STATE OF MICHIGAN

COURT OF APPEALS

TADEUSZ HEJNAR, ALICIA HEJNAR AND LIBERTY MUTUAL INSURANCE,

Plaintiffs-Appellees,

v

CINCINNATI INCORPORATED,

Defendant-Appellant,

and

PREMIER STEEL CO, GENERAL RIGGERS AND ERECTOR and HERRON ELECTRIC,

Defendants.

UNPUBLISHED
November 26, 1996

No. 187730
LC No. 93-324498-NP

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Defendant Cincinnati, Inc., appeals as of right from a judgment for plaintiff in this products liability action. We affirm in part, reverse in part, and remand.

The undisputed facts in this case establish that plaintiff, a fifty-three-year-old Polish immigrant, was injured while working on a steel slitting machine designed and manufactured by Cincinnati, Inc. While attempting to adjust a wooden 2 x 4 positioned on the line, plaintiff's left hand was crushed between two rollers.

On appeal, defendant first asserts that the lower court erred in refusing to admit into evidence four brochures and a diagram offered as exhibits by defendant, holding that their probative value was outweighed by their prejudicial effect. We review a trial court's determination to exclude evidence for

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

an abuse of discretion. *Gilliam v Lloyd*, 172 Mich App 563, 586; 432 NW2d 356 (1988). Reviewing the evidence here, we find no abuse of discretion.

> A design defect can be established upon proof :
>
> > (1) That the particular design was not in conformity with industry design standards, design guidelines established by an authoritative voluntary organization, or design criteria set by legislative or other governmental regulation; or
> >
> > (2) That the design choice of the manufacturer carries with it a latent risk of injury and the manufacturer has not adequately communicated the nature of that risk to potential users of the product. [*Owens v Allis-Chalmers Corp*, 83 Mich App 74, 81; 268 NW2d 291 (1978).]

In establishing that proof, the Michigan Rules of Evidence state that evidence is relevant if it makes the existence of any fact of consequence to a determination of the action "more probable or less probable than it would be without the evidence." MRE 401. All relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. Here, the lower court held that four brochures offered by defendant to establish the industry standard at the time of design, and a diagram indicating the placement of warning placards on the subject slitter machine were not admissible under MRE 403. We agree.

Defendant attempted to admit into evidence pages from brochures of other similarly configured coil handling equipment manufacturers whose machines had unguarded pull rolls. However, defendant failed to identify the date of the pages in order to establish if the standard with which they purportedly complied was in effect at the time the slitter at issue was designed and manufactured. Inasmuch as the brochures being offered were not identified as pertaining to the time period of the machine's design and manufacture, they were not relevant in determining if defendant met the pertinent industry standards. *Owens, supra*, 83 Mich App 81. Therefore, the lower court did not abuse its discretion in ruling that the confusion which would be created by the brochures was not outweighed by its probative value.

Defendant also attempted to admit at trial a diagram that demonstrated the location of thirty warning placards placed on the subject slitter machine, asserting that it was relevant because under Michigan law a manufacturer has a duty to warn users about the dangers associated with the intended use and foreseeable misuse of its products. However, defendant established through its expert witness that the relevance of the warning placards was their content as opposed to their location. The expert further testified that the diagram did not actually show the placards, but identified their location by showing their part number at the appropriate location on the line. Therefore, as the diagram did not relate to the content of the warning but only to their location, and also was confusing in that it only showed the location of the placards by part number, it was not an abuse of discretion for the lower court to refuse to admit the exhibit into evidence on the basis that its probative value was outweighed by its prejudicial effect.

Defendant also asserts on appeal that the trial court erroneously instructed the jurors that they had the duty to reduce any future damages award to present cash value. We agree. When a party fails to timely and specifically object to a jury instruction, as here, appellate review is precluded absent manifest injustice. *Janda v Detroit*, 175 Mich App 120, 126; 437 NW2d 326 (1989). Manifest injustice will not be found unless the error is of such a magnitude as to constitute plain error. *Id*. We find plain error here.

Under MCL 600.6306; MSA 27A.6306, after October 1, 1986, in a personal injury case the procedure to follow concerning the calculation of reducing future damages to present cash value is as follows:

> When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

We have interpreted this statute to mean that it is the duty of the trial court to reduce the award to its present cash value. *Nation v W D E Electric Co*, 213 Mich App 694, 699-700; 540 NW2d 788 (1995). Therefore, the trial court did err in its instructions. Further, this error resulted in manifest injustice, as not only did the jury perform the computation, but they were instructed under SJI2d 53.03 to calculate using a five percent simple interest discount rate, while under § 6306 a compound discount rate is contemplated. *Nation, supra*, 213 Mich App 699; MCL 600.6306(2); MSA 27A.6406(2).

Affirmed in part, reversed in part, and remanded to the lower court to calculate future damages to present cash value. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Timothy P. Pickard