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Gary Hunt v. Domtar Industries, Inc. : Reply Brief

Utah Court of Appeals

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890719-CA

COURT OF APPEALS

GARY HUNT,
Plaintiff/Appellant,

Case No. 890719-CA

Category 14 (b)

Defendants/Respondents.

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF TOOELE COUNTY, STATE OF UTAH
THE HONORABLE PAT B. BRIAN PRESIDING

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The plaintiff/appellant, Gary Hunt, submits this Reply Brief pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

POINT I

There is one issue on appeal in this case: Are there material issues of fact regarding whether ESI designed the transfer conveyor which injured Gary Hunt? Within that main issue are three subissues: 1) whether there was a design defect in the transfer conveyor initially designed by ESI; 2) whether there was a substantial alteration in that design; and 3) regardless of any substantial alteration, whether the original design defect was a proximate cause of Hunt's injury.

ESI argues that, of those three subissues, only the proximate cause issue was raised by Hunt in the trial court. ESI is wrong. The basis of the plaintiff's entire claim against ESI is that the transfer conveyor was negligently designed by ESI for, among other things, failing to have tail pulley guards. (R. 74, 779). That issue is preserved. Hunt also raised this design defect in his Memorandum in Opposition to ESI Motion for Summary Judgment. (R. 267-268, 271).

The main thrust of ESI's Motion for Summary Judgment on the design issue was that ESI wasn't responsible for Hunt's

injury because ESI's design was altered in 1985 when the transfer conveyor was changed from an open web steel joist frame to a channel iron frame. (R. 593, 596, 606-607). Hunt argued in his Memorandum in Opposition to ESI's Motion for Summary Judgment that regardless of the change in the frame, the tail pulley should have had a guard. (R. 267).

Each of the issues presented on appeal was raised in the trial court and is properly before this Court.

POINT II

ESI next argues that Hunt presented insufficient evidence that the conveyor which hurt Hunt was designed by ESI and constructed according to ESI's design. The trial court's Findings of Fact Nos. 5 & 6 (R. 774), coupled with Conclusion of Law No. 12 (R. 762) are sufficient to raise questions of fact regarding those issues which require remand. Hunt produced significantly more evidence than that of ESI's design and how it was followed.

The cases cited by Hunt in his initial appeal brief are applicable to this appeal. On the issues relied upon, there is no distinction between a negligent design claim or a strict products liability defective design claim.

ARGUMENT

POINT I

(Replying to Respondent's Point I)

ALL ISSUES PRESENTED ON APPEAL WERE RAISED
IN THE TRIAL COURT

In the Statement of Facts section of its Brief, ESI presents argument that needs response. ESI seems to argue that Hunt should be limited in his presentation of issues on appeal because of limited objections to the trial court's finding of facts and conclusions of law. ESI then lists finding of fact after finding of fact to which Hunt did not formally object.

In the trial court, Hunt did object to the entire excessive and unnecessary findings of fact submitted by ESI. (R. 669-670). Findings of fact are unnecessary to support the granting of summary judgment. Mountain States v. Atkin, Wright, 681 P.2d 1258 (Utah 1984). All that is required under Rule 52(a) of the Utah Rules of Civil Procedure is that the trial court issue a brief written statement of the grounds of its decision. Hunt did object, specifically or in his opposition to ESI's summary judgment motion, to every finding of fact and conclusion of law necessary to preserve these issues on appeal. Hunt's written memorandum in opposition to ESI's Motion for Summary Judgment preserves his objection to the only issue relevant to this appeal: the trial court's

conclusion of law that "the plaintiff was not injured by the transfer conveyor designed by ESI." (R. 766).

Also in the Statement of Facts section of its Brief, ESI claims that the "tracking" of the transfer conveyor, allegedly caused by a bent frame, and not the design of the conveyor, was the cause of Hunt's injury. First, it is disputed whether Hunt was taking action to correct excessive tracking when he was hurt. Hunt raised these disputed facts in the trial court. (R. 269, 668). Second, even if Hunt were taking action to correct excessive tracking, that doesn't defeat his claim.

The Utah Supreme Court has consistently held that there may be more than one proximate cause of an injury. Hall v. Blackman, 18 Utah 2d 164, 417 P.2d 664 (1966). Hunt's theory is that the design defect of no tail pulley guard was the significant contributing cause of his injury. This issue was specifically raised by Hunt in the trial court:

The bend in the conveyor frame issue raised by ESI is a red herring. The tail pulley should have had a guard and a kill switch whether or not a frame was of a web joist style or was slightly bent in construction. (R. 270, n. 1).

It is for the jury to allocate fault and causation. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985).

As stated above, there is one main issue on appeal in this case: Did the trial court err in concluding that no material issues of fact existed on Hunt's claim that ESI designed the transfer conveyor which injured him? Within that main issue on appeal are three subissues: 1) whether there was a design defect in the transfer conveyor as designed by ESI; 2) whether there was a substantial alteration in that design; and 3) whether that design defect was a proximate cause of Hunt's injury. As stated above in Hunt's initial Brief, all of these issues are fact questions for the jury. Soler v. Castmaster Division of HPM Corp. 98 N.J. 137, 484 A.2d 1225 (1984). ESI acknowledges that the causation issue was raised in the trial court. The trial court specifically concluded that genuine issues of material fact exist as to whether a tail pulley guard would have prevented the injuries suffered by Hunt. (R. 762). ESI argues, however, that the first two subissues were not raised in the trial court and cannot now be raised on appeal. ESI is wrong.

The first subissue is whether there was a design defect in the transfer conveyor designed by ESI. While Hunt alleged a number of design defects in his complaint, those defects are limited to one for purposes of this appeal: the failure to have a tail pulley guard on the transfer conveyor.

This issue was raised a number of times in the trial court. First, the plaintiff's Second Amended Complaint specifically alleges this design defect. (R. 73-76). This design defect was again specifically raised in Hunt's Memorandum in Opposition to ESI's Motion for Summary Judgment. In his opposition memorandum, Hunt stated:

Gary was hurt on the unguarded tail pulley of the transfer conveyor. (R. 268). . . .The ESI drawing had no guard around the tail pulley; the transfer conveyor as built had no guard around the tail pulley. (R. 267).

The trial court's Findings of Fact Nos. 5 & 6 further evidence that this design defect was raised in the trial court. Finding of Fact No. 5 states:

Engineering Associates, Inc. an engineering firm now know by the name of ESI Engineering, Inc. was retained in May of 1982 to provide engineering design of the salt washing facilities at the Salt Wash Plant, including conveyors. (R. 774).

Finding of Fact No. 6 provides, in pertinent part, as follows:

ESI Engineering prepared two drawings that depicted the transfer conveyor. . . .ESI's drawings of the transfer conveyor also did not include a tail pulley guard. (R. 774).

Based on these references to the trial court record, ESI's argument that the design defect issue was not raised in the trial court is without merit. That issue is properly

before this Court and is an issue for the jury. Campbell v. General Motors Corp., 184 Cal. Rptr. 891, 649 P.2d 224 (1982).

ESI next argues that the issue of whether there was a subsequent substantial alteration in ESI's design of the transfer conveyor was not raised in the trial court. This is an interesting argument because the subsequent alteration of the transfer conveyor was an issue on which ESI based its summary judgment motion. (R. 593, 596, 606-607). ESI can't have it both ways. ESI can't base portions of its motion for summary judgment on the subsequent alteration of the transfer conveyor designed by ESI and then argue on appeal that the subsequent alteration issue was not raised in the trial court.

As more fully explained in his initial Brief, Hunt's argument on appeal is that any subsequent alteration of the transfer conveyor was not "substantial" from a liability standpoint and that, even if the alteration is deemed "substantial," ESI's negligence in the original design defect of no tail pulley guard makes ESI liable for Hunt's injury.

This subsequent alteration issue was specifically raised by Hunt in his Memorandum in Opposition to ESI's Motion for Summary Judgment. ESI argued in the trial court that the 1985 change in the transfer conveyor frame from an open web steel joist frame to a channel iron frame was a substantial

alteration in its design, relieving it of liability. (R. 593, 596, 606-607). In opposition to ESI's memorandum, Hunt specifically raised the alteration issue, stating:

The tail pulley should have had a guard and a kill switch whether or not a frame was of a web joist style or was slightly bent in construction. (R. 267, n.1).

All issues presented by this appeal were raised in the trial court and are properly before this Court on appeal.

POINT II
(Replying to Respondent's Point II)

HUNT PRESENTED SUFFICIENT EVIDENCE TO CREATE A JURY
QUESTION OF WHETHER ESI DESIGNED THE TRANSFER
CONVEYOR WHICH INJURED HUNT

As set out in Point I of this Reply Brief, the trial court's Findings of Fact Nos. 5 & 6, coupled with Conclusion of Law No. 12, are sufficient to require the submission of the issue of ESI's negligent design to a jury. The trial court found that ESI was retained to design the transfer conveyor at the Salt Wash Plant, that ESI prepared drawings setting out that design, and that ESI's design did not include a tail pulley guard. (R. 774). The trial court concluded that material issues of fact exist as to whether a tail pulley guard would have prevented Hunt's injury. (R. 762). Although these findings and conclusions are sufficient to reverse the trial

court and remand this case to a jury, Hunt presented additional evidence to support his position on appeal.

In his Memorandum in Opposition to ESI's Motion for Summary Judgment, Hunt presented deposition evidence that: 1) ESI was hired by Lake Point because of ESI's expertise in conveyor design. (R. 268); 2) Lake Point received, from ESI, blueprints showing the transfer conveyor design. (R. 268); 3) Lake Point used the ESI blueprint to fabricate the transfer conveyor. (R. 267-268); 4) that blueprint design had no guard on the tail pulley. (R. 267); 5) the finished transfer conveyor had no guard on the tail pulley. (R 767); and 6) ESI observed the construction of the transfer conveyor and inspected the finished product. (R. 267). This evidence creates additional factual issues which require remand to the trial court for determination by a jury. Summary judgment was improper.

ESI argues that the cases cited by Hunt in his initial Brief are inapplicable and a "red herring" because they are strict products liability rather than negligent design cases. First of all, that's not true. Second, even if it were true, the principles relied upon by Hunt are equally applicable to strict products liability and negligent design cases.

The cases cited by Hunt in his initial Brief are not exclusively strict liability cases. McDermott v. Tendun

Constructors, 211 N.J.Super. 196, 511 A.2d 690 (1986), relied upon by Hunt for the proposition that a change in a product is not "substantial" unless it is related to the safety of the product, was an action "grounded on claims of negligence, breach of warranty and strict liability in tort." Id. at 692. Much like this case, the plaintiff in McDermott claimed that an extendable conveyor on which her husband was killed had a design defect of inadequate guarding devices. Id. at 697. Michalko v. Cook Color & Chemical Corp., 91 N.J. 386, 451 A.2d 179 (1982), cited by the court in the Soler decision, was an action in which "the complaint alleged negligence, strict liability and breach of express and implied warranties on the part of the defendants." Id. at 182. States Steamship Company v. Stone Manganese Marine, 371 F.Supp. 500 (D.C.N.J. 1973), also cited by the Soler court, was a claim alleging "negligence, strict liability in tort, breach of implied warranty and breach of express warranty." Id. at 501. In none of these cases did the court distinguish its reasoning based on negligent design and/or strict products liability.

This is consistent with the opinions of courts which have specifically concluded that the "substantial alteration" theory applies equally to strict products liability and

negligent design cases. As recently explained by the Wyoming Supreme Court:

We agree with appellee's general proposition that material or substantial alterations of a product after sale may constitute a defense to all three causes of action. Even if a product is defective, unmerchantable or negligently manufactured, the seller may not be liable for a plaintiff's injuries which are caused by unforeseeable alterations in the product rather than the original defects. (Citations omitted). In the context of strict liability, this defense has been explicitly codified in Restatement (Second) of Torts § 402A(1)(b) . . . In negligence and warranty claims the material alterations defense is raised under the rubric of intervening or superseding cause. See generally, W. Keeton, Prosser and Keeton on Torts § 102, at 710-712 (1984). (Emphasis added).

Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 345 (Wyo. 1986).

In Bingham v. Godfrey, 114 A.D.2d 987, 495 N.Y.S.2d 428, 429 (1985), the court reached the same conclusion:

A manufacturer of a product may not be cast in damages either on a strict products liability or negligence theory, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of the plaintiff's injuries. (Emphasis added).

These cases specifically address the issues on appeal in this case and support Hunt's position. These cases acknowledge that the "subsequent substantial alteration"

doctrine applies to negligent design cases. Whether there was a "substantial alteration" in ESI's design which would absolve ESI from liability is a jury question. Soler v. Castmaster Division of HPM Corp., 98 N.J. 137, 484 A.2d 1225, 1234 (1984).

The Ogle and Bingham cases also acknowledge the exceptions to that defense relied upon by Hunt on appeal. The Ogle case acknowledges that the plaintiff's injuries must be caused by the subsequent alteration, "rather than the original defect." Hunt argued in his initial Brief that, despite any alteration in the transfer conveyor, his injuries were caused by the original defect in ESI's design: the lack of a tail pulley guard. (Hunt Appeal Brief, p. 24). Similarly, the Bingham court stated that the subsequent modification must substantially alter the product and be the proximate cause of the plaintiff's injuries. Hunt argues on appeal that the 1985 change in the transfer conveyor frame was not the proximate cause of his injuries. The proximate cause of Hunt's injuries was the failure to have a guard on the tail pulley, a failure which was part of ESI's initial design and which existed before and after the 1985 frame alteration. (Hunt Appeal Brief, pp. 12-13, 24).

ESI cites no cases which specifically state that the principles cited in Hunt's appeal brief have no application to

negligent design cases. As just shown, courts which have specifically addressed that issue hold that the subsequent alteration principles have equal application to both strict products liability defective design cases and negligent design cases. This is because the essential elements of those causes of actions are interchangeable. As stated by the Michigan Supreme Court:

Like the courts in every state, whether a suit is based upon negligence or implied warranty [form of strict liability] we require the plaintiff to prove that the product itself is actionable -- that something is wrong that makes it dangerous. This idea of "something wrong" is usually expressed by the adjective "defective" and the plaintiff must, in every case, in every jurisdiction, show that the product was defective.

* * *

In an action against the manufacturer of a product based upon an alleged defect in its design, "breach of warranty and negligence involve identical evidence and require proof of exactly the same elements." (Citation omitted). A manufacturer has a duty to design its product so as to eliminate any unreasonable risk of foreseeable injury. (Citation omitted). For lack of reasonable care in the face of such duty, the manufacturer may be answerable in a negligence action. (Citation omitted). When proceeding under a theory of implied warranty a design defect is established by proof that the product is not reasonably safe for the uses intended, anticipated or reasonably foreseeable. (Citation omitted).

. . .[I]t is inconceivable that a jury could determine that the manufacturer had not breached its duty of reasonable care and at the same time find that the product was not reasonably safe for its reasonably foreseeable uses. The question in either case turns on reasonable care and reasonable safety. (Emphasis in original).

Prentis v. Yale Manufacturing Company, 421 Mich. 670, 365 N.W.2d 176, 186-87 (1984).

The Prentis Court is not alone in determining that the principles of negligent design and strict products liability for defective design are mutually applicable. A manufacturer or designer of a product "is required under both strict liability and negligence principles to design and produce a reasonably safe product." Anderson v. Dreis and Krump Manufacturing Corp., 48 Wash. App. 432, 739 P.2d 1177, 1183 (1987). The difference between a negligent design theory and a strict liability defective design theory is a limited one. As explained by the Arizona Court of Appeals:

Appellant's underlying theories as to both negligence and strict liability were the same, to-wit, defective design. . . .In both instances appellant had to prove that the tractor was in a defective condition and unreasonably dangerous. . . .Under the negligence theory a "defective design" arises when the manufacturer has failed to use reasonable care to design its products so as to make it safe for intended uses. Restatement (Second) of Torts § 395 (1965). The difference between the two theories of liability in a defective design case is that under strict liability the manufact-

urer can be held liable despite its best efforts to make or design a safe product. (Citations omitted).

Mather v. Caterpillar Tractor Corporation, 23 Ariz. App. 409, 533 P.2d 717, 719 (1975).

Hunt understands that his burden of proof at trial on a negligent design claim requires proof of fault that may not be necessary if this were a strict products liability claim. The substantive legal issues, such as substantial alteration, however, apply equally to strict products liability and negligent design claims.

ESI claims that the "substantial alteration" concept has no application to negligent design claims. ESI then cites negligent design case after negligent design case where product designers were relieved of liability when their products were substantially altered after initial design or when the designs were not followed. ESI can't embrace the concept when it helps their position and then turn around and condemn it as inapplicable when it hurts their position.

In the last section of its Brief, ESI recites case after case to support the proposition that a design engineer is not liable when its designs are not followed "in an important particular and damages result which may have been due to the departure." (ESI Brief, p. 36 and cases cited thereafter). Hunt doesn't disagree with the legal principles set

out those cases because they support Hunt's position. To relieve the design engineer from liability, any departure in the design must be "in an important particular" and the damages must be due to the departure. Am. Jur. Architects § 23 (1962). The departure must be "so far material that it may have been the direct cause of the injury." Lake v. McElfatrick, 139 N.Y. 349, 34 N.E. 922, 925 (1893). A design engineer cannot be liable for negligent design where "there is no evidence that the defects were not due to the departure from the plans." Dorsey v. Frishman, 291 F.Supp. 794, 796 (D. D.C. 1968).

Each of these cases cited by ESI supports Hunt's theory in this case. Hunt argues that the 1985 alteration in the frame of the transfer conveyor was not "in an important particular" from a liability and safety standpoint, nor was it "so far material that it may have been the direct cause of the injury." Hunt argues that the direct cause of the injury was ESI's failure to initially design the transfer conveyor with a tail pulley guard. Unlike the Dorsey case, here there is evidence that the defects were due to the initial design; not to the subsequent alteration.

ESI somewhat mischaracterizes the main issue on appeal in this case. It is not whether ESI's plans and specifications were followed. While that issue is part of the

law underlying this appeal, that is not the main issue on appeal. The main issue on appeal is whether ESI designed the transfer conveyor which injured Hunt. In addition to the evidence presented in the trial court regarding how ESI's design was followed (see record references p. 9 of this Reply Brief), Hunt stated in the trial court:

Even if Lake Point failed to follow the blueprint in every other respect, it followed ESI's design in the most important respect, the failure to include a guard around the tail pulley. (R. 267).

The issue on appeal here, the trial court's conclusion that "plaintiff was not injured by the transfer conveyor designed by ESI," was specifically based on the following:

Lake Point originally constructed the transfer conveyor with the frame designed by ESI, the frame was changed when the transfer conveyor was reconstructed in 1985 with a channel iron frame. . . . (R. 766).

The issue on appeal in this case is based on the "subsequent alteration" of the frame of the transfer conveyor in 1985, not on Lake Point's failure to follow ESI's plans or specifications in the original construction of the transfer conveyor in 1982-83.

The question, to be decided by the jury, is whether that alteration in ESI's design was "substantial" from a liability standpoint and even if it was, whether the original


design defect of no tail pulley guard was the sole or concurrent proximate cause of Hunt's injury. These are jury questions. McDermott v. Tendun Contractors, 511 A.2d 690 (N.J.Super. 1986); Soler v. Castmaster Division of HPM Corp., 98 N.J. 137, 484 A.2d 1225 (1984). ESI can present no convincing argument why these principles do not apply to a negligent design claim. As evidenced by the cases cited in this Reply Brief, they do. All cases cited and arguments made by Hunt in his initial Brief apply to this claim and the issues presented on appeal.

CONCLUSION

All issues presented on appeal were raised in the trial court. Hunt presented ample evidence to the trial court to create a jury question of whether ESI designed the transfer conveyor which injured Hunt. Summary Judgment on that issue was improper. This case should be remanded to the trial court for a jury to decide that issue.

DATED this 4 day of September, 1990.

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CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing APPELLANT'S REPLY BRIEF (Hunt v. Domtar Industries, Inc., et al.) were mailed this 4th day of September, 1990, to the following:

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