

STATE OF MICHIGAN  
COURT OF APPEALS

---

H. JOHN BATES,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 179300

Wayne Circuit Court

LC No. 92-212753-NZ

JOHNSON & HIGGINS of  
MICHIGAN, INC., STEHEN M.  
STUART, JOHN M. GUSSENHOVEN,  
Jointly and Severally,

Defendant-Appellants.

---

Before: Corrigan, P.J., and J.B. Sullivan\* and T.G. Hicks,\*\* J.J.

HICKS, T.G. (dissenting).

I respectfully dissent.

The majority correctly concludes that the trial court erred in refusing to give the requested instruction about the *bona fide* economic reason for the discharge. However, the failure to give the instruction, in this case, comprises substantial injustice.

We invest the jury with a studied (and healthy) skepticism for the arguments of counsel. The trial judge in this case instructed the jury, in his preliminary instructions after the jury was sworn, that “[**the**] **Court** will decide the questions of law that arise during the trial,” and that “**the Court’s** responsibility . . . is to instruct you as to the law which applies to this case.” At the conclusion, he instructed the jury that “[a]rguments, statements, and remarks of attorneys are not evidence . . .” (Emphasis has been added in both places.)

By failing to give the requested (and admittedly appropriate) instruction, the trial court licensed the jurors to discount, disregard, or ignore defense counsel’s argument about the economic reasons defense. If a juror carefully listened to all the instructions, and even if she believed defense counsel, she

---

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

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

could conclude, from the omission of the requested instruction at the end of the case, that the economic factors, while perhaps the company's *reasons* for the discharge, *were not a legal defense to plaintiff's claim*. This is misleading.

The importance of this error is magnified by the fact that the jurors interrupted their deliberations to ask for a rereading of the "employment questions"-the three questions on the jury form which related to this issue.

The "substantial injustice" concept should be applied only in very limited situations, because it encourages complacency in the jury instruction process. It becomes too easy to deny requested instructions in reliance upon counsel's right to cure those defects in her argument.

I am perhaps more pessimistic than the majority about the extent to which defective instructions can be cured by argument, no matter how skillful, especially where counsel's closing arguments are delivered **before** the court's final instructions. The trial court's denial of this requested instruction, made before closing arguments, has, at the very least, a dampening effect on counsel's argument.<sup>1</sup>

Determining whether this error comprises substantial injustice is clearly, and quite simply, a judgment call. In this case, I believe it is. I would reverse and remand for a new trial.

/s/ Timothy G. Hicks.

<sup>1</sup> Knowing that the trial judge denied the requested instruction, cautious counsel might hesitate in vigorously arguing this point.