STATE OF MICHIGAN

COURT OF APPEALS

ANN AYRE, as Personal Representative of the Estate of JAMES O. AYRE, Deceased; ELIZABETH SWIFT, as Personal Representative of the Estate of HOWARD G. SWIFT, III, Deceased; and SUSANNE BURNSIDE, as Personal Representative of the Estates of RODNEY G. BURNSIDE, Deceased, and BRADLEY H. BURNSIDE, Deceased,

Plaintiffs-Appellants/Cross-Appellees,

v

ATTWOOD CORPORATION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 16, 2001

Nos. 217911, 218064
Kent Circuit Court
LC No. 96-06527-NP

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

PER CURIAM.

These consolidated wrongful death products liability actions arose from the tragic deaths by hypothermia and drowning of James Ayre, Howard Swift, Rodney Burnside, and Burnside's fourteen-year-old son, Bradley, on November 11, 1995, after their "Outlaw 18" duck hunting boat capsized on Saginaw Bay.

On the morning trial began in September 1998, former defendant Outlaw Marine, Inc., the builder and seller of the Outlaw 18, settled with the estates. The case was tried against defendant Attwood, the manufacturer of a fuel-system component Outlaw had purchased through a distributor and installed in Ayre's Outlaw 18. Plaintiffs contended that this component, a vented fuel fill (VFF), was defective, and that Attwood was negligent in failing to warn of the component's dangerous characteristics. After a thirty-day trial, the jury returned a verdict of no cause of action, finding no negligence and no breach of implied warranty. The trial court denied plaintiffs' motion for new trial.

Plaintiffs Ayre and Swift estates appealed, and defendant cross-appealed (Docket No. 218064). Plaintiff Burnside estates, separately represented, also appealed (Docket No. 217911). This Court consolidated the cases. The two sets of plaintiffs raise essentially the same issues on appeal, asserting instructional error in connection with a sophisticated user instruction, evidentiary error in excluding product recall evidence, and that the verdict was against the great weight of the evidence. Defendant's cross-appeal challenges the original trial judge's denial of its pre-trial motion to file a cross-complaint, the trial court's denial of its motion for directed verdict, the order denying argument on the effect of lack of income tax on any award, and the court's approval of the settlement between the Swift and Burnside estates and the Ayre estate. We affirm the trial court's denial of plaintiffs' motion for new trial. Defendant's cross-appeal is therefore moot.

I

Plaintiffs argue that the trial court erred by charging the jury with a "sophisticated user" instruction which inaccurately stated the law and improperly delegated to the jury the question whether a duty existed, when there was no factual support for the instruction, and where the court did not advise plaintiffs' attorneys that it would read the instruction until after closing arguments, contrary to MCR 2.516(A)(4).

Jury instructions are reviewed in their entirety to determine whether they "adequately inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case." *Riddle v McLouth Steel Products*, 440 Mich 85, 101; 485 NW2d 676 (1992). When a party requests an instruction that is not covered by the standard jury instructions, it is within the trial court's discretion to give additional concise, understandable, conversational, and nonargumentative instructions, provided they are applicable and accurately state the law. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 22; 596 NW2d 620 (1999); see also MCR 2.516(D)(4). If the evidence does not support a jury finding under the proposed instruction, it is properly refused. *Cipri, supra* at 18-19 (sophisticated user instruction properly refused where not supported by the evidence).

A

MCR 2.516(A)(4) provides that "[t]he court shall inform the attorneys of its proposed action on the requests [for jury instructions] before their arguments to the jury."

There is no standard jury instruction addressing a failure to warn theory. Although plaintiffs timely submitted other proposed jury instructions pursuant to the trial court's scheduling order, and indicated various times during trial that they would request a failure to warn instruction, they did not submit a proposed failure to warn instruction until the evening after closing arguments. In response, defendant requested the "sophisticated user" language plaintiffs challenge on appeal (italicized below). The trial court instructed the jury regarding failure to warn as follows:

> Now, relative to the product again, the defendant had a duty to use reasonable care at the time it designed the vented deck fill, so as to eliminate unreasonable risks of harm or injury which were reasonably foreseeable.

> The defendant also had a duty to use reasonable care to communicate information that is essential to the safe use of the product. Now, this duty to warn and instruct extends to intended uses of a product and associated with the product – I should say, with the foreseeable misuse of a product.
>
> *However, a component supplier does not have a duty to warn or instruct a company that knew or should have known of the product's characteristics.*

After the jury was instructed, plaintiffs' counsel stated their objections on the record, including that they had not had the opportunity to argue the sophisticated user issue fully to the jury because defendant requested the sophisticated user instruction after closing arguments.[1]

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[1] Plaintiffs' counsel argued:

> MR. KELL [*counsel for Ayre and Swift estates*]: Your Honor, I feel constrained to join in the position of Mr. Hahn [counsel for Burnside estates] as expressed in chambers, I simply – I understand exactly what the Court's feeling is and so on, but I think as a matter of – I feel constrained to do that. Therefore, I do have an objection to the sophisticated user instruction, and the basis for the objection is I didn't have the opportunity to argue that fully to the jury.
>
> Secondly, I believe under the circumstances of this case, that the instruction should not have been given. Thirdly, if the instruction should have been given or an instruction like that were given, it should have been accompanied by additional – an additional instruction, providing guidance to the jury relative to a determination of whether or not Outlaw Marine, under the particular circumstances of this case, was in fact – could be deemed a sophisticated user or an entity which knew or should have known of the hazard to be warned of and associated with the product.
>
> I understand exactly what the Court has said in chambers and I respect that, but I feel constrained to preserve the objection.
>
> THE COURT: Okay, I have no problem with that.
>
> MR. KELL: Thank you.
>
> THE COURT: I also, I gave some options that you indicated in chambers, just so the record is clear, you would go along with this instruction.
>
> MR. KELL: Absolutely.
>
> THE COURT: If I – based on the options I gave, but I'm not holding you to that. I don't have any problem with what you are saying.

(continued…)

(…continued)

MR. KELL: Yes, sir. *I just want to say that I did in fact indicate in chambers to you, before you gave the instruction to the jury, that I was not going to object to it, and that is correct, that's the honest position***.**

THE COURT: Okay, thank you very much. Mr. Hahn?

MR. HAHN: Yes, your Honor, in regards to the sophisticated user instruction, I'd indicated in chambers that while given the same option, I indicated that I didn't think the sophisticated user instruction should be given and we'd be placing the objection on it, and I, quite frankly, all due respect, not going along with the option that was provided.

In particular, your Honor, in regards to it, we have had numerous discussions concerning instructions before closing argument where parties indicated what they wanted. In particular, we indicated that one of the instructions we wanted was a failure to warn instruction. The directive was, all right – and again, this is all before closing argument. The directive was that's fine, write one up, give it to Mr. Steel [defendant's counsel], see if we can agree on something.

Following, at that time, your Honor, there was absolutely no request made by Mr. Steel of a sophisticated user instruction, let alone, obviously, since there was no request for it, we weren't provided with one at that point, either. We then, your Honor, came out and argued the case. I specifically did not, in my closing argument, address the sophisticated user issue.

Following that, and following the close of all argument in the matter, Mr. Steel then made the request for the sophisticated user instruction. I feel, your Honor, that I was sandbagged in it, that had he made the request before closing, and the Court then could have said, "Yes, I'm going to give it. Mr. Steel give us some language on it a later time," I then would have come out and argued in closing and addressed that very topic.

Because there was no request made, and it was made only after all arguments had been completed, I obviously did not have the opportunity to address it, which I would have.

* * *

[MR. STEEL:] As far as the sophisticated user, so-called sophisticated user instruction, of course, those word were not used, but I know what counsel is talking about. We were talking about jury instructions, the Court asked for proposed instructions, and during all of the conversations with the Court the *plaintiffs never submitted a proposed instruction on failure to warn. That was given to me last night, after court hours, by way of fax. When I got that, in*

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response to that, I faxed –although I accept plaintiffs' word that they didn't receive it – a very short instruction, essentially, which the Court incorporated, and I expect in the spirit of compromise, the Court also added to the failure to warn instruction as requested by the plaintiff.

I don't feel that I did anything that would sandbag the other party in my sophisticated user request, because I never received their failure to warn request until last night, and mine was in response to it.

* * *

MR. HAHN: Your Honor, one other thing, if I could reply ever so briefly on the sophisticated user instruction. I want to be very clear, while Mr. Steel said he did not see our failure to warn instruction until last night, *and that is in fact true, he knew before he argued that it was coming. He knew before he argued that it was going to be given, and he in fact argued on that topic. We did not know in advance that the sophisticated user instruction was coming, we did not argue the sophisticated user issue. I think there's a big difference, and I want to make sure the record is clear.*

THE COURT: All right, thank you. I want to amplify the record a little bit in that regard, also. The pretrial order in this matter required that the proposed jury instructions be submitted to the Court prior to the beginning of trial. We did receive from the plaintiff, and in fact I've used them extensively today in instructing the jury, their requested instructions. Specifically, their requested instructions did not include an instruction on duty to warn.

At some point quite some time ago in one of our conferences in chambers, . . . one of the counsel for two of the plaintiffs here, co-counsel with Mr. Kell, indicated their desire to have added an instruction on duty to warn. That's when the Court was first apprised of this desire. *I indicated fine, and I invited counsel to put together an instruction and get it to the Court.*

A couple weeks ago, or week ago or something, we sat down preliminarily and went over instructions, and I think prior to that time, but at least at that time when the issue was brought up, I said "Please get us that instruction." I can remember a side-bar over here during the course of the trial where I reminded counsel again that I did not have this instruction on duty to warn. This case has been going on since the beginning of September, and I'm not being critical, I really am not here, because I think counsel on both sides have done a fine job, all five of the attorneys involved here.

But the bottom line is, I didn't get this duty to instruct – duty to warn, *we went into chambers yesterday afternoon <u>after we finished closing arguments</u> again and*

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*discussed it. It was indicated that one would be faxed over to Mr. Steel that night***.** Mr. Steel informed me in chambers when we were in there together that when he received that, he quickly wrote out one and requested the addition of a sophisticated user portion of that, and faxed it back. For whatever reasons, I guess plaintiffs' counsel have not, did not receive that or did not see it or whatever, but I believe in good faith, and I have no reason to question that that in fact happened.

Sophisticated user instruction, perhaps something that should have been anticipated and provided earlier by Mr. Steel, but I do think it really was – is responsive – *it's a responsive type of instruction.* There was never any initial request to the Court . . . to instruct by the plaintiff, didn't see one until, frankly, last night, Court didn't see it until this morning on the duty to warn, and I think sophisticated user language was understandable and appropriate, and *I agree that the counsel didn't have this prior to their argument, but I don't consider that the Court's fault.*

I would have delayed argument, we talked about that a little bit on the record, I believe, about these instructions, and it was indicated by both sides that they were prepared to go. And I realize what Mr. Hahn is saying, that they might not have anticipated this. It seems to me that *if I were to give a duty to warn, this is not to be unanticipated, that this level of sophistication of Outlaw has been at issue. There wouldn't be any need for that instruction if we didn't have a duty to warn instruction. And while I think the plaintiffs have done an exemplary job, as has defense counsel, on this one issue there's been plenty of time to get this submitted,* and I feel like I'm kind of pressed now, the day before Thanksgiving, when we've been going six weeks full trial time and three months of actual time , to sit back there and have to try to phrase something, and go back and forth and argue, where we spend a lot of time while the jury is sitting back there doing nothing, and the holiday coming. . .

So I think that plaintiffs had plenty of opportunity to prepare and submit an instruction. I think if they had done so, we could have addressed this issue earlier. I recognize the fact that regardless of what the plaintiffs do and regardless of what the defense does, it's the Court's obligation to instruct fairly and accurately. So, for the record, I recognize that fact. But I've tried to do that. I've tried to do that on rather short notice here at the end, with relatively little advance notice of what the parties actually wanted.

. . . . And further, *when I agreed to put in the sophisticated user instruction, I further put in some additional language at the request of the plaintiffs about misuse, foreseeable misuse, and so forth. So I added language that the plaintiffs didn't have in their original one, and I've tried to be fair to both sides in that regard.* [Emphasis added.]

Under the circumstances presented here, particularly that *plaintiffs* failed to submit a duty to warn instruction until after closing arguments, plaintiffs cannot be heard to allege error under MCR 2.516(A)(4). See Dean & Longhofer, Michigan Court Rules Practice, § 2516.3, p 238 (noting that "[i]f requests [for jury instructions] *are timely submitted*, the court must advise the parties as to its proposed action on the requests prior to closing arguments." Emphasis added.). Plaintiffs bear responsibility for the timing of the instruction.

The record does not support that plaintiffs lacked opportunity to fully address the sophisticated user defense in closing arguments. Nor does the record support the Ayre and Swift estates' assertion that after no evidence was elicited that either plaintiffs' decedents or Outlaw were sophisticated users, plaintiffs' counsel justifiably concluded that Attwood had abandoned the sophisticated user defense in favor of a proximate-causation defense.

Shortly before trial, defendant filed a motion for summary disposition. Defendant briefed and orally argued that it was entitled to rely on Outlaw's sophistication. Plaintiffs' brief in response to Attwood's motion briefed the sophisticated user issue. Defendant's brief in reply to plaintiffs' response to the motion for summary disposition further argued the issue. The trial court denied defendant's motion because it was filed fourteen months after the dispositive motion cut-off date. Defendant asserted the sophisticated user defense in opening statement, and argued it again in its motion for directed verdict, made after plaintiffs' proofs were in, which the trial court denied on the basis that a question of fact remained on that issue.

Plaintiffs' counsel's cross-examination of Clifton Ratza, Attwood's Vice President of Engineering and one of defendant's key witnesses, included substantial questioning regarding whether Attwood thought it necessary to provide installation guidelines to "sophisticated original equipment manufacturers," and to "smaller" manufacturers like Outlaw. Plaintiffs' counsel's closing arguments included that Outlaw Marine and Larry Scott, one of its manufacturer's representatives, did not know, and should not have been expected to know of the product's dangerous characteristics:

> This fuel fill and the hazardous, the dangerous characteristics of this fill to ingest water, even though it supposedly resists the ingestion of water, fooled Mr. Scott [manufacturer's representative for Attwood], and I say through no fault of Mr. Scott's own, he hadn't been warned, he hadn't been trained, he'd received no instructions about it, and it fooled Mr. Scott, he didn't realize the hazard.
>
> It fooled Mr. Cripe [owner of Outlaw Marine]. Mr. Cripe didn't recognize the hazard. . . .
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> * * *
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> . . . . Both of these individuals were unaware of the hazardous nature of this product. Both of these individuals, despite their best intentions, were fooled by this product.
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> * * *

> Let's look at the instructions [for installing the vented fuel fill]. Mr. Ratza told you that instructions were not necessary. Not necessary. Necessary or not, they have instructions. One instruction for every 48 fills. Is that responsible corporate behavior, ladies and gentlemen? They know that these fuel fills are going out not only to the . . . big boat manufacturers, but also to the smaller people, the smaller manufacturers, the people that maybe only do one, two, or three boats a year, who don't have the same skilled team of engineers available that the larger manufacturers do.
>
> * * *
>
> Let's talk about warnings for just a moment. What are we being told? You saw the catalog, you have seen the vented fuel fill. *The position of the defendant in this case apparently is, is that the feature which allows the water to flow into the gas tank is so obvious that no one needs a warning. Instructions aren't necessary. Indeed, instructions are superfluous. . . .*
>
> The problem with the defendant's case is that it is based on . . . arrogance. I do not dispute that Attwood is a very intelligent corporation filled with very, very intelligent people. But there is room in the world for people that are less fortunate, there is room for small businesses in this world that do not have the same resources that the Attwood company has. And these are the people that need the warnings. These are the people that need the instructions. [Emphasis added.]

Plaintiffs' counsel for the Burnside estates' closing argument included:

> You know, the people that knew the most about this product [at Attwood] thought the public should have been alerted about it . . . . But the vice-presidents won't let 'em.
>
> You know who else tells us that they should have said something? Good old-fashioned common sense, and common decency. If it's your product *and you know something about it, that the others don't, you share with them.*
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> * * *
>
> . . . . But what they want to do is they want to say to you, "We don't tell people how to build their boats, so we can't tell them where to put products." I agree, they shouldn't. But they can tell them what not to do with it, and they can do that without the fear of a lawsuit. All they had to say was, "Mount above the rub rail only."
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> * * *
>
> . . . . what does Attwood do when they come in here? They come in and tell you, "Well, you know, we only sell, sell 'em in bulk, we only sell 'em to OEMs. So, you know, you really don't need – they know what they are doing." Back to why

> he had it in the first place, if they know how to do it. But you know what else? They don't just sell to OEMs. Mr. Ratza testified, "We also sell 'em to distributors. We also know that they go to marinas. We also know that an individual can buy one . . . from a marina, and we know that it's, under that scenario, it's not likely they are gonna [sic] get the instruction. [Emphasis added.]

After defendant's closing argument, plaintiffs Ayre and Swift estates' counsel argued on rebuttal:

> Mr. Steel has talked a lot today about Attwood's responsibility to warn. He says they don't have a responsibility to warn, and one of the main reasons for that is that boat makers know. They already know that the vented fuel fill leaks, shouldn't be submerged, they already know how to install it, so they don't need instructions for installing it.
>
> The major gap that we have had in this three-month trial, though, is that not one boat maker has come in to tell you that. Not one. Don't you know if that were true, we would have had a boat maker come in and say it? . . . . The only boat maker that we've had in here to testify has been Mr. Cripe. And Mr. Cripe said he didn't know. . . .
>
> Mr. Steel also told us that Attwood's not responsible, Mr. Cripe is responsible, because, two reasons. Mr. Cripe violated NMMA regulations and Mr. Cripe already knew that the thing leaked . . . .
>
> * * *
>
> Jim Cripe did not know that the vented fuel fill wasn't watertight. . . .

This extensive treatment of the issue of Outlaw's sophistication by plaintiffs at trial undermines their arguments that they were prejudiced by the timing of the sophisticated user instruction or that they were unable to adequately address the defense in closing arguments.

B

The trial court instructed the jury:

> Negligence is the failure to use ordinary care. Ordinary care means the care that a reasonably careful person or entity or corporation would use. Therefore, by negligence, I mean the failure to do something that a reasonably careful person or entity or corporation would do, or the doing of something that a reasonably careful person or entity or corporation would not do, under the circumstances that you find existed in this case.
>
> Now, ladies and gentlemen, the law does not say what a reasonably careful person or entity or corporation, using ordinary care, would or would not do under the circumstances. That is for you to decide.

* * *

And it was the duty of the defendant, in connection with this occurrence, to use ordinary care for the safety of the decedents.

* *

Now, Ladies and gentlemen, when I use the words "proximate cause," I mean, first, that the negligent conduct must have been - - negligent conduct, or if you find a defect in the product, the defect in the product must have been a cause of the plaintiffs' or the decedents' deaths, and, second that the deaths here must have been a natural and a probable result of such negligent conduct.

Now, there may be more than one proximate cause. And to be a proximate cause, the claimed negligence need not be the only cause nor the last cause. A cause may be proximate, although it and another cause act at the same time or in combination to produce the occurrence.

And if you decide that the defendant was negligent, and that such negligence was a proximate cause of the occurrence, it is not a defense that the conduct of the Outlaw Company, or, for that matter, any others who are not parties to this lawsuit, may also have been a cause of this occurrence. However, if you decide that the only proximate cause of the occurrence was the conduct of the Outlaw Company, the boat builder, or some other entity that's not a party to this case, then your verdict should be for the defendant.

* * *

Now, there have been claimed by the plaintiffs in this particular matter - - there's some different theories. There's a negligence theory, there's also a products liability theory, as examples here, we've been talking a little bit about plaintiffs. There's been an allegation that defendant has breached am implied warranty, and when I use the words "proximate cause" with respect to this warranty claim here, this products liability claim, I mean, first that the failure of the product to conform to the warranty must have been a cause of plaintiffs' injury, and, second, that the occurrence which is claimed to have produced plaintiffs' death, or the decedents' death, and plaintiffs' damages, must have been a natural and a probably result of the failure of the product to conform to the warranty.

Now, there may be more than one proximate cause. A cause may be proximate, although it and another cause act at the same time or in combination to produce the occurrence. To be a proximate cause, the claimed failure of the product to meet the warranty need not be the only cause, nor the last cause.

When I use the words "implied warranty," I mean a duty imposed by law which requires that the manufacturer -- that the manufacturer's product be reasonably fit for the purpose and uses intended, or reasonably foreseeable by the manufacturer.

Let me say that again, I probably didn't say that very clearly.

When I use the words "implied warranty," I mean a duty imposed by law which requires that the manufacturer's product be reasonably fit for the purposes intended or reasonably foreseeable by the manufacturer.

Now, with respect to this aspect of plaintiffs' claim, the plaintiff has the burden of proof on each of the following:

First, the vented fuel fill was not reasonably fit for the use or purpose anticipated or reasonably foreseeable by the defendant in one or more of the ways claimed by plaintiff.

Second, that the vented fuel fill was not reasonably fit for the use or purpose anticipated or reasonably foreseeable by the defendant at the time it left defendant's control.

Third, that plaintiffs' decedents sustained damages.

And fourth, that the failure of the vented deck fill to resist water injection was a proximate cause of the death and damages of plaintiffs' decedents.

Now, again you'll be getting a jury verdict from which will help you, I think wind your way through those particular issues.

Now, relative to the product again, the defendant had a duty to use reasonable care at the time it designed the vented deck fill, so as to eliminate unreasonable risks of harm or injury which were reasonably foreseeable.

The defendant also had a duty to use reasonable care to communicate information that is essential to the safe use of the product. Now, this duty to warn and instruct extends to intended uses of a product and associated with the product – I should say, with the foreseeable misuse of a product.

However, a component supplier does not have a duty to warn or instruct a company that knew or should have known of the product's characteristics.

Now reasonable care means that degree of care which a reasonably prudent manufacturer would exercise under the circumstances which you find existed in this case. And, ladies and gentlemen, it's for you to decide, based on the evidence, what a reasonably prudent manufacturer would do or would not do under those circumstances.

A failure to fulfill the duty to use reasonable care is negligence. [Emphasis added.]

The jury separately found that defendant had not breached an implied warranty, and that defendant was not negligent.

The question is whether there was sufficient evidence to justify the court's giving the "sophisticated user" instruction as given. Objections to the wording of the instruction were not preserved.[2] To the extent that the Burnside estates seek to challenge the "should have known" language in the instruction, the challenge was forfeited by counsel failure to state this ground for objecting to the instruction, see n 2, *supra,* and was waived by plaintiffs' joint brief in opposition to defendant's motion for summary disposition, wherein plaintiffs themselves advanced the "knew or should have known" language.

There was conflicting testimony regarding whether Outlaw should have been aware of the VFF's characteristics based on its status as an original equipment boat manufacturer with knowledge of the various industry standards guiding the building of safe boats, and based on information in the public domain, including the simple fact that the product was a *vented* fuel fill, and was called a *deck*fill.

We conclude that the trial court did not err in giving the instruction. There was ample evidence presented from which the jury could have found that knowledge of the characteristics of the VFF was in the public domain. The trial testimony of the designers of the Attwood VFF, Clark and Whitley; and of Mulligan, Lefler, and Taylor supported that common knowledge within the industry is that vents and vented fuel fills are not waterproof, but water-resistant, and should not be located where subject to immersion. There was testimony that none of the fuel fills on the market, including vented ones, contain warnings as to this known danger, and that any and all boat builders are presumed to know such. Further, the American Boat & Yacht Council

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[2] The in-chambers discussions regarding the jury instructions were not on the record, and we have no account of the discussions other than the objections placed on the record, quoted, *supra.* The appellate briefs do not describe additional discussions or objections regarding the substance of the instruction (as opposed to the notice issue), and there is no additional information to be gleaned from the motion for new trial. The transcript of the objections placed on the record after the jury instructions were given reveals that Mr. Kell, counsel for the Ayre and Swift estates, apparently indicated in chambers that he would not be objecting to the instructions. He nevertheless objected that he had no notice of the instruction. He also asserted that the instruction should not have been given, without stating why, and that the jury should have been given guidance relative to whether Outlaw, under the facts, "could be deemed a sophisticated user or an entity which knew or should have known of the hazard to be warned of and associated with the product." Thus, even assuming Kell's clients could object after Kell indicated in chambers that he would not, the objections were not directed to the language used in framing the issue, i.e., there was no objection to use of the language "a component supplier does not have a duty to warn or instruct a company that knew or should have known of the product's characteristics." In fact, Kell seemed to have agreed that the standard was a "knew or should have known" standard, but felt that there was no evidence that Outlaw was an entity that knew or should have known, and that guidance should be given in addressing that issue. Mr. Hahn, counsel for the Burnside estates, did preserve the objection in chambers. However, the transcript does not refer to any objection regarding the substance of the instruction, only the lack of notice.

(ABYC) guidelines, universally accepted as the boat builder's bible, required that fuel lines be properly pressure-tested. Had a proper pressure-test been done in the instant case, it would have revealed that the VFF was improperly installed.

C

Plaintiffs further argue that defendant still had a duty to warn Ayre, the consumer. Although plaintiffs are correct that the duty to warn instruction in the instant case did not expressly address defendant's duty to warn the ultimate user of its product, there is no indication in the record before us that plaintiffs requested or submitted such an instruction. And, most important, the challenged sophisticated-user instruction did not negate any duty to warn the boat owner or ultimate user. Plaintiffs have not shown that they requested that the jury be instructed regarding a duty to warn decedent Ayre directly in a fashion different than the instruction given.

D

Plaintiffs assert that the trial court erred by giving the sophisticated user instruction after finding that Outlaw was not a sophisticated user. However, the statements of the court plaintiffs rely on were made in the context of the court finding that a question of fact regarding Outlaw's status as a sophisticated user precluded the court's granting defendant's motion for directed verdict on that ground. The court did not find as fact that Outlaw was not a sophisticated user as defined in the instructions. Although it seemed evident that Cripe, the owner of Outlaw Marine and designer of the Outlaw 18, did not have actual knowledge regarding the product's dangers, there was evidence from which the jury could conclude that Outlaw should have known about the product's characteristics given that it was a boat builder and there is a body of knowledge and standards applicable to boat builders. Plaintiffs' arguments that the instruction was unsupported by the evidence are unpersuasive, in light of the parties' theories of the case and the trial testimony.

E

Plaintiffs also argue that the sophisticated user instruction improperly delegated the question of duty to the jury. Generally, whether a duty exists is a question of law and does not require resolution of factual disputes. *Howe v Detroit Free Press, Inc,* 219 Mich App 150, 156; 555 NW2d 738 (1996), aff'd 457 Mich 871; 586 NW2d 85 (1998), citing *Farwell v Keaton,* 396 Mich 281, 286-287; 240 NW2d 217 (1976). "However, if there are factual circumstances that give rise to the duty, the existence of those facts must be determined by a jury." *Howe, supra* at 156.

In this case, the sophisticated user instruction did not improperly delegate the question of duty to the jury; in conjunction with the rest of the instructions it described the duty and left the factual question whether the duty was breached to the jury. The jury was given the task of deciding factual issues, including whether the product was itself defective, whether the misuse of the product was foreseeable and whether Outlaw knew or should have known of the product's dangerous characteristics.

F

Plaintiffs' remaining subarguments seem to be arguments based on factual inferences that plaintiffs believe should have been drawn from the testimony. Plaintiffs' argument that "a manufacturer always has an initial duty to warn, regardless of the purchaser's sophistication" is not supported by argument on point, but, rather, seems to be an argument that even sophisticated users would not have appreciated the danger. However, the evidence was conflicting on this issue, and if the jury agreed with this proposition, it would have either found the product defective or that there was a duty to warn which was not excused because it was not the case that Outlaw knew or should have known of the dangers.

II

Plaintiffs also argue the trial court erred in excluding product recall evidence, while it allowed defendant to provide extensive testimony about allegedly conscientious and safety-focused development of the product in question.

We review the trial court's determination to exclude the evidence of recall for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). Relevant evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). "Evidence does not present a danger of unfair prejudice unless it threatens the fundamental goals of MRE 401 and MRE 403: accuracy and fairness." *Wischmeyer v Schanz*, 449 Mich 469, 481; 536 NW2d 760 (1995).

Before opening statements, defendant moved in limine to preclude plaintiffs from producing evidence of a product recall. The trial court stated that it would not prohibit plaintiff from raising the recall in opening statement, but asked both counsel to tread lightly, and said it would hear arguments regarding the relevancy and admissibility of the recall evidence when the issue arose.

Plaintiffs argue that when Clifton Ratza, defendant's vice president of engineering, testified at length in the latter part of the trial regarding the safety-conscious development of the product, the door was opened to evidence of recall. At the conclusion of Ratza's testimony on direct examination, counsel for the Burnside estates argued outside the jury's presence:

> MR. HAHN: Your Honor, if you'll recall, yesterday during the testimony of, direct exam of Mr. Ratza, he testified about the product evolution of a product involved through the process. During that testimony we approached the bench. We had a side bar conference. We indicated that we believed he was getting dangerously close to the recall issue. We then went back and there was not much more testimony on it.
>
> Today, your Honor, we come in, and Mr. Steel not only develops the general product evolution, but now he develops the specific product evolution of the product involved, as the Court knows, that product did go through a recall. I submit, your Honor, that we are –

THE COURT: What was the basis for the recall again?

MR. HAHN: . . . . it's my understanding that when a fuel hose from a pump was inserted in and downward pressure was applied, the fill was breaking in this area (indicating), which would be the back area of the fuel pipe, rather than the vent.

THE COURT: And *just so the record's clear, that has nothing to do with this accident, right?*

MR. HAHN: That's my understanding, your Honor. One, plaintiff [sic defendant] has now put in evidence a misleading picture of this product. They have not given these members of the jury the true history as to what went on with this product. So right now as they sit here they are misled.

Secondly, your Honor, *the recall goes to the issue of testing and thoroughness*. Mr. Steel spent a great deal of time with Mr. Ratza, both yesterday and today, informing these jurors, suggesting to them, "We are thorough. We test. We think about safety. Gosh, you know, we couldn't do anything wrong. We did everything we possibly can."

Well, the fact of the matter is, they didn't, and it's pretty obvious because of the recall situation, your Honor.

* * *

And the fact that there was a recall, regardless of which technical issue the product was recalled [sic], goes directly to the reasonableness of Attwood and the evolutionary history of this product.

THE COURT: Mr. Steel?

MR. HAHN: Your Honor, if I may add one thing, then Mr. Steel can talk with regard to all of it, furthermore, your Honor, what is already in evidence, Plaintiff's Exhibit 65, is a letter from Attwood's regional sales manager, which states, quote: "Attwood has not tested this product early for production release."

This is far from a smooth evolution, your Honor, far from it. But the jury again, in its [sic] reiterating what has already been said, are sitting there with a false impression.

THE COURT: All right. Mr. Steel?

MR. STEEL: Yes, your Honor. I will incorporate the same arguments I made early in this case, when the issue arose regarding keeping it out, and the reasons for keeping it out then are the same now.

As far as the evolution of the design on this, we went through an evolution so the jury would know what happens to a product from start to finish. Mr. Ratza never

gave any indication that everything was fool proof or that he – even he acknowledged that they didn't do all of the steps for each particular product.

The fact that this thing was recalled is irrelevant to any issue in this case. *There is nothing at all about the recall that had to do with water entry.*

There were six or seven instances of breakage that prompted the recall. That in itself is not an acknowledgment that something was wrong with our process.

And even if there were some stretch of the imagination that this were somehow relevant to anything, the prejudicial effect is so significant, and I would have to go into a lot of information about the recall, and why it was done and why it had –

* * *

THE COURT:

* * *

And in this particular matter relative to a recall, I tried – well, I have been working up here on some other things, but I did try to pay attention generally to the testimony, because certainly counsel for plaintiff has made aware to the Court and also to defense counsel at side bar that he should proceed with some degree of caution, lest this issue of recall come up and the Court be asked to revisit an earlier ruling I made relative to the admissibility of that recall.

I haven't heard it get to that point. What I've heard the testimony is, it's basically a procedure and a method over a period of time when this product was developed.

I've listened to see whether there was a lot of emphasis, "And we did this to make sure this was safe," and all that, and to me it was a history of the product development.

And part of the claims that the plaintiffs have made in this case is that the manufacturer's been negligent in that regard, and certainly if they're claiming there's been negligence in the manufacturing of this product and distributing this product, whatever, it seems to me that it's totally appropriate for the company to be able to get in the process that was utilized in bringing this product through development stages and to market.

And I've listened to the testimony. I don't think it has crossed the line.

Furthermore, there are a couple of reasons. Number one, if we got into this recall, and I don't think he's crossed the line, if he should, just so the record is clear, how I see this, *if he got into the matter of recall, it has absolutely nothing to do with what happened in this accident.*

> *There could be, I guess, some degree of relevance if it's suggested that there was a shoddy procedure in developing a product. But that is far outweighed, it seems to me, by the prejudice that would be created by letting that testimony in.*
>
> *Simply, the recall was not relevant to anything involved in this particular mishap.* [Emphasis added.]

The record does not support plaintiffs' argument that the trial court's exclusion of the recall evidence allowed Attwood's claim of due care during the fuel fill's development to go unchallenged, or that the jury was left with the misleading impression that the fuel fill's development was error-free and that Attwood's conduct could not have been a substantial factor in producing the injuries at issue. Plaintiffs' counsel cross-examined Ratza at length, eliciting testimony including that although Whitley, an Attwood senior product engineer in charge of research and development, had suggested that a technical information bulletin to OEM's and the public regarding the performance of the vented fuel fill was warranted, Attwood decided against issuing such a bulletin; and that Whitley's immersion testing of the vented fuel fill did not occur until after the product was on the market. Plaintiffs' counsel also elicited from Ratza that Attwood made mistakes in the developing and bringing the fuel fill to market; and that a vented fuel fill of a competitor, Perko, reached the market before Attwood's even though Attwood began developing the product before Perko. Further, plaintiffs' counsel asked Ratza "[t]he mistakes that you made in developing this product were costly to the company, were they not?" after which defense counsel objected and requested a bench conference, and the jury was excused. The trial court sustained the objection, and asked plaintiffs' counsel to clarify what mistakes he was alluding to without mentioning the recall. Ratza then further testified about problems with the vented fuel fill unrelated to the accident at issue. Further, Attwood's senior design engineer and co-inventor of the VFF, Donald Clark, and co-inventor Mel Whitley testified regarding problems Attwood had had with the plastic of certain fuel caps cracking and that it discontinued using an O ring or sealing disk in fuel fills.

The trial court's conclusion that Ratza's testimony is properly described as covering the process Attwood went through in developing products generally is supported by the record. The trial court did not abuse its discretion by excluding evidence of defendant's voluntary recall of a fuel fill not at issue in this case, where the recall was due to a problem not involved in the instant case. MRE 403. In *Muniga v General Motors Corp,* 102 Mich App 755, 761-762; 302 NW2d 565 (1980), this Court held that the trial court did not err in excluding under MRE 403 evidence of a recall by the defendant of a different model car than that at issue:

> Evidence of the recall would have no relevance as to whether a separated engine in plaintiff's car could rotate, thus opening the throttle. The potential for rotation is determined not only by the engine mounts, but also by the parts adjacent to and adjoining the engine itself. Where testimony established that the recalled models had substantially different engine compartment layouts than plaintiff's model, evidence of the recall would have no bearing on the ability of plaintiff's engine to rotate and go into full throttle.
>
> We find no error.

III

Plaintiffs argue that the jury's verdict was against the great weight of the evidence because there was no credible evidence that instructions for safe use were not required of Attwood to guard against the placement of the fuel fill in an area where it could be submerged and therefore leak. Plaintiffs argue that there was no credible evidence that plaintiffs' decedents were sophisticated users or that Outlaw was a sophisticated user. Plaintiffs Ayre and Swift estates argue that Attwood's failure to provide warnings and installation instructions constituted negligence as a matter of law.

On a motion for new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party, while the appellate court's function is to determine whether the trial court abused its discretion in making such a finding. *Arrington v Detroit Osteopathic Hospital (On Remand),* 196 Mich App 544, 564; 493 NW2d 492 (1992); *Bordeaux v Celotex Corp,* 203 Mich App 158, 170; 511 NW2d 899 (1993). A trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the reviewing court. *Arrington (On Remand), supra* at 560. It is incumbent on the reviewing court to analyze in depth the record on appeal. *Id.*

At the conclusion of the hearing on plaintiffs' motion for new trial, the trial court stated regarding plaintiffs' great weight of the evidence argument:

> This went to the jury for the precise reason that there was a dispute. The Court did not feel that, based on the evidence I heard, that there was any appropriate way to grant [a] directed verdict for either side, and that the jury should be allowed to make their decision. They did, they had the benefit of excellent presentations, lengthy presentation, competent counsel, and I think that there is – while it could go either way, I suppose, depending on how jurors see it and how factual disputes are resolved by the jury, I do not believe the jury verdict here was against the great weight of the evidence.

Plaintiffs' appellate arguments are unpersuasive. Plaintiff Burnside estates argues that there was no *credible* evidence that instructions for safe use were not required of Attwood to guard against the placement of a fuel fill in an area where it could be submerged and no *credible* evidence that either plaintiffs' decedents or Outlaw were sophisticated users. Credibility is for the jury to determine. *Colbert v Primary Care Medical, PC,* 226 Mich App 99, 103; 574 NW2d 36 (1997). The Ayre and Swift estates' legal argument is simply that Attwood's failure to provide warnings and installation instructions constituted negligence as a matter of law, an unpersuasive argument in light of the conflicting testimony at trial regarding the obvious nature of the VFF's characteristics.

Based on the evidence presented at trial, including the testimony summarized above, we conclude that the jury could have found in either parties' favor. The trial court did not abuse its discretion in denying plaintiffs' motion for new trial. We therefore affirm the jury verdict. Defendant's cross-appeal is rendered moot by our disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White

I concur in the result only.

/s/ Henry William Saad