Ferguson v. King County, Tyssenkrupp Safway, Inc., and International Alliance of Theatrical Stage Employees, Local 15, No. 65092-1-I

Dwyer, C.J. (dissenting) — In resolving the crucial issue in this appeal, the majority does that which the jury plainly declined to do: accept as true the testimony of Safway's witnesses on the question of Safway's negligence.

The starting point of any sound analysis of the issues presented must be the jury's verdict. The jury found Safway negligent but also found that Safway's negligent acts were not a proximate cause of Ferguson's injuries.

Safway, as a party, did not concede its negligence. No witness testifying on Safway's behalf conceded negligence or the performance of negligent acts. The inescapable conclusion is that the jury did not accept the truth of all of the evidence presented on Safway's behalf. Also unavoidable is the conclusion that the jury did not accept as probative Safway's attempts to impeach or contradict the testimony of those witnesses giving testimony on Ferguson's behalf on the question of Safway's negligence. This matters.

Ferguson's claim, that one of the ways in which Safway was negligent was in supplying a defective swivel clamp, is not complex. These swivel clamps are supposed to rotate into the vertical position so that the ladder can be

installed on a vertical post as recommended in Safway's instructions. Ferguson's claim is that one of the swivel clamps was frozen in the horizontal position with its claw portion on top and its bolt on the bottom. This allowed the bolt to fall out of the ineffectively tightened clamp.

The testimony was that neither Safway's warehouse employees nor its truck drivers who delivered its scaffold components to jobsites were trained to inspect or recognize potential hazards in its ladders or clamps. Further evidence was that, from the immediate aftermath of the incident in June 2005 until the clamps were sent to Ferguson's expert witness for inspection and testing in November 2009, the clamps were in the sole custody and control of Safway personnel. When examined by Dr. Richard Gill, the expert, the clamp at issue could not be rotated, even with a crescent wrench.

Dr. Gill, Ferguson's engineering and human factors expert, testified to the jury that, "This clamp is defective. It won't rotate." Further, he opined that this condition prevented the ladder from being installed on a vertical post.

The clear premises underlying Dr. Gill's opinion were these: (1) Having been in Safway's sole possession the entire time, the clamp was in the same condition in November 2009 as it was in June 2005, and (2) the clamp was in the same condition when it came into Safway's sole possession on June 21, 2005 as it had been at the time of the collapse late on the evening of June 19, 2005.

Safway moved to dismiss Ferguson's claim, arguing that there was no direct evidence that the clamp was frozen on June 19, 2005. The trial court

agreed and granted the motion.

Moreover, at the conclusion of the case, the trial court instructed the jury that, "The court hereby withdraws from your consideration the following claim of negligence: (1) That the bracket and clamp on the ladders were in a defective condition for allegedly being frozen or difficult to turn at the time of delivery . . . ." (Instruction 2).

The applicable law is not complicated. When reviewing a defendant's motion for judgment as a matter of law, we are to review the evidence in the light most favorable to the plaintiff and give the plaintiff the benefit of all reasonable inferences from the evidence presented. Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001). Our review is directed to the existence or nonexistence of a "legally sufficient evidentiary basis for a reasonable jury to find" in favor of the plaintiff on the claim at issue. Civil Rule 50. "[I]t is essential to keep in mind that a verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts." Douglas v. Freeman, 117 Wn.2d 242, 254-55, 814 P.2d 1160 (1991).

At trial, Ferguson's position was clear: He was entitled to the benefit of the inference that the clamp "is as it was." It was for the jury to determine, Ferguson argued, whether this inference was outweighed by other evidence in the case. I agree.

The majority reasons differently. Based on the testimony of two witnesses, it determines that the inference in Ferguson's favor was not a

reasonable one.

The first of these witnesses was Safway's salesman, Scott Rowden, who visited the site after the incident and concluded that the collapse was caused by something other than a defective clamp. But surely the jury was not *required* to accept the analysis of the salesman on the cause of the collapse.

The second witness was John Poulson. But Poulson was clearly self-interested. There is no reason for the jury to have been *required* to accept his testimony as true.

Indeed, the jury's mixed verdict, in which it *did* find Safway negligent, indicates that it did *not* believe all of the testimony given in Safway's behalf. We will never know, however, whether the jury believed Dr. Gill's testimony concerning the defective clamp because the issue (and thus his testimony on the issue) was explicitly withdrawn from the jury's consideration. Perversely, given the jury's mixed verdict, one possibility is that the jury *did* believe Dr. Gill, believed the defective clamp to be a proximate cause of the scaffold's collapse, and declined to find for Ferguson on the question of proximate cause because the "clamp issue" had been withdrawn from its consideration.

This is, of course, speculation. And it is not for an appellate court to speculate on the reasons for a jury's decision. But neither is it for an appellate court to weigh the evidence. The majority does just that, however, in determining that Safway's witnesses were credible and, thus, the inference arising from other evidence in the case was an unreasonable one. In so doing, I

believe, the majority—and the trial court—usurp the role of the jury. It was for the jury, not the court, to determine if the testimony of Poulson and Rowden outweighed the testimony of Dr. Gill, premised upon the inference that the clamp was in the same condition when he examined it as it was at the time of the collapse.

Because the facts should be found by 12 jurors at trial, not by two judges on appeal, I respectfully dissent.[1]

[1] I concur in the majority's disposition of the cross-appeal, regarding claims between Safway and King County.