IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DENISE CHLOPEK
and JARON CHLOPEK,

Plaintiffs,

v.

MEMORANDUM AND ORDER
05-C-545-S

FEDERAL INSURANCE COMPANY
and BREG, INC.,

Defendants.

Plaintiffs Denise and Jaron Chlopek commenced this products liability action alleging that Denise Chlopek suffered a thermal burn injury to her great toe because of a defect in a Polar Care unit manufactured and sold by defendant Breg, Inc. After the liability phase of a bifurcated trial, the jury returned a verdict finding that defendant's product was not defective. The matter is presently before the Court on plaintiffs' motion for a new trial and on defendants' motion to strike plaintiffs' motion.

BACKGROUND

Defendant Breg manufactures and sells a medical cooling device called Polar Care 300. The Polar Care 300 consists of a small beverage cooler which is filled with ice water, and a hose and pump which circulates the chilled water to a connected pad which is wrapped around the area to be treated. The Polar Care 300 is sometimes used to control post-operative swelling. Defendant Breg

also manufactures and sells the Polar Care 500, which is similar to the Polar Care 300 and includes a temperature adjustment feature.

On May 31, 2002 podiatrist Andrew Pankratz performed fusion surgery on plaintiff Denise Chlopek's great right toe. Following surgery Pankratz prescribed the use of a Polar Care 300. A barrier was placed between the Polar Care pad and the plaintiff's skin and the foot was wrapped with the pad inside. Pankratz' nurse instructed plaintiff to leave the unit on until she returned to see Pankratz. Plaintiff used the Polar Care unit continuously for 240 hours, except when it was disconnected to eat or use the bathroom. When she returned on June 10, 2002 her right great toe had become ischemic and developed eschar. The toe was amputated on July 18, 2002.

The jury was provided the following first question in the special verdict form:

> 1. Was the Polar Care 300, when it left the possession of Breg, Inc., in a defective condition so as to be unreasonably dangerous to a prospective user?
>
> ANSWER: _____
> (Yes or No)
>
> IF YOU ANSWERED QUESTION 1 YES, ANSWER QUESTION 2. OTHERWISE PROCEED NO FURTHER.

The jury answered this question "no" and accordingly did not address the other questions on the verdict which concerned the causal and comparative negligence of the plaintiffs and two other

potentially negligent parties, Andrew Pankratz and Marshfield Clinic.

MEMORANDUM

Plaintiffs argue that the trial was unfair to them because of the voir dire, trial bifurcation, evidentiary rulings, jury instructions, special verdict and the judge's demeanor. Defendants contend that the rulings were correct and the trial fair. A new trial may be granted pursuant to Rule 59 if the verdict is against the weight of the evidence or for some other reason the trial was not fair to the moving party. Forrester v. White, 846 F.2d 29, 31 (7th Cir. 1988). Whether considered individually or collectively, the claimed errors did not result in an unfair trial to the plaintiffs.

Defendant's motion to strike is based on an erroneous scheduling order which failed to provide time for the filing of plaintiffs' brief in support of their motion. The matter having now been fully briefed in a timely manner there is no basis to strike the motion. Accordingly, the Court addresses the merits of each of the objections to trial procedure.

Voir Dire

Plaintiffs contend that the voir dire was improper because the Court failed to adequately inquire about possible juror prejudices

relating to excessive tort claims and verdicts and tort reform. To the contrary, the Court asked the following question of the potential jurors which clearly addressed these concerns:

> Do any of you have opinions concerning the commencement of lawsuits the administration of justice generally, or jury awards which would in any way affect your ability to serve as a fair and impartial juror in this case?

Furthermore, the question and the entire set of proposed voir questions was presented to plaintiffs' counsel at the pretrial hearing on Friday, April 24, 2006 where it was approved without objection. Plaintiffs offer no evidence that any juror was in fact concerned with tort reform issues and the issue of excessive damages was mooted by the finding that there was not a defective product. There is simply no basis to suggest that the voir dire failed to impanel an impartial jury.

Trial Bifurcation

Rule 42(b) permits the bifurcation of trial for claims or issues within claims "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy...." In this case, bifurcation of the trial between liability and damages promoted all of the interests identified in the rule. Bifurcation promoted judicial economy by eliminating the need for damage testimony entirely. If promoted fairness by permitting the jury to assess whether the product was defective

without the potential unfair prejudice which could result from sympathy engendered by the severity of plaintiff's injuries and damage. It is apparent that the hope of benefitting from unfair prejudice, and not any sense of fairness, is precisely the advantage plaintiffs were seeking from a trial that combined damage and liability testimony. Contrary to plaintiffs' suggestion, the jury was well aware that plaintiffs brought the action because of an injury sustained to Denise Chlopek's toe. There is no rational basis to contend the scope of her damages was necessary to evaluate whether the Polar Care product was defective.

Evidentiary Rulings

Plaintiffs are critical of four evidentiary rulings: (1) the exclusion of a later Polar Care 300 warning pursuant to Rule 407; (2) the exclusion of certain reports in exhibit 10 of others allegedly injured by the Polar Care 300; (3) the exclusion of reports in exhibit 11 concerning injuries by the Polar Care 500; (4) the receipt of evidence that the Polar Care 300 was FDA approved. The Court continues to believe that the rulings are correct and they provide no basis to award a new trial.

The warning added to the Polar Care 300 after plaintiff's injury was appropriately excluded under Rule 407. Plaintiffs contend that the warning not to use the Polar Care 300 for more than 12 continuous hours was not a subsequent remedial measure

because defendant's vice president testified that the warning was not added to address safety concerns. The reason for adding the warning, however, is irrelevant to the application of Rule 407:

> When, after an injury or harm allegedly caused by an event, measures were taken that, if taken previously, would have made the harm less likely to occur, evidence of the remedial measure is not admissible to prove ... a defect in a products' design, or a need for a warning or instruction...

The motive for adding the warning is irrelevant to whether, if previously added, the warning would have made plaintiff's injury less likely. Clearly a warning against continuous use would have made plaintiff's injury from continuous use less likely. The subsequent warning was certainly offered to prove that the product was defective because it lacked such a warning. Even assuming it was offered for some other purpose, it could not have been prejudicial to plaintiffs since the only issue the jury reached was the question of whether the product was defective. Its consideration of the subsequent warning in connection with question 1 of the special verdict would clearly have been improper under Rule 407.

Exhibit 10 was a collection of user complaints concerning the Polar Care 300. They were excluded as irrelevant, or more unfairly prejudicial than probative (Rules 402 and 403) and because they were hearsay (Rule 802). The standard for admitting prior incidents or claims to prove a product defect is whether the

other incidents were "substantially similar." Nachtscheim v. Beech Aircraft Corp., 847 F.2d 1261, 1268 (7th Cir. 1988). Even if similarity is established a 403 analysis may exclude them. Nachtsheim at 1269. At the April 24, hearing the Court examined each component of exhibit 10 for similarity and determined that most were not sufficiently similar to warrant admission. In addition, each part of the exhibit consisted of statements made by third parties who were not present and were not deposed. The statements were offered for the truth of the fact that those third parties sustained thermal injuries from a Polar Care 300. As a result, the statements were also properly excluded as hearsay.

Exhibit 11 is a collection of user complaints for the Polar Care 500. The component statements of exhibit 11 are subject to analysis similar to that for exhibit 10. However, exhibit 11 statements are subject to an additional hurdle in that the Polar Care 500 is capable of temperature adjustment so that it is far less likely that the circumstances of injury are "substantially similar" to those encountered by plaintiff. Accordingly, the exclusion of exhibit 11 statements was also proper.

Evidence was admitted at trial concerning the FDA's device approval process and that the FDA had approved the Polar Care 300 for sale. Plaintiffs argue that the FDA approval was irrelevant. The FDA has relevance to the question of whether the device was defective. Any concerns about the jury affording undue weight to

the FDA approval were alleviated by the ability to present evidence concerning the scope of the underlying approval process.

Special Verdict

Plaintiffs argue that the special verdict was unfair because it included questions concerning the negligence of plaintiffs, Andrew Pankratz and Marshfield Hospital. Specifically, plaintiffs argue that the evidence at trial was insufficient as a matter of law to sustain a jury finding that any person other than defendant Breg was negligent or caused her injury. Of course, the jury did not answer any of the questions concerning contributory or third party negligence because it found that the plaintiff's product was not defective. It is therefore difficult to imagine, even if there was merit to the argument that the evidence at trial could not have sustained "yes" answers to the questions, how the presence of those questions in the verdict might have prejudiced the plaintiffs. Plaintiffs advance the highly speculative theory that prejudice arose because the jury, overcome by the complexity of the verdict, simply seized upon the fact that a "no" answer to question 1 would allow them to "go home early," ignored the instructions and answered no to question 1 as a means of avoiding its duty. There is absolutely no support for this theory which is entirely contrary to the presumption central to the jury trial system, that a jury takes its responsibility seriously and follows the instructions of the Court.

Jury Instructions

Plaintiffs' arguments concerning the jury instructions are similarly meritless. Plaintiffs do not take issue with the instructions relating to the question answered by the jury. They argue that the instructions relating to the negligence of Dr. Pankratz and Marshfield clinic were inadequate statements of the law of medical negligence. Again, assuming the assertion is true and assuming plaintiffs did not waive their right to object, there is no basis to find that these instructions had any impact on the jury since they did not reach the questions to which these instructions related.

Plaintiffs also argue theat the court erred by not instructing the jury on the bifurcation procedure and severity of plaintiff's injury. The jurors were informed at the time of the voir dire and throughout the trial that Plaintiff Denise Chlopek suffered a thermal burn injury to her great toe. The scope of her damages is irrelevant to the jury's negligence determination and introduction of such evidence or an instruction in the liability phase of trial would have been improper. No doubt such an instruction or related testimony might tend to unfairly prejudice a jury when addressing the question of negligence, but plaintiff is certainly not entitled to the benefit of unfair prejudice, particularly in the jury instructions.

Judge's Demeanor

Finally, plaintiffs argue that the judges demeanor rendered the trial unfair to them. Plaintiffs' argument is based entirely on an exchange between plaintiffs' counsel and the Court during the second day of trial when counsel was cross examining defendants' expert witness. After counsel engaged in a heated exchange with the witness concerning a non-responsive (but relatively harmless) answer, the court reprimanded counsel and advised that the "gentlemanly and ethical approach" to the situation would be to move to strike the non-responsive answer. Contrary to plaintiffs' counsel's assertion, the Court addressed its comments to proper procedure and did not attack counsel's personal integrity, nor did it intend to do so.

There is no reason to believe that this brief exchange had any prejudicial effect on the jury. This is particularly true in light of the instruction provided to the jury to ignore the judge's demeanor: "If during the course of this trial you have gained any impression that the Court has a feeling one way or another in this case, then you should completely disregard any such impression." Nor was any curative instruction ever suggested.

CONCLUSION

None of plaintiffs' challenges to the trial and pretrial procedures or rulings suggest that the trial was unfair to them.

The conduct of the voir dire and the bifurcation of issues for trial had the effect of reducing the potential for unfair prejudice. The evidentiary rulings were in accordance with the rules of evidence. The special verdict and jury instructions effectively presented the issue and the law to the jury, indisputably so for the only issue the jury actually addressed. Finally, there is nothing to suggest that the Court's criticism of counsel's cross examination technique had any impact on the jury's response to the special verdict.

ORDER

IT IS ORDERED that defendants' motion to strike plaintiffs motion for a new trial is DENIED.

IT IS ORDERED that plaintiffs' motion for a new trial is DENIED.

Entered this 21st day of June, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge