STATE OF MICHIGAN

COURT OF APPEALS

WYOMIA RAY,

Plaintiff-Appellant,

v

RHEEM TEXTILE SYSTEMS, INC., f.k.a. NEW YORK PRESSING MACHINERY CORP.,

Defendant-Appellee.

UNPUBLISHED
March 19, 2002

No. 225934
Oakland Circuit Court
LC No. 98-009682-NO

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict of no cause of action in this products liability case. We affirm.

Plaintiff, who had about twenty years of experience in the pressing and dry cleaning business, suffered an injury shortly after beginning work at Best Cleaners, when her hand became trapped in a "New Yorker Ultramatic" garment press. According to plaintiff, as she pushed her hand into a pants pocket to straighten it out, the head of the machine fell down on her arm and locked, entrapping it and exposing it to steam heat. Plaintiff suffered severe burns and had grafts of skin harvested from her leg and transplanted to her left arm, wrist, and hand.

I

Plaintiff first argues that the trial court erred in refusing to allow her to present "postmanufacture evidence" (specifically post manufacture dealer bulletins and retrofit kits) in support of a postmanufacture failure to warn theory. Plaintiff contends that defendant had such a duty, but even if it did not, defendant voluntarily assumed such a duty and discharged it negligently. We disagree.

Questions regarding duty are for the court to decide as a matter of law and are subject to de novo review. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001).

A

Plaintiff was allowed to proceed on her traditional design defect theory under the risk-utility test. As part of her design defect theory, plaintiff was permitted to argue both that

defendant's product was defectively designed from a safety standpoint, and that defendant breached a point-of-manufacture duty to warn.

In *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989), after remand 208 Mich App 556; 528 NW2d 787 (1995), this Court explained the appropriate risk-utility test to be utilized in a traditional design defect case:

> To summarize, a prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product. See *Prentis* [*v Yale Mfg Co*, 421 Mich 670, 687, n 24; 365 NW2d 176 (1984)].

This theory of negligence was described as the more "traditional" one of two in *Gregory v Cincinnati, Inc*, 450 Mich 1, 11-12; 538 NW2d 325 (1995):

> In Michigan, there are two theories that will support a finding of negligent design. The first theory is based on a failure to warn. This theory renders the product defective even if the design chosen does not render the product defective. See *Gerkin v Brown & Sehler Co*, 177 Mich 45, 57-58; 143 NW 48 (1913); *Comstock* [*v General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959)]; American Law of Products Liability, 3d, § 32:2, pp 17-19. This warning includes the duty to warn about dangers regarding the intended uses of the product, as well as foreseeable misuses. *Antcliff v State Employees Credit Union*, 414 Mich 624, 637-638; 327 NW2d 814 (1982). If, however, the manufacturer is not aware of the defect until after manufacture or sale, it has a duty to warn upon learning of the defect; if there exists a point-of-manufacture duty to warn, a postmanufacture duty to warn necessarily continues upon learning of the defect. *Comstock, supra*; Products Liability, *supra* at § 32:79, p 130.
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> The other, more traditional means of proving negligent design questions whether the design chosen renders the product defective, i.e., whether a risk-utility analysis favored an available safer alternative. *Prentis v Yale Mfg Co*, 421 Mich 670; 365 NW2d 176 (1984). In such a complaint, the focus of any duty begins with whether the product was defective when it left the manufacturer's control. *Holloway v General Motors Corp (On Rehearing)*, 403 Mich 614, 621; 271 NW2d 777 (1978). [Footnote omitted.]

The *Gregory* Court clarified that only one type of postmanufacture duty is recognized in this state:

> In Michigan to date, the only postmanufacture duty imposed on a manufacturer has been the duty to *warn* when the defect existed at the point of manufacture, but

> for some reason was undiscoverable by both the manufacturer and the consumer at that time. *Comstock, supra*. However, we have never held that a manufacturer has a postmanufacture duty to repair or recall in this context, and have never held that any postmanufacture duties can arise from subsequently discovered knowledge unattributable to a defect at the time of manufacture. [*Gregory, supra* at 17-18; footnotes omitted; emphasis in original.]

The *Gregory* opinion makes clear that when a party is bringing a traditional design defect case (the second theory described in the opinion, in which the risk-utility test is used), postmanufacture evidence (of repairs, safety improvements, technological developments, new OSHA standards, etc.) may not be used retrospectively to establish that a defect existed *at the time of* manufacture. As the *Gregory* Court explained, in a traditional design defect case

> [e]vidence of conduct after the date of manufacture improperly shifts the focus from the premanufacturing decision and has the potential to taint any finding of liability. [*Gregory*, *supra* at 6.]

Therefore, the only way the postmanufacture dealer bulletins and retrofit kits would have been admissible in this case is if defendant had a postmanufacture duty to warn. A postmanufacture duty to warn exists if a defect is "latent" –which is defined as "present but not visible, apparent, or actualized; existing as potential . . . . " *Random House Webster's College Dictionary*, p 749 (2000). This duty arises regardless of when the latent defect is discovered, including after the date of manufacture. A post-sale duty to warn may arise—but only if a latent defect existed in the product at the point of manufacture, "but for some reason was undiscoverable by both the manufacturer and the consumer at that time." *Gregory*, *supra* at 17-18.

Thus, the admissibility of defendant's postmanufacture dealer bulletins and retrofit kits depends on whether plaintiff asserted a latent defect, "undiscoverable" at the point of manufacture, about which defendant had a duty to warn upon learning. At trial, plaintiff described this theory (her theory C) as follows:

> C. IT LEARNED OF THE EXISTENCE OF HAZARDS FOLLOWING THE SALE OF THE NEW YORKER "ULTRAMATIC" PANTS PRESSER MODEL NO. 1-AAL08S, SERIAL NO. 62376, AND UNDERSTOOD ITS PRODUCT'S DANGEROUS CHARACTER, BUT FAILED TO WARN OF THE LATENT HAZARDS.

This characterization implies that defendant "learned" of the press' dangerous propensity after its manufacture. It fails, however, to specify what the "latent defect" was.

In *Comstock*, *supra* at 168, the plaintiff identified the latent defect that triggered the postmanufacture duty to warn: brake failure attributed to a manufacturing defect in a sealer that allowed brake fluid to escape, thereby causing brake loss. Our Supreme Court explained:

> If such duty to warn of a known danger exists at point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market. [*Id.* at 177-178.]

However, as the *Gregory* Court explained:

> To support a claim of latency, the plaintiff usually must make "an initial showing that the manufacturer acquired knowledge of a defect present but unknown and unforeseeable at the point of sale and failed to take reasonable action to warn of the defect." See *Patton v Hutchinson Wil-Rich Mfg Co*, 253 Kan 741, 761; 861 P2d 1299 (1993); see also *Comstock, supra.* [*Gregory, supra* at 20, n 22.]

Accordingly, a party must identify the latent defect of which the manufacturer acquired knowledge.

Plaintiff failed to identify a latent defect that would support a postmanufacture duty to warn. Even after the court pushed plaintiff to specify what the latent defect was, plaintiff could not point to a particular defect, but only to the fact that defendant learned that injuries were occurring:

> THE COURT: What's the latent defect?
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> [Plaintiff's Counsel]: The latent defect again you Honor is the failure - - one, it's failure to warn.
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> THE COURT: That's not a latent defect.
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> [Plaintiff's Counsel]: Number two, the failure to put any guards on these machines, install the guards on these machines consistent on getting those in the machines.
>
> THE COURT: It's design.
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> [Plaintiff's Counsel]: I'm sorry, your Honor. The latent defect. The latent defect is they found out that people were getting their arms, their hands, their wrists caught between the buck and the head because they were either trampling on the pedal or activating the bar or the timers were locking down on these people's hand. They found out there was something wrong with their machines. They told their dealers, you must disconnect foot pedals, you must have a head safety guard if you've got a timer on these machines. They also - -
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> * * *
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> They had a document in 1977 that said since 1971, we have been sending bulletins and letters to all dealers as well as to end users allegedly of our air operating presses advising that pedal-operated presses must be equipped with head safety guards, we still find that plant owners still disregard our advice and they allow untrained operators to operate our equipment without the head guard. That's just one of the pieces, your Honor. They knew there was something wrong with their machine. They knew. If you look at the bulletin, it was attached to our response to their motion to exclude the evidence[,] shows that they knew, they gave instruction[s to] disconnect the pedal, disconnect the timer, put these head

> safety guards on, put a foot pedal guard on. We still find that these things are being activated either by hand other [sic] at worse, by foot.

Plaintiff did not describe a latent defect that was responsible for the injuries described. Rather, plaintiff described injuries and safety devices that were later made available to reduce the risk of these injuries. Because the only recognized postmanufacture duty to warn in this state involves latent defects, plaintiff's failure to specify a latent defect was fatal to this theory of recovery and the court properly excluded it.

There is an inherent inconsistency between a traditional design defect theory and issues of latency. As the *Gregory* Court explained:

> In *Prentis*, we held that design defect cases require a risk-utility balancing test. *Id*. at 684, 691. With the focus on conduct rather than simply the product, proof of a defect by the risk-utility test resolves any issue of latency because the result of the test is a finding that the manufacturer either knew or should have known of the danger at the point of manufacture. Accordingly, a design defect cannot, practically speaking, be deemed undiscoverable at the point of manufacture. In other words, constructive knowledge imputed to the manufacturer under the state of the art at the time of design renders the concept of latency at issue in *Comstock* moot in a design defect case. There being no issue of latency, the question becomes whether any postmanufacture duty is imposed. [*Gregory, supra* at 21-22, footnotes omitted.]

Additionally, in footnote 24, the *Gregory* Court explained:

> One commentator has subdivided design defects into two categories at opposite ends of the spectrum: (1) inadvertent design errors, and (2) conscious design choices. Henderson, *Judicial review of manufacturers' conscious design choices: The limits of adjudication*, 73 Colum L R 1531, 1547-1550 (1973).
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> "At one end of the spectrum are risks of harm which originate in the inadvertent failure of the design engineer to appreciate adequately the implications of the various elements of his design, or to employ commonly understood and universally accepted engineering techniques to achieve the ends intended with regard to the product. At the other end of the spectrum are risks of harm which originate in the conscious decision of the design engineer to accept the risks associated with the intended design in exchange for increased benefits or reduced costs which the designer believes justify conscious acceptance of the risks. In cases involving liability for inadvertent design errors, the means employed to reach the intended ends are insufficient: in cases involving liability for conscious design choices, the intended ends themselves are out of step with prevailing social policies. [*Id*. at 1548.]"
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> In the context of Michigan law, we regard Professor Henderson's characterization of inadvertent errors as things the manufacturer "should have known" at the time of manufacture, see *id*. at 1550, whereas the conscious design choice is a danger

> that the manufacturer knew, but that the risk utility favored the design chosen. *Id*. at 1553.

Conversely, if there was no design defect, i.e., if the jury concludes, as it did in this case, that there was no inadvertent error in design and no failure in design under a risk-utility analysis, then there was no defect at the time of manufacture. In such a case, the later notice of injury, additional developments in safety technology, and more stringent workplace safety standards cannot render the original design defective. In a design defect case, the risk-utility test operates to impute a conscious design choice to defendant. In that situation, the alleged defect falls within this spectrum of "knew or should have known" and any issue of latency (and "undiscoverability") is subsumed in this inquiry. Further, the *Gregory* Court emphasized the uniqueness of the postmanufacture duty to warn situation in *Comstock*, distinguishing it from a traditional design defect case:

> In the unique context in which the manufacturer acknowledged the existence of a *latent manufacturing* defect, as evidenced by numerous failures and the offer to repair, the Court imposed a duty to warn. [*Comstock*,] *supra* at 175-176. It was apparent that this subsequently discovered knowledge and increase of the risk of serious injury required some attempt to prevent the accident. Reasoning that "[i]f such duty to warn of a known danger exists at point of sale, . . . a like duty to give prompt warning exists when a *latent defect* which makes the *product hazardous to life becomes known* to the manufacturer *shortly after the product* has been put on the market." *Id*. at 177-178 (emphasis added). [*Gregory, supra*, 450 Mich at 18-19, emphasis in original.]

Because no latent defect was identified in this case, and because "if the manufacturer should have known of the problem, liability attaches at that point, not post manufacture," the postmanufacture dealer bulletins and retrofit kits were properly excluded. Any postmanufacture evidence would have been prejudicial and irrelevant, and plaintiff was properly limited to introducing evidence showing what defendant knew or should have known at the point of manufacture in 1965.

We further note that plaintiff was permitted to admit one bulletin regarding dual hand buttons to impeach defendant's witness on the issue of feasibility.[1] Plaintiff never laid a foundation to establish that head guard described in the bulletins was within the state of the art at the time of manufacture, or that the head guard was similar in pertinent respects to the one plaintiff's expert recommended and defendant's expert testified would not be feasible. In fact, the 1971 bulletin refers to the head guard as "recently" developed. Nor did plaintiff seek to established that the matters addressed in the bulletins were actually within defendant's knowledge when the press was manufactured.

B

[1] We note that even this use was questionable as the expert admitted that the buttons could have been installed at the time of manufacture and never asserted that the use of the buttons was not feasible, only that they impaired the utility of the press.

The second portion of plaintiff's pleadings alleged that defendant voluntarily assumed a postmanufacture duty to repair, retrofit, or recall its product when it mailed "dealer bulletins" to its dealers and manufacturers, and that defendant negligently performed this assumed duty by failing to inform the customers and actual users of the press of subsequent remedial safety devices.

In her appellate brief, plaintiff described this theory as follows:

> B. IT KNEW OF THE DEFECTS IN ITS PRODUCT, UNDERSTOOD ITS DANGEROUS CHARACTER, AND UNDERTOOK TO MAKE RETROFIT GUARDS FOR THE PRESSER BUT NEGLIGENTLY FAILED TO INSTALL ANY GUARD ON THE NEW YORKER "ULTRAMATIC" PANTS PRESSER MODEL NO. 1-AAL-8S, SERIAL NO. 62376;

Plaintiff characterized this theory as a "negligent assumption of a duty" theory and argued that even if, as defendant argued, defendant did not initially have any postmanufacture duty to warn, it voluntarily assumed such a duty by distributing to its dealers and distributors the dealer bulletins and retrofit kits postmanufacture. The court excluded this theory of recovery on the basis that there was no legal authority for this proposition. We agree. Under *Gregory*, the law is clear that no postmanufacture duty to repair, retrofit, or recall is recognized in this state. *Gregory, supra* at 18.

In *Zychowski v A J Marshall Co,* 233 Mich App 229, 230; 590 NW2d 301 (1998), the defendant was a distributor of a food grinder manufactured by General Slicing Machine Company, Inc.; the plaintiff injured his hand after placing it in the food grinder and brought suit, alleging that the defendant was negligent in "not responding to, or assisting in, a recall of the grinder by General Slicing." This Court reiterated the rule that "in general, a manufacturer or distributor is under no duty to recall a product," explaining, *id.* at 231:

> This is particularly true in a case such as this where the grinders were not defective at the time of manufacture, but, through new technology, may now be made to be less dangerous. [*Gregory, supra* at 19-20, footnote omitted.]

Zychowski, *supra* at 231, acknowledged that "[a] party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform" and "[o]nce a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Id*. It is these propositions upon which plaintiff relies.

Plaintiff contends that defendant is liable because it voluntarily "began a campaign to warn of dangers associated with the actual use of its products and to inform of new technology that could be used to make its products less dangerous." The bulletins demonstrate that defendant undertook to urge its dealers to strongly encourage their customers to purchase available safety devices on new or rebuilt presses and to retrofit old presses. The bulletins do not, however, establish that defendant undertook to locate and notify all current owners of presses manufactured years before of the need and availability of new safety devices, or of measures necessary to make the old presses safe. There was no evidence that defendant initiated a recall. The bulletins only support that defendant urged its dealers to notify press owners of the advisability and availability of there products.

II

Next, plaintiff argues that the court erred by instructing the jury that defendant owed no duty to plaintiff to warn of risks which are obvious and patent to all. We disagree.

Claims of alleged instructional error are reviewed on appeal for an abuse of discretion. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). Jury instructions are reviewed in their entirety to determine whether they fairly apprised the jury of the applicable law and the issues to be tried in the case. *Id*. This Court will not reverse a trial court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice. *Id*.

The revisions to the product liability statute that took effect in 1996 limit the duty to warn. The accident which is the subject of this case occurred on October 10, 1995. This lawsuit was filed in October 1998. 1995 PA 249 (specifically, MCL 600.2948) applies to cases filed on or after the effective date of the amendatory act, which was March 28, 1996. See Historical and Statutory Note following MCL 600.2925d. Therefore, the 1995 amendments to the Product Liability Act apply.

MCL 600.2948, which was added as a part of the amendments, provides in pertinent part:

> (2) A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action. [Emphasis added.]

The jury in this case was instructed that defendant owed no duty to warn of risks which were "obvious and patent to all." This instruction was thus more favorable to plaintiff than what is provided in MCL 600.2948. Although plaintiff argues that the statute is not intended to apply where a simple tool is not involved, the statute contains no such language.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper