Tulsa Law Review

Volume 11 | Number 1

1975

Manufacturers' Products Liability--The Oklahoma Supreme Court Considers the Competency of Circumstantial Evidence in a Products Liability Action

Daniel J. Boudreau

The possible alternatives cloud the key consideration—the people. It will be a difficult choice when the housing decision-makers determine the trade-off between the rights of these people to a safe and habitable dwelling, and putting financial onus on the landlord, risking abandonment and new slums, or increased government largess.

James Kevin Checkett

MANUFACTURERS' PRODUCTS LIABILITY—THE OKLAHOMA SUPREME COURT CONSIDERS THE COMPETENCY OF CIRCUMSTANTIAL EVIDENCE IN A PRODUCTS LIABILITY ACTION. *Green v. Safeway Stores, Inc.*, 541 P.2d 200 (Okla. 1975).

In April of 1974, the Oklahoma Supreme Court pointed out in *Kirkland v. General Motors Corp.*[1] that manufacturers' products liability was a separate and independent cause of action standing on its own. The court also made it clear that inferences from circumstantial evidence, which is the core of the res ipsa loquitur doctrine, are no less applicable to strict liability in tort. It specifically decreed that a plaintiff may prove his cause of action for manufacturers' products liability by circumstantial evidence and proper inferences drawn therefrom since actual or absolute proof of a defect in a sophisticated product may be within the peculiar knowledge or possession of the defendant.[2]

One year later, in *Green v. Safeway Stores, Inc.*,[3] the court considered whether the plaintiff had produced competent circumstantial evidence to support a theory of recovery in manufacturers' products liability and found that the trial court had erred in failing to sustain the defendant's demurrer to the evidence and request for a directed verdict as there was no evidence tending to reasonably support the judgment

trolled at the local level. *See* C. DOXIASIS, URBAN RENEWAL AND THE FUTURE OF THE AMERICAN CITY 154-61 (1966).

1. 521 P.2d 1353 (Okla. 1974).
2. *Id.* at 1363.
3. 541 P.2d 200 (Okla. 1975).

for the plaintiff.[4]

In *Green*, plaintiff purchased a carton containing Seven-Up at the defendant's store. She left the store carrying the carton by its handle, crossed the street and was waiting for a traffic signal when she heard a pop, felt a sting, looked down and saw that she was cut and bleeding. The plaintiff testified that she did not misuse the carton, swing the carton, or do anything that would cause the bottle to fall. The carton itself was not introduced into evidence. Trial was had prior to the promulgation of *Kirkland* and the case was submitted to the jury under theories of negligence and breach of implied warranty. The jury returned a verdict for the plaintiff and on assignment to the court of appeals the judgment was affirmed. On appeal to the supreme court, the majority opinion applied the principles of manufacturers' products liability as enunciated in *Kirkland*.[5]

In reversing the judgment, the court emphasized that strict liability, in itself, does not prove the plaintiff's case and cited *Kirkland* for the proposition "that the injury is not of itself proof of the defect, or that the proof of the injury shifts the burden to the defendant."[6] The court noted that the plaintiff still had the burden of establishing first, that the product caused the injury and second, that a defect existed in the product, if the action is against the retailer, at the time of sale for public use.[7] The majority opinion in *Green* agreed that the plaintiff had failed to carry this burden and concluded that there was no competent evidence whatsoever, direct, circumstantial or otherwise to sustain an action in products liability.[8] Underlying this conclusion, the court appeared to be saying that the bare fact that an accident happens to a product is not sufficient proof that it was in any way defective.

The dissent, while acknowledging that proof of the injury is not

4. *Id.* at 203.

5. *Id.* at 202. Although the decision in *Kirkland* was prospective, the court there held that it "may . . . be applied by the appellate courts in cases which have been tried and are for decision on appeal where it would not prejudice the rights of the litigants." 521 P.2d at 1368.

6. 541 P.2d at 202.

7. *Id.* To recover under manufacturers' products liability, the plaintiff must also prove that the defect made the article unreasonably dangerous to him or to his property. However, in the *Green* case, proof of this element was not at issue.

8. *Id.* at 203. The majority also held, in this connection, that the doctrine of res ipsa loquitur could not be invoked until, as a preliminary proposition, the plaintiff established what caused the injury. They held further that the doctrine could not be invoked because it was not presented to the trial court nor relied upon by plaintiff on appeal to sustain the judgment of the trial court.

proof of the defect,[9] argued that inferences from other proved facts should have been sufficient to support a finding of all the essential elements prescribed by *Kirkland*.[10] It relied on *Kirkland* for the proposition that a plaintiff may prove his cause of action in manufacturers' products liability by circumstantial evidence and inferences drawn therefrom.[11] The court stated in *Kirkland*:

> [M]ore than likely Plaintiff may be forced to rely on circumstances and *proper* inferences drawn therefrom in making his proof. . . . [I]n some accidents the surrounding circumstances and human experience should make Plaintiff's burden less arduous . . . .[12]

The dissenting opinion in *Green* claimed that a beverage bottle falling from a carton while it is being handled normally is exactly the type of accident which does not ordinarily occur without a defect.[13] Consequently, proof that the carton caused the injury and proof that the carton was defective should have been inferred from the uncontradicted facts describing how the accident happened. The dissent also contended that the plaintiff adequately established that the defect was in the carton at the time it was sold by Safeway. By alleging that she exercised proper care of the carton, Mrs. Green eliminated her own improper use as an equally probable cause for the injury. By accounting for the small time lapse between the sale and the accident, she discounted the possibility that the carton was subjected to any harmful intermediate handling[14] or that the defect resulted from long continuous use.[15]

The reasoning of the dissent appears to conform to the proposition in *Kirkland* that a plaintiff may prove his cause of action in manufac-

---

9. *Id.* at 207.

10. *Id.* The dissent contended there was sufficient evidence to submit the case to the jury under any theory, i.e. negligence, breach of warranty or strict liability.

11. *Id.* at 206.

12. 521 P.2d at 1363-64 (emphasis in original).

13. 541 P.2d at 207-08. Justice Hodges stated:

> It is common knowledge that just as a chair leg does not ordinarily break causing a fall which results in injury, neither does a carton designed and extensively used to transport soft drinks ordinarily collapse permitting bottles to fall to the ground causing injury, if those in control thereof have exercised proper care.

14. *Id.* The dissenting justices concluded that "[t]here was sufficient showing that the time lapse was too small to permit the carton to be subjected to any extraneous harmful force or that it was mishandled while in the hands of the plaintiff."

15. *See* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 845 n.282. The author there cites several cases to support the statement that "[i]t has been said a good many times that the seller does not undertake to provide a product that will not wear out."

turers' products liability by inferences from circumstantial evidence. The majority while citing *Kirkland,* declined to apply it as authority to support Mrs. Green's theory for recovery. This refusal is interesting in view of Justice Doolin's zealous introductory statement in *Kirkland*:

> The issue for us in this case is the present and the future of products liability litigation in Oklahoma. Much we do in this case may set the pattern of such litigation in Oklahoma and may determine whether this young, vigorous and progressive State shall now meet the challenge of the mass advertising of today, its hypnosis, and the pace and flow of the economics of the late twentieth century.[16]

It appears, from an analysis of the approach taken in the *Green* opinion, that the court's enthusiasm for products liability may be on the wane. Since a lawyer will seldom be able to produce actual or absolute proof that a defective product caused injury to the plaintiff, refusal to allow reliance on circumstantial evidence is bound to significantly reduce the number of actions based on this theory.

Daniel J. Boudreau

16. 521 P.2d at 1356.