

STATE OF MICHIGAN
COURT OF APPEALS

ADA JEANETTE KOPJA and RAYMOND
KOPJA,

UNPUBLISHED
February 27, 2001

Plaintiffs-Appellants,

v

No. 215009
Oakland Circuit Court
LC No. 97-538169-NP

GENIE COMPANY,

Defendant-Appellee.

Before: Saad, P.J., and White and Hoekstra, JJ.

WHITE, J. (*dissenting*).

Because I believe that plaintiff presented sufficient evidence to withstand defendant's motion for summary disposition, I respectfully dissent. Under the circumstances presented here, plaintiff's failure to present statistical evidence regarding the incidence of failure of defendant's automatic garage door opener emergency release mechanism should not be fatal to her case.

I

Plaintiff testified at deposition that the automatic garage door opener was installed around June 1994. There is no dispute that it was installed according to defendant's instructions. The emergency release mechanism knob hung at a height of six feet. Plaintiff is 5'2" tall. The incident in question occurred in April 1996. Plaintiff testified that she had not pulled on the knob of the emergency release mechanism before that date and, to her knowledge, neither had anyone else.

Plaintiff's response to defendant's motion for summary disposition argued that defendant's release mechanism "violates Federal and ANSI standards which require that it . . . 'shall be constructed so that a hand can firmly grip it and detach the operator by applying a maximum of 50 pounds of force . . .'" Plaintiff attached to her response 16 CFR § 1211.9 and ANSI/UL 325, § 31.4.1.¹ 16 CFR 1211.9 states in pertinent part:

¹ Defendant had listed these two regulations alone in answers to plaintiff's interrogatories asking what federal, state and industry regulations pertained to the garage door opener at issue. Copies
(continued...)

(a) A means to manually detach the door operator from the door shall be provided. The means shall be colored red and shall be easily distinguishable from the rest of the operator. It shall be capable of being adjusted to a height of 6 feet (1.8 m) above the garage floor when the operator is installed according to the instructions specified in § 1211.13(a)(2) of this subpart. The means shall be constructed so that a hand can firmly grip it and detach the operator by applying a maximum of 50 pounds (223 N) of force to the means with the door obstructed in the down position.

ANSI/UL 325, § 31.4.1 is virtually identical.²

Plaintiff's expert, a licensed mechanical engineer, testified that plaintiff's counsel asked him to comment from an engineering standpoint whether the release cord mechanism was well designed. He testified that he had tested the cord and knob emergency mechanism at issue and that the knob came off in his hand, as it had in plaintiff's. He further testified:

Q You said you had in arriving at your opinion, you had called to mind various devices, ropes with handles on their end. What particular things are you calling to mind specifically?

A Well, this is – a rope with a handle on it is used on various small gasoline engines to start them. I'm thinking about an outboard motor and different lawn mowers and roto tillers that I have owned

* * *

and various lawn mowers, snow blower, *almost all of the gasoline engine equipment that doesn't have an electric start has a pull cord on it, and they are generally put on more securely or in a different fashion.*

* * *

(...continued)

of the interrogatory were attached to defendant's motion below.

² UL 325, applicable to "door, drapery, gate, louver and window operators and systems," provides:

A means to manually detach the door operator from the door shall be provided. The means shall be colored red and shall be easily distinguishable from the rest of the operator. It shall be capable of being adjusted to a height of 6 feet (1.8 m) above the garage floor when the operator is installed according to the instructions specified in 51.3.1 and 51.4.1(4). The means shall be constructed so that a hand can firmly grip it and detach the operator by applying a maximum of 50 pounds (223 N) of force to the means with the door obstructed in the down position. . . .

Q Okay. What—I'm asking you, what is your opinion in this case or what are your opinions in this case regarding the release knob and cord?

A Well, my opinion is that the release knob was not securely affixed at the end of the release cord, so that when the woman took a hold of it and tried to actuate it, she pulled the knob off the cord . . . it was the fact that the knob came off in her hand that precipitated the fall, and my opinion is it could have been affixed more securely.

* * *

Q What would you do differently? What's your alternative design to correct this inaccurate or insecure fixing of the knob on the release cord?

A Well, the simplest design to affix it right now would be to tie a bigger knot on the end of the cord. The easiest knot to tie in that regard is a figure eight knot rather than rather than an overhand knot. You often see those knots which just turn out to be a little bigger. In cords with handles on them like on a ski jacket that's got a hood and little handles on it, they tie figure eight knots in it. There are stop knots at the end of the line, and that would made [sic] a bigger knot, and that in itself would have taken care of it, or you could have had a washer that would have been under the knot, between the knot and the handle, so that a steel washer would not distort it. It would fit nearly the diameter of the rope, and then you couldn't have pulled the rope through it probably with any kind of knot.

There are a couple of easy things to do if you don't want to use this handle. If you don't want to use this handle, you could make a T handle like that, or you could bond to the rope on to —there are all sorts of heating and fusing things that you can mold a handle into this. That might cost more. Certainly tying a bigger knot in it wouldn't cost anything.

Q The T handle you're referring to is the lower picture on your Exhibit 2?

A A handle like that could have been made, yeah and, as I said, you could also by plastic molding process, you could have fused a handle on the end of this cord. I mean there is like I say [sic] probably a hundred different ways to do this. Which one you're going to use might depend on what kind of supplier you had available for the design. There is nothing wrong with this handle if you tied a bigger knot in the rope.

Q So you don't have any — when you say nothing wrong with this handle, you don't have any criticisms of the knob itself?

A No. It's all right. I mean —it's sort of the knob and the rope together. Its' not all right if you're not going to do something to make the rope not come through it. You're going to have to put — if you're going to affix this design just like it is and do something with it, you either have to put a washer under it or tie a bigger knot.

I would probably put a washer and tie a bigger knot. You'd break the handle before it came off.

* * *

Q Okay. You've given me the facts supporting your opinion. Is there anything you can point to in the engineering body of standards or treatises or textbooks regarding retention of a knob or a handle on a cord that you relied on?

A No, nothing that I relied on, *and I don't recall ever seeing anything like suggested ways to hold knobs on cords. I don't.*

Q You basically see this as just being a very simple proposition. You've got – you've got a knob that slips over a cord, and you just need to make the either the nut or the retention of the cord and the knob such that it won't slip through the opening in the hole?

A Exactly.

Q That's it?

A That's it.

Q And you're not aware of any engineering standards or documentation you can point to that would tell you how to go about designing something, some retention system for a knob such as we have here?

A No, I don't know of any textbooks. *Sometimes a device is so simple and has been around for so long, I mean you just go, and you see one.* If we looked around, we'd probably find one. If he's got venetian blinds, we'd see this, and there is just all kinds [sic] of things.

Q On the couple of the alternative designs you mentioned were tying a bigger knot, for example, a figure eight knot or using a steel washer so it wouldn't distort or you said even ideally the combination of the two. You haven't tried that with this particular cord or knob?

A I tied a figure eight knot in the other end of it where it wouldn't fiddle with it, and, yes, I tried – I tied a figure eight knot in it and used it, and I couldn't pull it off, and it didn't appear to me that I was hurting the knob either. I mean it just would not go through the knob, and that was it.

He further testified:

Q Okay. Are there any industry standards or regulations - strike that.

Are there any industry standards that you feel were violated by the means by which the Genie Company uses to secure the knob to the release cord?

A No, and by that I assume that you mean written or promulgated standards that talk about putting knobs on cord like the DFR [sic CFR?] materials or similar.

Q Or ANSI or whomever, whoever is promulgating standards to affix knobs?

A And I take your meaning to be written standards, and the answer is, no, I know of none.³ *I think it violates standards of good engineering practice, but they're not necessarily written.*

* * *

Q Okay. In your alternative design, you don't envision a force at which the retention – the alternative retention systems you've articulated here should fail or would be intended to fail?

A No, I don't. [Emphasis added.]

In answers to plaintiffs' interrogatories, defendant stated it had not considered any other designs for the emergency release cord and knob. Defendant also stated that the release mechanism of the garage opener system was tested before its manufacture and sale. In response to plaintiff's interrogatory asking whether defendant performed any tests to determine the amount of downward force exerted on the emergency release cord, necessary to cause the handle to become separated from the cord, defendant objected to the interrogatory as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence "because testing performed on the subject release lever during the February 26, 1998 [i.e., after the instant suit was filed] inspection revealed that the downward force necessary to release the lever never exceeded 1 pound."

II

Statistical evidence of risk is not required as a matter of law in order to present a prima facie case of design defect. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995), in which this Court noted that in design defect cases, "a plaintiff has the burden of producing evidence of the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of a design's risk, citing *Owens, v Allis-Chalmers Corp*, 414 Mich 413; 326 NW2d 372 (1982); and *Hamman v Ridge Tool Co*, 213 Mich App 252, 260-261; 539 NW2d 753 (1995), in which this Court summarized the evidence plaintiff presented in support of his negligent design claim, and concluded that such evidence, which did

³ The CFR and ANSI regulations plaintiff attached to her response to defendant's motion, quoted *supra*, set forth in very general fashion the parameters for the release mechanism, including the height from which it should hang and the color of the pull-knob; the regulations do not, however, specifically address the type or size of knot, or type or size of knob, that could withstand fifty pounds of force. Thus, I do not view plaintiff's expert's testimony that he was aware of no written regulations addressing the interaction between a cord and knob as contradicting the regulations attached to plaintiff's response. As noted in note 1, *supra*, defendant's answers to interrogatories set forth only these two regulations.

not include a statistical breakdown of product failure, was sufficient to withstand defendant's motion for judgment notwithstanding the verdict or new trial. See also 1 Institute of Continuing Legal Education, Torts: Michigan Law and Practice, Product Liability, §§ 8.3, 8.4, Negligent Design, pp 8-5 - 8-6 (2000 ed), which states in pertinent part:

To establish a prima facie case [of negligent design], a plaintiff must present evidence regarding the following:

- the magnitude of the risk of injury presented by the defect in the product and the reasonableness of the proposed alternative designs; or
- other evidence otherwise concerning the “unreasonableness” of the risks in the design.

Owens v Allis-Chalmers Corp, 414 Mich 413, 429-432, 326 NW2d 372 (1982); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364, 533 NW2d 373 (1995).

2. The Magnitude of the Risk of Injury

§ 8.4 The magnitude of the risk analysis requires “a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident.” *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187, 439 NW2d 326 (1989). Two distinct approaches have emerged to establish the magnitude of the risk.

Some courts have concluded that to calculate the magnitude of the risk, a plaintiff would have to present evidence regarding the number of injuries in a particular time frame and the corresponding number of incidents without the injury. If such evidence is not produce, “the magnitude of the risks is quite uncertain because it is dependent upon an unknown incidence of [the specific injury in question], [and] an examination of the effects of any proposed alternative design must bear a *heavy burden* in determining whether the chosen design was unreasonably dangerous.” *Fisher v Kawasaki Heavy Indus*, 854 F Supp 467, 470 (ED Mich 1994) (citing *Owens [supra]*); *Eldridge v Crane Valve Co*, 924 F Supp 81, 84 (WD Mich 1996 (emphasis added)).

Other courts have concluded that failure to present evidence of the statistical breakdown of the risks does not prevent a plaintiff from making a prima facie case. *Reeves*, 176 Mich App at 189; *see also Hamann v Ridge Tool Co*, 213 Mich App 252, 539 NW2d 753 (1995); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 533 NW2d 373 (1995). . . .

In *Owens, supra*, the plaintiff sued the manufacturer of the forklift her husband had been driving when it rolled over and he was killed, alleging that the forklift was negligent designed for failing to include some sort of driver restraint as standard equipment that would have prevented her husband from being ejected when the forklift rolled over. The *Owens* Court noted that the

issue the plaintiff presented “is whether she established a prima facie case that the forklift was defectively designed because of its failure to include some sort of driver restraint as standard equipment.” *Id.* at 418. The Court explained:

Our conclusion that the plaintiff did not present a prima facie case is based on the lack of evidence concerning both the magnitude of the risks involved and the reasonableness of the proposed alternative design. Although from the testimony of plaintiff’s expert one might infer that a forklift rollover and the injuries resulting from being pinned under the overhead protective guard were foreseeable, neither his testimony nor any other evidence on the record gave any indication how likely such an event might be. In conjunction with this uncertainty, the record also produces no indication how the use of any of the driver restraints would affect a forklift operator’s ability to do his or her job or the operator’s safety in other circumstances.

The nature of a forklift operator’s work is not a function concerning which the Court is able to take judicial notice. We must look to the record to determine what showing was made that any of the proposed driver restraints would be compatible with the nature of a forklift operator’s work. Especially in a case such as this, where the magnitude of the risks is quite uncertain because it is dependent upon the unknown incidence of forklift rollovers, an examination of the effects of any proposed alternative design must bear a heavy burden in determining whether the chosen design was unreasonably dangerous.

Little evidence was provided on these points. The only evidence concerning the nature of a forklift operator’s work was one statement made by plaintiff’s expert on cross-examination that he did not know whether most forklift drivers would be in the forklift the better part of their working day or whether they would be in and out of it. He said he had seen both types of operations. Concerning the effects of any of the proposed driver’s restraints, the only testimony was a statement by the expert that certain types of seat belts allow some freedom of movement and would only lock when jerked. Regarding whether seat belts would be used, the expert did not testify about the industry in question, but the workers at decedent’s workplace indicated that they would not wear seat belts if they were provided. No evidence was provided concerning the effects of the use of the other restraints, and no cost estimates were provided for any of the restraints.

Viewing the evidence in a light most favorable to the plaintiff, we cannot conclude that plaintiff established a prima facie case for either negligence or a defective product. Even if this Court could take judicial notice that the costs involved in attaching a seat belt or other designated restraint to a forklift would not be great, we cannot take judicial notice that their use by forklift drivers would be likely, practical, or more safe. Neither the costs nor the effects of the other restraints were established. [*Owens, supra* at 428-430. Emphasis added.]

In the instant case, unlike in *Owens*, plaintiff’s expert testified regarding several alternative designs and their effects. Plaintiff’s expert testified that an alternative design

containing a larger knot would add no cost, would be effective in preventing the release knob from detaching, and that he had tested the knob in question with a figure eight knot, finding that the knob did not come off the cord. Defendant stated in discovery that it had considered no alternative designs for the emergency release knob and cord. *Owens*, unlike the instant case, involved an alleged failure of a manufacturer to anticipate risks that might occur in the event it did not provide an additional safety device on its product. Plaintiff in the instant case did not allege that defendant failed to include an additional item or safety device in its emergency release mechanism, rather, plaintiff alleged that the emergency release mechanism was defectively designed and not fit for its intended purpose.

In the instant case, plaintiff's counsel argued, and it appears to be a matter of common sense, that persons would utilize emergency release mechanisms such as the one at issue infrequently, i.e., when a garage door fails to operate automatically. The emergency release mechanism is a back-up system that is expected to function as intended, but was shown in the instant case not to have done so. Under the circumstances presented, I conclude that plaintiff's failure to present statistical evidence regarding the incidence of failure of the emergency release mechanism is not fatal to her case. I would reverse.

/s/ Helene N. White