IN THE COURT OF APPEALS OF IOWA

No. 8-882 / 08-0365
Filed February 19, 2009

STEPHEN MARTIN SCOTT,
Plaintiff-Appellant,

vs.

DUTTON-LAINSON COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Appeal from the district court judgment in a products liability case. **REVERSED.**

Michael Jones of Patterson Law Firm, L.L.P., Des Moines, for appellant.

J. Campbell Helton of Whitfield and Eddy, P.L.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

SACKETT, C.J.

Plaintiff-appellant, Stephen Scott, appeals from the district court judgment entered in his suit against defendant-appellee, Dutton-Lainson Company, the manufacturer of a swivel jack for a boat trailer. He claims the court erred in excluding (1) evidence that Dutton-Lainson modified the pin of the swivel jack following Scott's injury and (2) testimony concerning a statement by an officer of Dutton-Lainson that it modified the swivel jack as a result of Scott's injury. He also claims a substantial right was affected by the court's exclusion of the evidence Dutton-Lainson modified the pin. We reverse.

I. Background and Proceedings.

Plaintiff, the manager of a boat dealership, was injured when the swivel jack on a boat trailer collapsed when he attempted to move the boat and trailer and the tongue of the trailer landed on his foot. He sued the trailer manufacturer and the trailer jack manufacturer, alleging the jack failed due to defects in its design and manufacture and the negligence of the defendants. He also alleged the defendants failed to warn him adequately of the danger.

Before trial, the defendants filed a motion in limine pursuant to Iowa Rule of Evidence 5.104 and Iowa Rule of Civil Procedure 1.431 for a ruling on preliminary questions of admissibility of certain evidence including subsequent remedial measures. Plaintiff dismissed the trailer manufacturer, but proceeded to trial against Dutton-Lainson. At the beginning of trial, the court sustained the motion. The court submitted the case to the jury on theories of design defects and failure to warn properly. The jury returned a verdict finding Dutton-Lainson

was not at fault. The court entered judgment for the defendant and dismissed the plaintiff's claim.

II. Scope and Standards of Review.

Our review is for correction of errors at law. Iowa R. App. P. 6.4; *Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410, 412 (Iowa 1997). Trial courts are granted broad discretion concerning the admissibility of evidence, and reversal is warranted only if the court clearly abused its discretion, to the complaining party's prejudice. *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002); *see also* Iowa R. Evid. 5.103(*a*). Therefore, our review of the court's decisions concerning admissibility of evidence is for an abuse of discretion. *Jensen v. Sattler*, 696 N.W.2d 582, 585 (Iowa 2005).

III. Analysis.

A. Subsequent Remedial Measures. The plaintiff contends the court erred in excluding evidence the defendant modified the pin in its swivel jack after his injury. Iowa Rule of Evidence 5.407 governs the admissibility of evidence of subsequent remedial measures:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort or breach of warranty or for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The rule is "not a general rule of exclusion," but rather "a rule precluding the evidentiary use of remedial measures to prove negligence." *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595, 597 (Iowa 1996).

Rule 5.407 was adopted before Iowa adopted the Restatement (Third) of Torts: Product Liability sections one and two for product defect cases. *See Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002). The language of the rule excludes evidence of remedial measures if offered "to prove negligence," but does not require exclusion if offered "in connection with a claim based on strict liability in tort." Iowa R. Evid. 5.407. In *Wright*, the supreme court, after a lengthy discussion of strict liability and negligence in product liability cases and changes in the analytical framework since earlier Iowa cases stated, with reference to design defect claims, "we prefer to label a claim based on a defective product design as a design defect claim without reference to strict liability or negligence." *Wright*, 652 N.W.2d at 169. The court noted "the Products Restatement does not place a conventional label, such as negligence or strict liability, on design defect cases." *Id.*

This shift in Iowa jurisprudence turns our focus to the official comment to the rule, which provides, in pertinent part:

> The Rule excluding evidence of subsequent repairs originally rested on the notion that such repairs were irrelevant, or had little probative value, to the issue of the defendant's antecedent negligence. More recently, Courts and legislatures have frequently retained the exclusionary rule in negligence cases as a matter of "public policy," reasoning that the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident. *However, when the context is transformed from a typical negligence setting to the modern products liability field, the "public policy" assumptions justifying this exclusionary rule are no longer valid.* This is because it is unrealistic to suggest that the contemporary corporate mass producer of goods, the normal products liability defendant, who manufactures tens of thousands of units of goods, will forego making improvements in its product, and risk enumerable additional lawsuits and the attendant adverse effect upon its public image,

> simply because evidence of adoption of such improvements may be admitted in an action founded on strict liability or breach of warranty for recovery on an injury that preceded the improvement. . . .
>
> . . . Courts that have held Federal Rule of Evidence 407 or a similar state statute inapplicable in products liability actions have generally noted that *a products liability case looks to, or emphasizes a defect in the product, rather than any conduct or culpable act on behalf of the manufacturer.* . . .
>
> Therefore, it is the Committee's position that *relevant evidence should not be excluded from a products liability case by an obsolete evidentiary rule when modern legal theories, accompanied by economic and political pressures, will achieve the desired policy goals.*

Iowa R. Evid. 5.407 Official Comment (1983) (emphasis added).

Because this design defect case "emphasizes a defect in the product, rather than any conduct or culpable act on behalf of the manufacturer," we conclude rule 5.407 should not act to exclude evidence of subsequent remedial measures in a design defect case. We conclude the district court abused its discretion in excluding evidence of subsequent modifications in the design of the swivel jack.

With the adoption of sections one and two of the Restatement (Third) of Torts: Product Liability, product's design is defective:

> when, at the time of sale or distribution, . . . the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Parish v. Jumpking, Inc., 719 N.W.2d 540, 543 (Iowa 2006) (quoting the Restatement, section two).

B. Affecting a Substantial Right. The plaintiff claims the court erred in excluding the evidence the jack was modified because it "was relevant and highly

probative" and excluding the evidence adversely affected him and prejudiced his substantial right to a fair trial. *See* Iowa Rs. Evid. 5.402, 5.403. We agree. The evidence of a subsequent change in design is relevant to the fact finder's consideration whether the prior design was defective.

C. Admission of a Party Opponent. The plaintiff contends the court erred in excluding the testimony or deposition evidence of an officer of the dismissed defendant, Prestige Trailers, that referred to a conversation with Mr. Haase, an engineer and officer of Dutton-Lainson. In the conversation, Mr. Haase reportedly said Dutton-Lainson changed the design of the jack in response to the accident. The plaintiff contends the evidence should have been admitted as an admission of a party opponent. *See* Iowa R. Evid. 5.801(*d*)(2) (providing an admission by a party opponent is not hearsay). We agree that the testimony offered falls within the ambit of rule 5.801(*d*)(2).

IV. Conclusion.

The district court abused its discretion in applying rule 5.407 to exclude evidence of subsequent design changes. The exclusion of such evidence prejudiced the plaintiff's substantial rights. Rule 5.801(d)(2) excepts the proffered admission by a party opponent from exclusion as hearsay. We reverse the judgment of the district court.

REVERSED.