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Recent Cases

INJURED CONSUMER PREVAILS IN STRICT PRODUCTS LIABILITY ACTION DESPITE MANUFACTURER'S PRODUCT WARNING

The United States Court of Appeals for the First Circuit held that the manufacturer of a defective power sweeper was strictly liable for the consumer's injuries. In *Austin v. Lincoln Equipment Assoc., Inc.*, 888 F.2d 934 (1st Cir. 1989), the court found that the sweeper's operator had established a prima facie case that the power sweeper was unreasonably dangerous. The court held that the operator had neither assumed the risk of using the sweeper nor misused it, despite his failure to heed the warning label.

Background

On the date of the accident, Otis Austin ("Austin") used a power sweeper manufactured by Garlock Equipment Company ("Garlock") to sweep a flat rooftop in Providence, Rhode Island. As an employee for a roofing company, Austin's job was to sweep gravel into rows so that other employees could remove the gravel with hand-brooms and shovels. After partially completing the job, Austin stopped the sweeper approximately two to five feet from the roof's edge, despite the warning label on the sweeper which read, "CAUTION! DO NOT OPERATE WITHIN TEN FEET OF EDGE OF ROOF." When Austin restarted the machine, it bucked backwards against him; he fell off the roof and suffered severe injuries. Austin sued both Garlock and the seller of the machine, Lincoln Equipment Associates, Inc. ("Lincoln"), claiming that the machine was defective. He claimed that the sweeper's brush and wheel clutch failed to engage properly due to a poorly designed interlock mechanism.

The U.S. District Court's Decision

At trial before the United States District Court for the District of Rhode Island, Garlock moved for a directed verdict; the motion was denied. At the close of trial, the court submitted special interrogatories to the jury. In response, the jury found Garlock strictly liable, but it found Lincoln not liable. The jury further found that Austin had not assumed the risk of injury by operating the machine within ten feet of the roof edge. However, the jury found that Austin was 60% negligent. Taking Austin's negligence into account, the jury awarded him \$160,000. Garlock did not object to the verdict before the jury was dismissed. Nine days after trial, Garlock moved for a judgment notwithstanding the verdict on the grounds that it was not liable as a matter of law. Garlock alternatively moved for a new trial on the grounds that the jury had reached inconsistent verdicts for Lincoln and Garlock. The district court denied the motions. Garlock appealed to the United States Court of Appeals for the First Circuit, raising both issues on which the district court had denied Garlock's motions.

Products Liability in Rhode Island

In 1971, Rhode Island adopted the theory of strict liability found in section 402A of the Restatement (Second) of Torts ("Restatement"). Section 402A provides:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused . . . if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) of Torts §

402A(1) (1965). This rule of strict liability applies even if the seller has exercised all possible care in preparing and selling the product. According to the Rhode Island Supreme Court, strict liability attaches only if the defect renders the product unsafe for its intended use or if the manufacturer fails to warn of any dangers posed by the product that are reasonably foreseeable at the time of marketing.

"Consumer Expectation Test." In strict products liability cases, the injured party must prove that the product is defective and that the defect caused his injury. Rhode Island courts employ a "consumer expectation test" to determine whether a product is defective under the strict liability definition. This standard protects consumers who may be unaware of the dangers posed by using a product as it was intended to be used. Under this standard, a defect renders a product "unreasonably dangerous" if it creates a strong likelihood that the user will be injured. A manufacturer's failure to warn consumers of a foreseeable, unreasonable danger inherent in its product is grounds for strict products liability. However, in strict products liability cases, Rhode Island courts determine the manufacturer's and the consumer's relative liability for the consumer's injuries by considering the parties' comparative negligence, and allow a complete defense to the manufacturer if the consumer assumed the risk of operating the product.

The First Circuit's Opinion

Austin's Prima Facie Case.

The United States Court of Appeals for the First Circuit initially assessed whether Austin had established a prima facie case by producing enough evidence at trial to support the jury's verdict. The court found that the evidence was sufficient to show Garlock's sweeper was unreasonably dangerous. The sweeper's interlock mechanism was meant to ensure that the

brush and wheel clutches simultaneously engaged, preventing any backward thrust. Austin's expert witness testified that a poorly designed interlock mechanism caused the machine's sudden backward motion. The court concluded that the interlock mechanism could reasonably be construed as a defect under the strict liability definition. The court further found that the machine's bucking motion could reasonably be construed to have caused Austin's injury. Thus, the court found that Austin had presented to the trial court a prima facie case sufficient to justify the jury's verdict.

Assumption of Risk. Garlock contended that the assumption of risk defense barred any liability and, therefore, required a judgment in its favor as a matter of law. This contention, if accepted, would relieve Garlock of liability. To establish an assumption of risk defense, Garlock had to prove that Austin was aware of the specific risk that the machine might knock him backwards, appreciated the magnitude of the risk, and voluntarily exposed himself to the danger. The appellate court noted that Austin was an experienced roofer who appreciated the inherent danger of working on rooftops. He frequently had worked with the sweeper and knew it exerted "some backward pressure" each time he started it. However, Austin testified that he did not realize the sweeper could jump back in the way it had on this occasion, and that he had neither read the warning label nor received any instructions on operating safety. On the strength of Austin's testimony, the appellate court found that the trial court properly denied the motion for directed verdict based on assumption of risk.

"Carelessness" Not the Same as "Misuse." Next, Garlock contended that Austin had misused the machine. A product is not considered defective if the consumer's misuse caused the injury. According to Garlock, by using the sweeper within two to five feet of the roof's edge, despite the displayed warning label proscribing operating the machine within ten feet of a roof's edge, Austin had

misused the product. The appellate court found that Austin had not misused the sweeper. Misuse is using the product for a purpose not intended or foreseen by the manufacturer. The purpose of the sweeper was to sweep gravel, the exact task for which Austin employed it. The court stated that "careless" use of a product for its intended purpose is not the same as misuse.

Garlock also argued that Austin's use of the sweeper in a manner contrary to the warning was tantamount to misuse. The court held that a warning negates strict liability only if following the warning would have abated the danger. In this case, although Austin's use of the sweeper near the roof's edge compounded the danger, Garlock was still strictly liable because the sweeper was dangerous even if the warning had been heeded. The court stated, "[i]f a product is unsafe regardless of whether the user has followed the manufacturer's warning, the user's careless failure to do so is simply contributory negligence." Accordingly, the appellate court agreed with the trial court's denial of Garlock's motion for directed verdict based on a misuse theory.

Manufacturer Waived Objection to Inconsistent Verdict. Garlock lastly contended that the jury verdicts against it, as manufacturer, but for Lincoln, as seller, were inconsistent and required a new trial. The court agreed that, absent special circumstances not present in this case, if the manufacturer of a product is found strictly liable, the seller also is liable. The court declined to consider the issue, however, because Garlock had not raised the objection in a timely fashion. According to the court, a party waives an inconsistent verdict objection if the objection is not raised before the jury is dismissed. Garlock failed to raise the objection until nine days after the trial. Thus, the court considered the objection waived.

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ADVERTISEMENTS FALSELY ALLEGING "PERMANENT HAIR REMOVAL" VIOLATED THE FEDERAL TRADE COMMISSION ACT

In *Removatron International Corporation v. Federal Trade Commission*, 884 F.2d 1489 (1st Cir. 1989), the United States Court of Appeals for the First Circuit held that deceptively advertising a hair removal machine violated section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Additionally, the court granted the government's motion to prohibit continued advertising in order to prevent future economic harm to potential purchasers of the machine.

Factual Background

Removatron International Corporation ("Removatron") and Frederick E. Goodman marketed a hair removal machine, or epilator, which used tweezers combined with a burst of radio frequency energy ("RFE") to destroy hair follicles, thereby removing unwanted body hair. The Federal Communications Commission ("FCC") approved Removatron's machine to emit RFE at a particular frequency. Removatron advertised that the machine permanently removed hair. Removatron's advertisements asserted that the epilator was "clinically tested," that the machine (rather than its RFE) was approved by the FCC, and that the RFE completely destroyed hair follicles by heating the surrounding tissue.

Removatron advertised its machine mainly in beauty industry trade magazines. Salons usually purchased the machine for \$4,000.00, and charged individual customers \$35.00 per one hour treatment. Removatron instructed the purchaser that several treatments were required in order to obtain permanent hair removal and that such treatments might not work for everyone. Machine owners and operators in turn communicated the same information in

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