STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM AND CASUALTY COMPANY, Subrogee of Thomas and Jean Chaldekas, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED March 30, 2001
v	No. 219322 St. Clair Circuit Court
PARKS CORPORATION and ACE HARDWARE CORPORATION, Defendants-Appellees/Cross-Appellants.	LC No. 96-001092-NP

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

PER CURIAM.

I. Nature of the Case

Because this is a subrogation[1] case, plaintiff State Farm as subrogee "stands in the shoes" of the homeowner subrogor and, therefore, its products liability claim against defendant will be adjudicated as though the homeowners brought this action. *Yerkovich v AAA*, 461 Mich 732, 738; 610 NW2d 542 (2000). The subrogee's legal rights in this suit are identical to the subrogor's. *Id*. Accordingly, this case boils down to a "failure to warn" claim by a homeowner, Thomas Chaldekas, who purchased a can of linseed oil and says the packager and retailer should have warned him of the spontaneous combustibility of linseed oil-soaked rags which caused the fire damage to his home.

Because the homeowner: (1) admitted he knew the dangers of spontaneous combustion of linseed oil-soaked rags; (2) testified that he paid little, if any, attention to the warning labels on the cans he purchased, and (3) admitted that he permitted the linseed oil-soaked rags to remain on

[1] "Subrogation, simply defined, involves 'the substitution of one person in the place of another with reference to a lawful claim or right.'" *Atlanta Intern Ins Co v Bell*, 438 Mich 512, 521; 475 NW2d 294 (1991), quoting 73 Am Jur 2d, Subrogation, § 1, p 598.

the premises the very night of the fire at issue, we uphold the jury's verdict of no cause of action against the homeowner's subrogee, plaintiff State Farm.[2]

II. Facts and Proceedings

In 1992, Thomas and Jean Chaldekas bought their home at 315 Orchard Street in Algonac for $68,000. The Chaldekas' hired defendant Rick Rohnicki, d/b/a D&R Painting, to help with some renovations to the ninety-year-old house. Rohnicki in turn hired Michael Winisky, d/b/a Custom Remodeling, to clean and refinish the home's main staircase. In March 1994, Chaldekas mixed a solution made of equal parts linseed oil, turpentine and vinegar for workers to use to refinish the staircase.[3] Chaldekas bought the Ace Linseed Oil from defendant Ace Hardware and the oil was packaged by defendant Parks Corporation. For four or five days, Winisky worked on the staircase by applying Chaldekas' solution with steel wool and then wiping the wood clean with rags.

On the night of March 4, 1994, Chaldekas smelled a peculiar, smoky odor in the house and, suspecting it might be caused by some rags, looked inside a closet beneath the main staircase. The workers stored paint cans, linseed oil and other supplies in the closet and, when he opened the door, Chaldekas also noticed some rags on the closet floor. Chaldekas picked up the rags, shook them out and placed them on the steps in his garage. Chaldekas testified that he did so because he knew rags soaked with linseed oil and turpentine would spontaneously combust and start a fire if left in a pile to dry.

Sometime after the Chaldekas' went to bed, they heard a fire alarm sound and went into the hallway to investigate. The couple saw flames on the main floor near the staircase, but were able to get down the stairs and exit the house through the front door without injury. After extinguishing the fire, investigators inspected the premises and conducted interviews. The fire investigators determined that the fire started by the spontaneous combustion of linseed oil-soaked rags left inside the closet under the main stairway.

On March 26, 1996, plaintiff State Farm filed this suit as subrogee of the Chaldekas' against Ace Hardware, Winisky and Cargil, Incorporated, the manufacturer of the linseed oil, and later added as defendants Parks Corporation and Rohnicki.[4] Plaintiff asserted that defendants were liable for fire damage to the Chaldekas' home under several product liability theories including failure to adequately warn of the potential fire hazard, negligent manufacture, negligent design, and for breach of warranty, strict liability and violation of the Michigan Consumer

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[2] Because we uphold the jury verdict in favor of defendants, we need not address the numerous issues raised by defendant as cross appellants with the exception of defendant's claim for attorney fees, which we discuss *infra*.

[3] Witness' trial testimony differed on this issue. Jean Chaldekas testified that Thomas Chaldekas always mixed the solution for Winisky while Thomas Chaldekas testified that he made the first batch of solution and that Winisky probably mixed it himself thereafter.

[4] Plaintiff dismissed Cargil before trial and dismissed Rohnicki and Winisky after plaintiff's closing argument.

Protection Act, MCL 445.901, et seq.; MSA 19.418(1), et seq.[5] Following a two week trial, the jury returned a verdict of no cause of action in favor of defendants Ace and Parks.

III. Law of Subrogation

This Court has defined subrogation as:

> The substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. A legal fiction through which a person who, not as a volunteer or in his own wrong, and in absence of outstanding and superior equities, pays debt of another, is substituted to all rights and remedies of the other, and the debt is treated in equity as still existing for his benefit, and the doctrine is broad enough to include every instance in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by such other.
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> It is well established that a subrogee (e.g., the instant plaintiff) acquires no greater rights than those possessed by his subrogor (e.g., the instant defendant). This principle is true whether subrogation is conventional or arises by operation of law. Subrogation is an equitable doctrine which is applied when someone, not a volunteer, discharges an obligation for which another person is primarily liable. [*Allstate Ins Co v Snarski*, 174 Mich App 148, 154-155; 435 NW2d 408 (1988), quoting *Foremost Life Ins Co v Waters*, 88 Mich App 599, 603; 278 NW2d 688 (1979), rev'd on other grounds 415 Mich 303; 329 NW2d 688 (1982) (citations omitted).]

After the fire, the Chaldekas' collected on a property insurance policy issued by plaintiff State Farm. State Farm paid the homeowners $404,083.09 to repair the home and for personal property lost in the fire. Under the law of subrogation, State Farm, as subrogee, brought suit against defendants to recover the amounts paid to the Cheldakas'. As noted above, State Farm, as subrogee, stands in the shoes of the homeowner subrogor and assumes the same and no greater legal rights as the homeowner. *Yerkovich, supra*, 461 Mich 737.

IV. Duty to Warn

A. Supplemental Jury Instruction

Plaintiff claims that the trial court erred by failing to give a supplemental jury instruction regarding defendants' duty to warn about the potential fire hazard of linseed oil and linseed oil-soaked rags. We disagree.

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[5] The trial court granted defendant's motion for summary disposition and dismissed plaintiff's strict liability claim.

This Court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 19; 615 NW2d 17 (2000). The Court examines the jury instructions as a whole to determine whether there is error requiring reversal. *Id.*

A trial court is only obligated to give a supplemental jury instruction if the standard instructions do not adequately cover an area. *Estate of Stoddard v Manufacturers Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). When requested, "the trial court may, in its discretion, 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, 18; 596 NW2d 620 (1999). The determination whether the supplemental instructions are applicable and accurate is also within the trial court's discretion. *Stoddard, supra*, 234 Mich App 162. However, the supplemental instruction must be warranted and supported by the evidence presented. *Id*. at 163. This Court "will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Grow v WA Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999); MCR 2.613(A).

Plaintiff requested the following supplemental instruction:

> A manufacturer and retailer [sic] seller which supplies a product to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character insofar as it is known to the manufacturer, or of facts which to its knowledge make it likely to be dangerous, and proper instruction as to the safe use of the product, if the manufacturer has reason to anticipate that those for whose use the product is supplied will discover its condition and realize the danger involved. Consciousness of a vague danger by the user, without appreciation of the seriousness of the consequences, may require the manufacturer to provide warnings or proper instructions for use of the product. The specific danger must be fully known to the user at the time the injury occurred, in order to avoid a duty to warn or inform. A failure to fulfill the duty to use reasonable care is negligence.

Plaintiff failed to present sufficient evidence to warrant the above failure to warn instruction and, therefore, the trial court did not abuse its discretion by refusing to give the instruction to the jury.

B. Failure to Prove Duty to Warn

"Under Michigan law, the manufacturer of a product has a duty to warn of dangers associated with the intended uses or reasonably foreseeable misuses of its product." *Portelli v I R Const Products Co, Inc*, 218 Mich App 591, 598-599; 554 NW2d 591 (1996). However, to prevail, the plaintiff must establish that the defendant's negligent failure to warn was a proximate cause of his injury. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 250-251; 492 NW2d 512 (1992). As this Court observed, "[i]n most failure-to-warn cases, proximate cause is not established absent a showing that the plaintiff would have altered his behavior in response to a warning." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 406-407; 571 NW2d 530 (1997). Accordingly, to establish proximate cause, a plaintiff must present evidence that the

product would have been used differently had the defendant given the warning. *Mascarenas, supra*, 196 Mich App 251, citing *Ferlito v Johnson & Johnson Products, Inc*, 771 F Supp 196, 199 (ED Mich, 1991).

Here, plaintiff failed to present evidence to support its claim that an improved warning label on the linseed oil container would have led Chaldekas to properly dispose of the linseed oil-soaked rags. Significantly, plaintiff failed to make the basic showing of what warning was printed on the linseed oil container Chaldekas purchased from Ace Hardware. The actual containers Chaldekas bought were blackened by the fire, but plaintiff presented possible labels that may or may not have been on Chaldekas' container and no witness, including Chaldekas, could identify which label was attached to the one Chaldekas bought. Accordingly, plaintiff's evidence failed to establish what the label warned and, therefore, any conclusions the jury could draw regarding the adequacy of the warning would have been purely speculative.

Chaldekas also admitted that he did not read the warning label on the container of linseed oil. Thus, the adequacy of the warning had no impact on Chaldekas' use of the product or his storage of the linseed oil-soaked rags. Chaldekas further admitted that he already knew of the danger of spontaneous combustion of rags soaked in linseed oil and knew that he should immerse the rags in water to prevent combustion. In fact, shortly before the fire, Chaldekas smelled a chemical smoke coming from the closet and, suspecting the linseed oil-soaked rags, he took some of the rags and spread them out in his garage. Thus, despite Chaldekas' knowledge of the fire hazard of linseed oil-soaked rags and his awareness of vapors coming from the closet before the fire, Chaldekas failed to remove all of the rags or to immerse them in water which he knew would prevent a fire. Therefore, plaintiff's proposed instruction is contrary to the proofs: Chaldekas testified that he was not merely conscious of a "vague danger," as plaintiff asserts in the proposed instruction, but Chaldekas admitted he fully appreciated "the seriousness of the consequences" of the "specific danger" of allowing linseed oil-soaked rags to dry.

Accordingly, plaintiff's case failed to establish that defendants' failure to warn Chaldekas of the dangers of linseed oil-soaked rags was the proximate cause of his injuries because a better warning label would not have induced Chaldekas, who knew about the risk of spontaneous combustion and knew of the danger inside the closet, to properly dispose of the linseed oil-soaked rags. *Mascarenas, supra*. In fact, plaintiff's failure to warn case borders on frivolous because (1) the warning was wholly superfluous in light of Chaldekas' admissions that he knew of the dangers and nonetheless allowed the dangerous condition, of his own making, to exist, and (2) Chaldekas paid little, if any, attention to any warning label on the linseed oil container.

As a whole, the trial court's instructions adequately informed the jury of the parties' theories and the applicable law, including plaintiff's negligence claims. In light of the lack of evidentiary support for plaintiff's failure to warn claim, the trial court did not abuse its discretion by refusing to give the requested supplemental instruction. Indeed, it would have been an abuse of discretion if the trial court gave the instruction because it was contrary to the proofs and would have required the jury to base its determination on conjecture and speculation.

V. Special Verdict Form

Plaintiff claims that the trial court abused its discretion by omitting questions on the special verdict form that asked the jury to determine whether defendants negligently failed to warn about the proper disposal of linseed oil-soaked rags and whether defendants negligently designed and manufactured the linseed oil. This Court reviews a trial court's decision whether the to use a special verdict form for an abuse of discretion. *Wengel v Herfer*t, 189 Mich App 427, 435; 473 NW2d 741 (1991); see also MCR 2.514(A).

Because we find plaintiff's failure to warn claim wholly meritless for the reasons discussed *supra*, the trial court did not abuse its discretion in refusing to submit a special verdict question on that issue. Further, because the trial court thoroughly and fairly instructed the jury regarding plaintiff's negligent design and negligent manufacture claims, the court did not abuse its discretion in failing to list each negligence claim on the verdict form. The jury was fully informed of plaintiff's theories and, contrary to plaintiff's argument, this case was not so complex that the jury required written special questions regarding negligent design and negligent manufacture.

VI. Exclusion of Documentary Evidence

Plaintiff contends that the trial court erred by excluding certain documentary evidence. We review a trial court's decision to exclude evidence for an abuse of discretion. *Department of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). An abuse of discretion occurs "only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the ruling made." *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000).

Francis Davidson, president if defendant Parks, testified that the manufacturers supplying him linseed oil assured him that the oil met industry and federal specifications. During cross-examination, plaintiff showed Davidson a facsimile of a document purported to be a cancellation of the federal specifications for the manufacture of boiled linseed oil from 1987. Davidson testified that he never saw the cancellation notice and had no knowledge that the federal specifications were ever canceled. Defendants objected to plaintiff's questions regarding the document, arguing lack of foundation, and the trial court sustained the objection. After defendants' redirect-examination of Davidson, plaintiff moved to admit the document and defendant objected, arguing that its contents were beyond the scope of defendants' redirect-examination. The trial court sustained defendants' objection and refused to revisit the issue when plaintiff renewed its motion the next day.

The trial court did not abuse its discretion by refusing to admit the document. On redirect, Davidson denied any knowledge of the technical specifications for linseed oil. However, defense counsel did not ask Davidson any questions about the document offered by plaintiff. Accordingly, there was no basis for admitting the document.

Moreover, in light of the facts available to the trial court when plaintiff offered the document, it was not self-authenticating pursuant to MRE 902(5), which applies to "books, pamphlets, or other publications purporting to be issued by public authority." MRE 902(5)

provides that certain documents issued by a public authority do not require additional indicia of authenticity to be admissible. The rule generally applies to official publications of documents such as constitutions, laws, court rules, resolutions, regulations or ordinances published under the authority of the government. MCL 600.2113; MSA 27A.2113; MCL 600.2116; MSA 27A.2116; see also 29A Am Jur 2d Evidence § 1190, citing FRE 902(5). The document plaintiff offered does not bear a certification, signature or official seal to suggest that it was part of an official government book, pamphlet or other publication. Further, as noted above, plaintiff offered the evidence during Davidson's testimony and, not only did he fail to authenticate the document, he denied any knowledge about it. Accordingly, based on the facts before it, the trial court did not abuse its discretion in refusing to admit the document. Further, the trial court did not abuse its discretion by refusing to revisit the issue when plaintiff raised it the next day, after Davidson left the stand and after the close of proofs.

VII. Attorneys Fees

Defendants filed a cross appeal claiming that the trial court erred for failing to award defendants attorney fees because plaintiff filed a frivolous claim. The trial court's award of attorney fees is reversible only for abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 379; 533 NW2d 373 (1995).

At the hearing on defendants' motion for costs, the parties argued several procedural issues and presented their respective arguments regarding whether the suit was frivolous. The court noted that it presided over the trial and heard all the evidence, as well as things that the jury did not hear. The court also noted that it had already ruled on the "frivolousness" of the action when it denied defendants' motion for directed verdict. The court concluded that the suit was not frivolous. Consequently, the court awarded $23,415.80 for costs, but not attorney fees. This Court then reduced that amount to $10,563.56 on its finding that the court erred in awarding the full amount because the deleted portion represented expenses of counsel and, since the trial court had declared that the action was not frivolous, attorney fees could not be awarded. *State Farm Fire & Cas Co v Parks Corp*, unpublished order of the Court of Appeals, entered November 24, 1999 (Docket No. 221884).

An abuse of discretion is found only if "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). As discussed *supra*, we believe that plaintiff's attempt to impose liability on Ace and Parks for negligent failure to warn certainly borders on frivolous because of Thomas Chaldekas' various, damaging admissions. It is clear from Chaldekas' own testimony that not only did he virtually ignore any warning that may have been printed on the linseed oil can, he admitted that he was fully aware of how to handle linseed oil-soaked rags to avoid spontaneous combustion and failed to do so here. However, our review of the record does not lead us to conclude that the remainder of plaintiff's claims were frivolous. The trial court apparently agreed because it denied defendants' motion for summary disposition, its motion for directed verdict and its motion to recover attorney fees. We also observe that the trial court reviewed the evidence and carefully considered the issues raised by the parties before

deciding that the action had some arguable legal and factual merit. Accordingly, we cannot conclude that the trial court abused its discretion in denying defendants attorneys fees.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad