STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY POWELL,

Plaintiff-Appellee,

v

ANDERSON HICKEY COMPANY INC,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 179325
LC No. 90-387780

Before: Holbrook, Jr. P.J. and Taylor and W. J. Nykamp,* JJ.

PER CURIAM.

Defendant appeals as of right a jury verdict in favor of plaintiff, finding that defendant was negligent and had breached an implied warranty "in one or more of the ways claimed by plaintiff" in this product liability case. Defendant's post-trial motions for judgment notwithstanding the verdict or a new trial were denied by the trial court. We reverse and remand for a new trial limited to plaintiff's failure to warn theory.

Defendant first argues that the trial court erred in denying its motion for a partial directed verdict at the close of plaintiff's proofs because plaintiff failed to establish a prima facie case of design defect. We agree.

In Michigan, two theories support a finding of negligent design: (1) a design defect, which renders the product defective when a risk-utility analysis favors an available safer alternative; and (2) a failure to warn, which renders a product defective even if the design chosen for the product does not render the product defective. *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). Under the latter theory, it is well established that a manufacturer's duty to warn of an inherently dangerous characteristic of its product exists, notwithstanding the fact that the product itself is not defective in design or workmanship. *Id.; Gerkin v Brown & Sehler Co*, 177 Mich 45, 60; 143 NW 48 (1913). Having reviewed the parties' pleadings, opening statements of counsel, trial evidence and testimony, closing arguments, and the court's instructions to the jury, it is clear to us that the intended

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

focus of plaintiff's case was on a failure to warn theory of liability. At the close of plaintiff's proofs, however, defendant moved for a partial directed verdict on the theory of design defect. Plaintiff's counsel opposed the motion, arguing:

> Your Honor, I'm sure you recall Dr. Cunitz's testimony with regard to this.
>
> > Q[.] So you can't say one way or another if the defect or hazard that you talked about could have been designed out of this desk, correct?
>
> He says,
>
> > A[.] No, I don't agree with that. I think it could have. I think a competent engineer back in the sixties could have dealt with this problem.
>
> Your Honor, I think that the jury is certainly entitled to consider that that's a defect in and of itself.

The court agreed and denied defendant's motion. Thus, plaintiff's argument on appeal that this case was tried solely on a theory of failure to warn is disingenuous. The court clearly erred in denying defendant's motion for a directed verdict regarding the design defect theory.

We reject any suggestion that this error was rendered harmless on the basis that the court's subsequent instructions did not improperly broaden plaintiff's theories of liability to include traditional design defect. This is incorrect. The court gave the exact instruction (SJI2d 25.31) that would have been given if one wished to broaden the theories to include design defect. SJI2d 25.31 is entitled "Negligent Design and/or Manufacture-Definition." It is, simply stated, the traditional design defect instruction. Said another way, if plaintiff had properly pleaded and proved design defect, she would not have been subject to a directed verdict regarding this theory and would have had SJI2d 25.31 presented to the jury as the basis for determining her claim of design defect. It is logically impossible to view this type of error as harmless because it requires the implicit conclusion that juries do not follow instructions. Such an assumption is at odds with any understanding of a serious judicial system.

The trial court also erred when it allowed plaintiff's expert witness to testify beyond his expertise as a safety/warnings expert regarding the desk's design defect. Plaintiff's expert was only competent to testify regarding the failure to warn theory. Yet, at trial, plaintiff's expert testified as follows: "I don't think there should be a warning. I think this thing should be fixed so no warning is necessary." He also testified: "I don't think you need any warning labels on this desk. It needs to be redesigned so it's not hazardous anymore." We are not convinced that the court's subsequent limiting instruction dispelled the prejudice attributable to the jury hearing the expert give expert testimony regarding design defect that was clearly outside the witness's area of expertise.

Defendant also alleges various instructional errors by the trial court. We find that the trial court erred in giving the breach of implied warranty instructions (SJI2d 25.21 and SJI2d 25.22). The use note to these standard jury instructions specifically state that, on the basis of, *Prentis v Yale*, 421 Mich

670; 365 NW2d 176 (1984), that they should not be used in an action against a manufacturer for an alleged defect in the design of its product.

Further error occurred when the court gave a nonstandard jury instruction that stated: "If you find that the design choice of Anderson Hickey carries with it a latent risk of injury and … ." This instruction was contrary to law. See *Owens v Allis-Chalmers Corp*, 414 Mich 413; 425; 326 NW2d 372 (1982) (the test, however, is not whether the risks are obvious, but whether the risks were unreasonable in light of the foreseeable injuries). See also *Casey v Gifford Wood Co*, 61 Mich App 208, 217; 232 NW2d 360 (1975) (the test of liability is no longer the latent-patent rule, but whether the danger from which the plaintiff suffered injury was unreasonable and foreseeable; instructions to the jury should be couched in these terms rather than the latent-patent terms; because they were not so couched, we find error).

Considered together, these errors were not harmless. See *Gregory*, *supra* at 33-34 (giving improper jury instruction further confused and tainted the jury's finding of liability requiring new trial; there is simply no principled means to find these errors harmless). See also *Solomon v Shuell*, 435 Mich 104, 139, n 33; 457 NW2d 669 (1990) (cumulative effect of errors required reversal).

Reversed and remanded for a new trial limited to plaintiff's failure to warn theory. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Wesley J. Nykamp