

1978

Leerco v. Boise Cascade and Sanford Corp : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT OF THE
STATE OF UTAH

LEERCO, A
Partnership,

Plaintiff and
Respondent,

-vs-

Case No. 15925

BOISE CASCADE AND
SANFORD CORPORATION,

Defendants and
Appellants.

BRIEF OF RESPONDENT

LEERCO

Reply to appeal from the judgment of the
Third Judicial District Court for Salt Lake County
Honorable Peter F. Leary, Judge

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IN THE
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STATE OF UTAH

LEERCO, a Partnership,	:	
	:	
Plaintiff and	:	
Respondent,	:	
-vs-	:	Case No. 15925
	:	
BOISE CASCADE AND	:	
SANFORD CORPORATION,	:	
	:	
Defendants and	:	
Appellants.	:	
	:	

BRIEF OF RESPONDENT
LEERCO

NATURE OF THE CASE

This is a product liability action under which Respondent claims damages as a result of having used appellant's product consistent with the labelling on the product. After doing so, Respondent claims that the product turned yellow, damaging the items to which it was applied.

DISPOSITION IN LOWER COURT

The case was tried to a jury before the Third

District Court of Salt Lake County, Utah. The jury, upon special interrogatories, rendered judgment for respondent as prayed.

RELIEF SOUGHT ON APPEAL

Respondent prays that the verdict of the jury and the judgment entered by the Trial Court be affirmed.

STATEMENT OF THE FACTS

Respondent agrees with the statement of facts contained in Appellant's brief with the exception of the following:

1. The next to last sentence of paragraph one (1) of page four (4) is argument, not fact. Though the testimony referenced by appellant was given, it was clearly contradicted by respondent's president who testified that (a) Leerco needed the original damaged mosaics for updating (T.93)*, (b) that the damaged mosaics were unsuitable for use in making new negatives, and (c) that despite the most careful handling, the negatives became damaged through use and need to be replaced (T.62-66).

2. Paragraph one (1) of page five (5) is misleading. At T.78-9, Leerco's president testified that by use of Exxon billing records he became satisfied that

* "T" designations refer to the transcript of proceedings.

the yellow mosaics were created during the time Sanford, rather than Best Test Cement was being used.

3. The testimony of Sanford's vice president concerning the "coverage" of the cement was given. However, both logic and other testimony which the jury apparently believed, controvert what was said. First, his assertion that the addition of "thinner" does not increase the volume is patently absurd. Though that may be true when the thinner is used to thin drying cement, it would not be true if thinner were used to thin down the consistency of fresh cement. Second, no tests were performed by either defendant which involved use of a squeegee in insure only a minute quantity of cement between the surfaces cemented as was done by Leero(T.85).

4. The "testimony" of appellant's "photographic experts" at page seven (7), is also something short of a statement of fact in light of Lindsay's testimony that the yellow mosaics would not produce usable negatives (T.83, 85, 86).

5. The factual statements in paragraph two (2) of page nine (9) about "photographic yellowing" are all well and good, but an examination of the Mosaics which are in evidence make it perfectly clear that it is the Sanford's Cement itself which has turned color.

6. Respondent does not argue with the assertions on pages nine (9) and ten (10) of appellant's brief about the sterling general quality of appellant's product. What cannot be controverted is that if one scrapes a quantity of that product off the damaged mosaics in evidence, it is not "transparent" and clear but yellow and ugly. Examination of the mosaic's clearly shows that the photos on them have been turned yellow by the cement.

ARGUMENT

For purposes of this argument, both appellant's points will be treated as one. And, though they are phrased as legal niceties, both concern one question: Did plaintiff-appellant put on a prima facie case which was sufficient to support the verdict? It did.

A. It was "possible" for Sanford's Cement to have caused the Mosaics to turn yellow. Appellant argues that this is impossible because only 3 1/2 gallons of Sanford's Cement was used by Leerco and "every single witness, including Leerco's president, testified that one gallon of Sanford's Rubber Cement would make seven mosaics." (There is no transcript reference to the asserted evidence of Leerco's president). The real basis for this argument is the testimony of Sanford's vice president that one gallon would make seven mosaic's, and

that of Pembroke's man who ran tests in which one gallon made six mosaics. Respondent asserts that if these tests and the testimony thereabout do not constitute the evidentiary equivalent of Genesis 1:1, then this argument fails in light of the jury's verdict. In fact, the tests are despositive of nothing. At T. 308-309 Francis Gilbert, of Sanford, testified that one gallon of cement covers about 60 to 80 square feet. Nothing was established as to the foundation of this assertion. At T. 333, et seq, Walter Chitty of Pembrokes states that he personally ran some tests on coverage and that on plain paper, one quart covered 1 1/2 3 x 4 sheets for 18 square feet which indicates a gallon would cover 72 square feet. Nothing was established regarding the manner of application, testure of the paper or thickness of application. On the contrary, Leerco's president, in describing a test on plaintiff's Exhibit 19, indicates the use of a squeegee to get the air and excess cement out from between the two surfaces glued together. Common sense indicates that this procedure would remove all but the thinnest of films of the cement; a far cry from dabbling it on with a brush as one would usually do. Undoubtedly, the amount of cement used would be less than 1/3 the normal amount, especially if it was thinned.

These tests proved nothing and the assertions about coverage made by plaintiff's witnesses were properly ignored by the jury. The estimate of the cost of cement for each mosaic by Mr. Lindsay does not support appellant's claim.

B. The evidence clearly established proximate cause. Lindsay testified that the first yellow mosaics were made "about when" they started using Sanford's (T.78) and that after they quit using it, the mosaics quit turning yellow. In order to test the theory of causation Leerco spread Best Test on one side of paper and Mylar and Sanford's adjacent to it. Low and behold, the product of the test, plaintiff's exhibit 19, shows that the Sanford side turned yellow and the other did not. Surely, the jury cannot be criticized for basing it's findings on causation on this utterly plain evidence.

As to the asserted violation of the label indications for the product, Mylar is an apparently inert plastic. Physical examination of the damaged mosaics makes it fairly clear that the mylar did not cause the yellow stains. However, appellant makes the argument here (at page 15) and made it to the jury, that photographic paper isn't included in the meaning of "paper" as that term is used on Sanford's label. The jury didn't buy that argument and neither should this Court. As the

special interrogatories make plain, the jury felt that if the basic property of the item to which the cement is applied is paper, the customer should have no obligation to separate among those which are dyed, have ink on them, have emulsions on the front or may be shaped like party hats in determining which they can use this cement on. The can said paper. Leerco used it on paper, and was damaged. It is entirely proper that appellant pay for the damage.

C. The case law. Not one case cited by appellant is relevant to this lawsuit because most relate to products applied to the skin, a matter where allergic people are best able to prevent the harm and have properly been saddled with the responsibility of doing so. Here, we are not involved with exotic beauty potients or things you put in your eyes. We are talking about one of the really mundane products in the world: rubber cement. It's label contains no hint that it is different from all other rubber cements or that it is unsuitable for any purpose except eating it, rubbing it on your skin or breathing it's fumes.

The only other case cited by appellant appears to have been inserted to support it's redundant and unsupported claim that the yellowing was caused by impro-

per photographic processing. As indicated, this argument is rendered absurd by exhibit 19 on which one sheet of photograph was discolored by Sanford's and not by another brand. Cause and effect are clearly established and Price v. Ashby's, Inc. is inapposite.

D. The line of cases to which this Court's attention should properly be drawn is that which establishes that jury verdicts ought not to be disturbed over quixotic arguments as those presented by appellant in it's brief here. The Court has stated the same rule in many forms. Charlton v. Hackett, 360 P.2d 176, 11 U.2d 389 (1961) holds that a jury "verdict must be sustained if 'substantially supported' by the record". In Owy-hee, Inc. v. Robbins Marco Polo, 407 P.2d 565, 17 U.2d 181 (1965), we find that an appellant from a verdict must prove that his evidence was so clear, credible and undisputed that all reasonable minds would find that his view of the facts and right to recovery has been established. Child v. Child, 332 P.2d 981, 8 U.2d 261 (1958) holds that appellant must show that there is "no reasonable basis in the evidence on which the trial court [jury] could have rationally thought that the requisite degree of proof was met."

Furthermore, on appeal the verdict is accorded

the benefit of every evidentiary and legal doubt. White v. Christensen, 550 P.2d 1289 (1976); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (1976); Lee v. Howes, 548 P.2d 619 (1976); Bullock v. Ungritch, 538 P.2d 190 (1975); and Steele v. Wilkinson, 349 P.2d 1117, 10 U.2d 159 (1960). This Court took an even more adamant view when it held, in Hoggan & Hull & Higgins, Inc. v. Hall, 414 P.2d 89, 18 U.2d 3 (1966) that on an appeal from a judgment for plaintiff, the evidence favorable to plaintiff must be considered to the exclusion of contrary evidence.

These rules were succinctly stated in tandem in Marks v. Continental Casualty Co., 427 P.2d 387, 19 U.2d 119 (1967) where this Court held that a reviewing court reviews the evidence in the light most favorable to the trial court's findings and will not disturb them if there is a reasonable basis in the evidence to sustain them.

A similar rule has uniformly been held to apply to motions for directed verdict. In this case, the rule would apply both to defendant's motion for directed verdict and for judgment notwithstanding the verdict. In Rhines v. Dansie, 472 P.2d 428, 24 U.2d 375 (1970) this Court stated the following rule:

[Granting defendant's motion for dir-

ected vereict] was tantamount to granting a motion for a non-suit, and we must reverse the ruling if the evidence was such that reasonable men could arrive at a different conclusion.

Citing Merrill v. Oregon Short Line Railroad, 81 P 85, 29 U 2641. Accord, Anderson v. Gribble, 513 P.2d 432, 30 U.2d 68 (1973). About the law, therefor, there is no substantial question.

That the plaintiff-respondent met it's evidentiary burden in all respects is shown without resort to the testimony. An examination of the physical exhibits makes the facts plain. A look at Mosaic exhibits which James Lindsay testified were made by Leerco prior to the use of Sanford's cement shows that but for slight discoloration around the edges, they are without flaw. On the contrary, mosaic exhibits produced while Sanford's was in use are in various stages of discoloration. If one will (as was done by counsel before the jury and likely by the jury itself) scrape a small amount of the cement itself off the discolored exhibits, it will be plain to see that the Sanford's cement itself has discolored and discolored the photographs to which it has been applied. Similarly, such an examination will show that a reasonable man could conclude that the mylar plastic had no effect on the cement. Such examination will

also show that a reasonable man could conclude that the "yellowing" reaction occurred within the cement itself or by the relationship with the paper used in the developed photographs. From this, the jury concluded that the cement was the proximate cause of the discoloration (See special interrogatory No. 2). Special interrogatories number 3, 5 and 9 show plainly that the jury believed that respondent did not assume negligent in any way in it's use of appellant's product. Nevertheless, special interrogatory Number 8 indicates that the jury believes Leero "misused" the product by using it in a manner which could not reasonably be foreseen by appellant. The other special interrogatories plainly resolve any possible inconsistency here. Interrogatory number one (1) contains the general conclusion that Sanford was negligent. Interrogatory number seven (7) shows the jury's belief that the cement performed in a manner which breached the warranties and representations stated on the label (Appendix to appellant's brief). Read in tandem, it is plain that the jury believed that the term "transparent" thereon coupled with use of the generic and unrestricted word "paper" in describing permissible use of the product, could lead a reasonable man to conclude that he could put the cement on any

kind of paper without having it's color affected. There is certainly nothing absurd about that. Plaintiff's exhibit 19 plainly shows that the cement did not meet this warranty specification. And, though the chemical reason for the failure was not proven, the fact of the failure has been proven beyond any doubt by that exhibit.

Now, appellant focuses on respondent's failure to prove chemical causation. Such proof is not required under our law once ultimate causation has been shown as was done here by Exhibit "19". In Utah Coop. Association v. Egbert Huderli Hog Farms, 550 P.2d 196 (1976) this Court concerned itself with a claim by plaintiff that hog feed purchased from defendant had contained Salmonella bacteria which killed it's hogs. The Court first held that when defendant sold hog feed it ought to have reasonably expected it would be fed to hogs so as to saddle defendant with an implied warranty. The same rationale applies here where defendant's label said you could put the cement on paper. The hog feed wasn't restricted to Berkshires any more than this cement was restricted to use on plain white bond. "Hogs" are hogs: "paper" is paper (including photographic paper). Second, the Court held that the evidence of the source of the infection didn't have to be proven to an absolute certainty

so long as plaintiff adduced "substantial evidence" to support the "likelihood" that the infection came from the feed. Similarly, in this case, though plaintiff did not prove the exact chemical cause of the discoloration, the physical exhibits plainly show that the cement is the "source" of the problem.

The issue of "causation" was also addressed in Christopher v. Larsen Ford, 557 P.2d 1009 (1976). There, the warranty relied on was a general statement by a retailer of Mobile homes that the vehicle was fit for it's intended use. After having disposed of seller-appellant's warranty arguments this court turned it's attention to the seller's claim that plaintiff had failed to show that defects cognizable under the warranty had caused the performance deficiencies of which plaintiff complained. Plaintiff had called an expert who stated his assessments of the defects and stated that they were the reasons the vehicle wasn't fit for it's intended use. In affirming the judgment, this Court simply said:

...Notwithstanding the defendant's contentions with respect thereto, the testimony of Mr. Haslam concerning the defects in the motor home, coupled with his opinion that because of those defects the vehicle did not meet the just stated requirement [that the motor home be fit for the "usual and ordinary purpose it's intended use],


provided a sufficient basis to justify permitting the jury to pass on that issue.

In the instant case, the jury had appellant's statements about it's product in evidence (Appendix to appellant's brief). It found the statements to contain a warranty. A substantial portion of Mr. Lindsay's testimony constitutes his opinion that the Sanford's cement caused the discoloration (T. 75-76, 79, 83-86, 350-1). Under the ruling in Christopher, supra, that is enough to take the issue to the jury. The jury believed the overwhelming persuasive evidence, both physical and testimonial, adduced by plaintiff-respondent. It disbelieved the inconsistent, speculative and often plainly irrelevant proofs of defendant-appellant. It thoughtfully answered special interrogatories which specify the entirely proper basis of it's verdict in detail. That is all the law requires.

CONCLUSION

For the reasons stated, plaintiff-respondent respectfully prays the Court to affirm the jury's verdict and the judgment rendered thereon.

Dated this 8th day of June, 1979.


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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Respondents to Leonard H. Russon, HANSON, RUSSON, HANSON & DUNN, 702 Kearns Building, Salt Lake City, Utah 84101 this 5th day of June, 1979.


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