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Jack Aldon Hewitt v. The General Tire and Rubber Co. : Brief of Appellant in Answer to Respondent's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JACK ALDON HEWITT,
Plaintiff and Appellant,

— vs. —

THE GENERAL TIRE AND RUB-
BER COMPANY, a corporation,
Defendant and Respondent.

Case No.
8038

FILED
AUG 15 1956

Appellant's Brief in Answer to Respondent's Petition for Rehearing

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Appellant's Brief in Answer to Respondent's Petition for Rehearing

POINT I.

THERE WAS EVIDENCE FROM WHICH THE JURY COULD REASONABLY FIND THAT THE DEFENDANT WAS NEGLIGENT.

For convenience, the Appellant answers the first two points of Respondent's brief under this one heading. Although the Petition for Rehearing and brief in support thereof, if confined to the record, do not raise any new matters which were not covered by the briefs pre-

viously submitted in this matter, we nevertheless feel constrained to submit this answer brief.

The first point raised by the brief in support of the petition for rehearing is that the inference that the defendant was negligent was not warranted by the evidence. The evidence under this point was quite fully summarized in appellant's brief on appeal to which we respectfully refer the court. The defendant urges that the jury could reasonably find from the evidence in this case that the plaintiff was negligent and the evidence upon which defendant's rely in this connection is the experiment which it performed on a similar tire, which established that it required 155 pounds of air pressure to break the wires in the bead and explode the tire. In a second experiment on the same tire after the bead wires had been broken the tire did not explode until 53 pounds of air had been introduced into it. The defendant infers from this experiment that plaintiff must have been negligent in that he must have put 155 pounds of air into the tire (notwithstanding his positive evidence that he did not), because otherwise the tire would not have exploded. Defendant points to the further evidence that the air tank at plaintiff's service station was maintained at a pressure of 175 pounds, and, therefore, defendant infers, plaintiff must have used at least 155 pounds of the available air. It would be much more reasonable to infer from the experiment, in light of all the evidence in the case, that the experimental tire was without defect as it had the specified strength to withstand 155 pounds of air before the bead wires broke,

whereas the tire which injured the plaintiff was greatly defective because it was capable of withstanding a pressure of less than 40 pounds. Another reasonable inference to be drawn from the experiment is that the tire which injured the plaintiff must have been more defective in respects other than the broken bead wires than the experimental tire because it exploded when inflated with less than 40 pounds of air; whereas, the experimental tire after the wires had been broken did not explode until it had received 53 pounds of air.

Again counsel complains that the court completely overlooked all the testimony relative to the explosion being caused by the used tube being placed in the tire and becoming wedged between the bead of the tire and the rim. In this respect, counsel shows an abject devotion to improper inference. He states the proposition that the plaintiff placed a used tube in the tire, which is true. From this solitary fact, he infers, against the direct evidence, that the plaintiff improperly mounted the tire; and he further infers that part of the tube, because it was used, became wedged between the bead and the rim. From this, counsel further assumes that all the 20 bead wires were broken by less than 40 pounds of air pressure; and he blames all this on a used tube, from which we conclude that the only safe thing to do to a used tube is to burn it. In arriving at its verdict, the jury was not required to follow defendant's devious course of reasoning with respect to the used tube. On the contrary it found the plaintiff's testimony to be true and it believed Dr. Linford when he stated that the

explosion was caused because the bead wires were defective, allowing the tube to extrude, and under his mathematical calculations, the tire exploded under a stress of 1,000 pounds rather than 5,600 pounds. Under the evidence the tire was properly mounted by the plaintiff, and he examined the tire in the mounting process to make certain that no portion of the tube was wedged between the casing and the rim. There was testimony by Respondent's expert Mr. Taylor that the explosion might have been caused by the wedging of the tube between the bead and the rim, assuming that the tube was wedged between the bead and the rim. But even on this hypothetical situation, the jury was entitled to believe Dr. Linford when he stated that, assuming such fact to be true, it would not be a significant factor in the explosion.

There was no evidence from which it could reasonably be inferred that the plaintiff was negligent. Under the particular evidence in this case there was no evidence from which it could be reasonably inferred that a third party caused the explosion. From the particular evidence in this case, the inference is compelling that the explosion was not caused by a third party because of the extraordinary force that would be required to break the bead.

The defendant would induce the court to infer that the insulated bead wires may have lost their strength to resist less than 40 pounds of air pressure simply

because the tire had been stored for a period of time. The manufacturer of a tire could not take much pride in its product if it would become worthless through being exposed to the weather conditions that existed in the storeroom of the Granite Furniture Company during the period of time involved. There was no evidence that the room in which the tire was stored was either cold, damp, wet or otherwise climatized in any manner that could have adversely affected the tire; and tires in their normal and expected use are subjected to all types of cold, damp, muddy weather conditions.

It thus appears, although the defendant is allergic to the use of reasonable, if not compelling, inferences by the court, defendant does not hesitate to urge upon the court many inferences that are neither reasonable nor compelling, from which the writer concludes that the defendant's aversion to inferences is limited strictly to those which are reasonable and compelling and his devotion to inferences is limited strictly to those which are remote and unlikely, but which benefit his theory.

Among other things, the jury in arriving at its verdict, and this court in reinstating it were entitled to find that the tire was new and had never been mounted before; that in the absence of defect the strength of the bead wires was such that the tire would not explode until 155 pounds of air pressure had been inserted into it or 5,600 pounds of force had been applied to pull the bead; that the wire used in the bead was delivered to the plaintiff on large reels about three feet in diameter

and weighed between 600 and 700 pounds; that the wire was first delivered to the defendant's Akron, Ohio, plant and from there removed to defendant's Wako, Texas, plant (necessarily requiring the use of machinery in handling); that the tire exploded after being properly mounted when less than 40 pounds of air had been introduced into it; that x-rays taken of the tire after the explosion indicated that all of the 20 wires were broken; the bead was so defective that it could not withstand a pull of 1,000 pounds rather than 5,600 pounds, which represented the specification for a non-defective bead; that in the manufacture of tires the defendant makes the following inspections (each one of which could have been negligently made, and at least one of which—the last one—must have been negligently made):

(a) The bead wires are inspected as they leave the reels. (R. 346)

(b) The beads are inspected in the beginning of the tire making process after the wires are wound. (R. 324)

(c) After the bead wrap has been applied, they are inspected again to see that the wrap completely covers the wire. (R. 328)

(d) After the tire has been completely examined on a drum, it is inspected before traveling on a conveyor to the case room. (R. 345)

(e) There is an inspection at the baggage extractor mechanism after the tire is cured where beads have been

kinked and a lot of defective tires are drawn out. (R. 355)

(f) When tires leave the curing room they are hung on a conveyor which passes through the inspection department for final inspection. (R. 343)

(g) The inspector takes the tire with each hand and puts force on both beads of the tire. If he rejects the tire, he puts it into a pile which passes to another department for further investigation. (R. 344) If the majority of the wires in the bead are broken, or if the bead is kinked, the final inspector will detect it if he does his job properly. (R. 356)

It is unconceivable that a tire so defective as the tire involved in this lawsuit could have left the defendant's factory without negligence on the part of the defendant. The manufacturer knew that the tire was a highly dangerous instrumentality which could cause serious bodily injury or death if it were put to the use for which it was designed. Certainly they would have the duty to carefully inspect and to test, if necessary, the tire before placing it upon the market. The evidence is clear in this case that the defect in this tire could have been easily detected by mere manual flexion of the tire, and that such procedure is supposed to be followed when the tire passes through its final inspection.

Throughout its brief the defendant has overlooked the established principle recognized in the opinion of the court, that on an appeal from a directed verdict the

evidence must be reviewed in the light most favorable to the losing party.

POINT II.

THIS CASE DOES NOT EXTEND THE DOCTRINE OF RES IPSA LOQUITUR TO CASES WHERE THE DOCTRINE HAS NO APPLICATION.

In its brief defendant arrays against the unbiased decision of this court, the biased opinion of a contributor to the "Insurance Counsel Journal" which criticizes the very recent Wisconsin case of *Ryan vs. Philco*, 1954, 266 Wis. 630, 64 N.E. 2d 226. Mr. Gibbs (the contributor) is not only opposed to the Wisconsin decision, but he is also opposed to Prosser on Torts and to the majority view in the bursting bottle cases, and we assume that Mr. Gibbs would also be opposed to the decision rendered by this court in this case. We desire to take the following quotation from the Wisconsin case, appearing at page 233 of the N. E. Reports:

"In the instant case we are of the opinion that the plaintiff would establish that there was no intervening negligence on the part of other persons which could have caused the short circuit in the sealed unit of the refrigerator after it left Philco's possession. Philco is charged with knowledge that such refrigerators are transported by common carrier from its factory to points of distribution and sale, and that purchasers of the same do on occasion have to remove them the same as other household furniture and appliances when they move from one place of residence to another. Therefore, it is also the duty of the

defendant to so make such sealed unit that the ordinary jars and jolts received in transportation by common carrier, or in moving the refrigerator by motor truck from one location to another would not dislodge its parts so as to cause a short circuit. The evidence disclosed the position and handling of the refrigerator from the time it was uncrated at the shop of the dealer to the time of the accident. It was transported by the dealer in the normal course of business and installed in the Zick home at Fox Lake by merely plugging the refrigerator cord into an electric outlet. When the Zicks moved from Fox Lake to Beaver Dam they employed a professional mover to move the furniture and the refrigerator. That such moving had no effect on the mechanism of the refrigerator is attested by the fact that Mrs. Zick noticed the same tingling sensation when mopping the floor in the home at Fox Lake before such moving that was observed after. It was definitely established that no one attempted to adjust or tinker with the sealed unit mechanism. In other words, Philco's original exclusive control of the sealed unit carried up to the time of the accident, even though its physical possession thereof had ended at the time of shipment. We, therefore, on the basis of analogy to the bursting bottle cases, think that it was entirely proper to invoke the doctrine of *res ipsa loquitur*, and permit the jury to draw the inference that it did from the short circuit causing plaintiff's injury. Refrigerators do not ordinarily transmit electric current through the handle so as to severely shock and injure persons who may grasp such handle in the customary use thereof.

“The duty to exercise reasonable care on the part of the manufacturer of an article, which if defective, may be imminently dangerous, includes the proper inspection and testing of the article.”

The case cites with approval a Minnesota case of *Peterson vs. Minnesota Power and Light Company*, 207 Minn. 387; 291 N. W. 705, 707, and *Bosch vs. Damm*, 296 Mich. 522; 206 N. W. 669.

We submit that the Wisconsin decision, deplored by Mr. Gibbs in the "Insurance Counsel Journal," is a well reasoned decision; and we respectfully commend it to this court's attention.

The case of *Matievitch vs. Hercules Powder Company*, (Utah), 282 P. 2d 1044, is clearly distinguishable from the case at bar. In that case there was no evidence explaining the explosion of the dynamite and cap, and there was no evidence as to how and why the dynamite exploded. In the case now before the court, there was evidence of a defective bead and evidence that a defective bead caused the explosion. We see no inconsistency between the court's decision in this case and its decision in the Hercules Powder Company case.

POINT III.

PLAINTIFF IS ENTITLED TO INTEREST ON THE VERDICT AND THE JUDGMENT FROM APRIL 23, 1953.

Counsel for the defendant have stated that in the event the petition for rehearing is denied they will not pay interest on the judgment from the time the verdict and judgment on the verdict were entered. There is approximately \$2,500.00 interest involved in this case. The verdict was rendered April 23, 1953, (R. 63-A) and the

judgment on the verdict was entered April 23rd, 1953. (R. 63).

Section 15-1-4, *Utah Code Annotated*, 1953, provides that the judgment obtained in this case shall bear interest at the rate of 8% per annum. Rule 54 (e) provides as follows:

“(e) *Interest and Costs to be Included in the Judgment.* The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the Register of Actions and in the Judgment Docket.”

This court in its decision ordered that the judgment upon the jury verdict be reinstated. We respectfully contend that the judgment should bear interest from April 23, 1953, as the clerk is required by statute to allow interest from the date of the verdict, and plaintiff would not receive full justice under the law upon reinstatement of the verdict unless such interest is allowed. In view of the expressed attitude of counsel for the defendant in this matter, we respectfully move this court to include in its order denying the petition for rehearing a further order allowing plaintiff interest on the judgment on the verdict from April 23, 1953, in order to obviate the necessity of this matter being brought

again before this court in a later proceeding. In the case of *Keller vs. Chournos*, 95 Utah 31, 70 P. 2d 86, the court revised its judgment to include interest at the statutory rate, which had inadvertently been omitted from its opinion.

CONCLUSION

We respectfully conclude that the decision rendered in this matter is in all respects fair, just and right and properly applies the law to the evidence in this case, and that the defendant's Petition for Rehearing should be denied.

Respectfully submitted,

WOODROW D. WHITE

Attorney for Plaintiff

and Appellant.