expires. [2]

The verdict is affirmed, the trial court's award of attorney fees is reversed, and we remand for proceedings consistent with this opinion.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] Defendant Holiday Rambler Corporation raises no issue on appeal. Therefore, Kohler will be referred to as defendant.

[2] The record is unclear as to whether January 11, 1993 was the day the twenty-eight day reply period expired or the day the clerk should have mailed out the notices, i.e., the day after the twenty-eight day period expired. Fees must be awarded from the day after the twenty-eight day period expires, what that date is in this case must be determined by the trial court.