Fierro v. International Harvester Co.
Cal.App. 2 Dist., 1982.

Court of Appeal, Second District, Division 2, California.
Evelyn M. FIERRO, Gary S. Fierro, Mark A. Fierro, Suzanne R. Fierro, Rozanne R. Fierro, minors, by and through their guardian ad litem, Kate G. Fierro, Carl A. Fierro and Kate G. Fierro, Plaintiffs and Appellants
v.
INTERNATIONAL HARVESTER COMPANY, Defendant and Respondent.
Civ. 61577.

Jan. 14, 1982.

Appeal was taken from judgment entered by the Superior Court, Los Angeles County, Charles H. Older, J., in favor of manufacturer of skeleton vehicle unit in wrongful death action. The Court of Appeal, Compton, J., held that: (1) since issue of failure to warn was never pleaded and plaintiffs offered no evidence on subject, issue was never properly raised and no instruction thereon was warranted; (2) nothing about skeleton vehicle unit required any warning to purchaser that gasoline was volatile and that sparks from electrical connection or friction could cause ignition, or that it was necessary to cover and protect exposed fuel tanks before operating unit under circumstances which would subject them to damage; and (3) where plaintiffs proffered instructions attempted to impose duty on manufacturer to foresee very accident which occurred, ignored weighing process as to benefits of design versus danger inherent in design, failed totally to deal with role of purchaser in chain of production, and in effect attempted to fix liability totally on manufacturer, they were properly rejected.

Judgment affirmed.

West Headnotes

[1] Trial 388 ⚿251(8)

388 Trial
388VII Instructions to Jury
388VII(D) Applicability to Pleadings and Evidence
388k249 Application of Instructions to Case
388k251 Pleadings and Issues
388k251(8) k. Actions for Personal Injuries. Most Cited Cases

Where issue of failure to warn was never pleaded and plaintiffs offered no evidence on subject, issue was never properly raised and no instruction thereon was warranted.

[2] Products Liability 313A ⚿37

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak37 k. Warnings or Instructions. Most Cited Cases
(Formerly 178k37)

Nothing about skeleton truck unit required any warning to purchaser that gasoline was volatile and that sparks from electrical connection or friction could cause ignition, or that it was necessary to cover and protect exposed fuel tanks before operating unit under circumstances which could subject them to damage, where there was no evidence that any feature of skeleton unit was unique or contained any component or capability which was known to manufacturer and which was not known to or readily observable by purchaser, fuel tanks and filler spouts were patently exposed and were obviously designed to hold gasoline, and properties and propensities of such volatile liquid were matter of common knowledge.

[3] Products Liability 313A ⚿35.1

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak35.1 k. In General. Most Cited Cases
(Formerly 313Ak35)

Purchaser's failure to guard against any danger that may have existed in using manufacturer's skeleton truck unit did not render unit defective.

[4] Negligence 272 ⚿1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 k. In General. Most Cited Cases
(Formerly 272k136(25))

Parameters of foreseeability and specifically foreseeable events remain matters of fact to be determined in each case.

[5] Products Liability 313A ⚿36

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak36 k. Design, Inspection, or Test. Most Cited Cases

Where there was no claim that any part of manufacturer's skeleton truck unit was defectively manufactured, nor was there any evidence that unit was defectively designed for use intended, i.e., to be used as component part of truck to be fabricated by purchaser, purchaser's failure, if any, to design truck which it ultimately placed on road in such fashion as to minimize danger of damage to fuel tank and the resultant fire was cause of driver's injury when truck rolled over after tire blew out and gasoline spilled from damaged tanks with ensuing fire, and superseded any causative factor involving manufacturer's conduct.

[6] Products Liability 313A ⚿36

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak36 k. Design, Inspection, or Test. Most Cited Cases

Manufacturer of skeleton vehicle unit could reasonably expect that purchaser would take appropriate measures to insure proper design to cover and protect fuel tanks.

[7] Trial 388 ⚿255(1)

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k255 Necessity in General
388k255(1) k. In General. Most Cited Cases

Trial 388 ⚿267(1)

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k267 Modification or Substitution by Court
388k267(1) k. In General. Most Cited Cases

In civil case, court has no duty to instruct, sua sponte, on any issue, nor does court have any duty to modify or correct instructions proffered by party.

[8] Trial 388 ⚿240

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k240 k. Argumentative Instructions. Most Cited Cases

Trial 388 ⚿244(2)

388 Trial
388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency
388k244 Undue Prominence of Particular Matters
388k244(2) k. Evidence and Matters of Fact in General. Most Cited Cases

Trial 388 255(1)

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k255 Necessity in General
388k255(1) k. In General. Most Cited Cases
While litigant has right to have jury properly instructed on its theory of case, instructions proffered on such theory must accurately state law and must not be argumentative in overemphasizing or stressing selective items of evidence.

[9] Products Liability 313A 96.5

313A Products Liability
313AII Actions
313Ak96 Instructions
313Ak96.5 k. Automobile Cases. Most Cited Cases
Where proffered instructions attempted to impose duty on manufacturer of skeleton truck unit to foresee accident which occurred when modified vehicle overturned after tire blew out, gasoline spilled from damaged tanks and ensuing fire resulted in driver's death, instructions ignored weighing process as to benefits of design versus risk of danger inherent in it, failed totally to deal with role of purchaser in chain of production and in effect attempted to fix liability totally on manufacturer, instructions were properly rejected.

***864 **924** Jones & Wilson by Robert L. Wilson, Los Angeles, for plaintiffs and appellants.
Millard, Stack & Stevens by L. Raymond Millard, **Howard** A. **Kapp**, Los Angeles, Marie Polizzi Holweger, Glendale, for defendant and respondent.
***865** COMPTON, Associate Justice.
Appeal by plaintiffs in a wrongful death action from a judgment in favor of defendant. We affirm.

International Harvester Company (International) builds, among other things, a vehicle known as the 1600 series Loadstar truck consisting of only an engine, cab and chassis. These skeleton vehicles are sold to commercial users who install a body or other additions according to their particular needs.

In 1969, International sold one of these units to Luer Packing Company (Luer). At the time of delivery the unit was equipped with three fuel tanks-one located under the cab and two auxiliary tanks located on either side of the unit, exterior of the cab.

Luer installed a Thermo-King refrigerator unit on the chassis, thus creating a completed refrigerator truck for the handling of meat products. It is undisputed that International had no involvement with the design, acquisition or installation of the Thermo-King unit. International simply contemplated that the unit would be modified in some fashion to make it commercially functional. The unit was not designed to, nor was it anticipated that it would be, operated in its unaltered configuration.

Some five years later, while in the course and scope of his employment with Luer, the decedent was driving the refrigerated truck in question along State Highway 163 in San Diego County at about 60-70 miles an hour. A tire blew out. The truck hit a guard rail, skidded along for a distance and turned over. Gasoline spilled from the damaged tanks and the ensuing fire resulted in the death of the decedent.

Plaintiffs, which include Luer's worker's compensation insurance carrier, in the instant action seek to impose liability on International for negligence and manufacturer's strict liability. The complaint alleged, in general terms, International's delict in manufacturing and designing the truck. The evidence, however, focused on the location of the fuel tank and filler necks and their exposure to damage when the truck struck the guard rail and turned over. While conceding that the evidence supports

the judgment, plaintiffs claim error in the giving and refusing of certain jury instructions.

***866** Partway through the trial, during the plaintiffs' cross-examination of one of International's witnesses, plaintiffs for the first time suggested that International had a duty to warn Luer that attaching a power cable from the Thermo-King unit to the truck's battery might create a fire hazard. ****925** There was the further suggestion that International had a duty to warn Luer that the body which it installed on the chassis should be designed to protect the necks of the fuel tanks from impact. The trial court refused to give BAJI 9.20,[FN1] an instruction proffered by the plaintiffs dealing with the issue of a failure to warn. We treat this latter issue first.

FN1.BAJI 9.20 states:

> "One who supplies a product (directly or through a third person,) for another to use, which the supplier knows or has reason to know is dangerous or is likely to be dangerous for the use for which it is supplied, has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the supplier has reason to believe that they will not realize its dangerous condition. A failure to fulfill that duty is negligence. P This rule applies to a

[1][2] Since the issue of failure to warn was never pleaded and plaintiffs offered no evidence on the subject, we conclude that the issue was never properly raised and that no instruction thereon was warranted. In any event, there was nothing about the International unit which required any warning to Luer. A sophisticated organization like Luer does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition. (Kaiser Steel Corp. v. Westinghouse Elec. Corp., 55 Cal.App.3d 737, at 748, 127 Cal.Rptr. 838.)

There was no evidence that any feature of the skeleton unit was unique or contained any component or capability which was known to International and which was not known to or readily observable by Luer. The fuel tanks and the filler spouts were patently exposed, and they were obviously designed to hold gasoline. The properties and propensities of that volatile liquid are a matter of common knowledge. Nor did Luer need to be advised of the necessity to cover and protect the exposed fuel tanks before operating the unit under circumstances which could subject them to damage.

[3] In short, the absence of a warning to Luer did not substantially or unreasonably increase any danger that may have existed in using the International unit (***867**Canifax v. Hercules Powder Co., 237 Cal.App.2d 44, 46 Cal.Rptr. 552;Dosier v. Wilcox-Crittendon Co., 45 Cal.App.3d 74, 119 Cal.Rptr. 135) and Luer's failure to guard against those eventualities did not render the International unit defective. (Garman v. American Clipper Corp., 117 Cal.App.3d 634, 173 Cal.Rptr. 20.)

Plaintiffs' principal contention on appeal is that the trial court erroneously refused to instruct the jury on the basis of instructions proffered by the plaintiffs as to the duty of International to design a crash-worthy vehicle.

There is no question but that the trial court gave instructions which completely and correctly embraced the principles enunciated in Barker v. Lull Engineering Co., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443.[FN2] In addition, the trial court gave an instruction submitted by defendant to the effect that the manufacturer of a motor vehicle must "take accidents into consideration as a reasonably foreseeable occurrence involving their product."

FN2.BAJI 9.00.5 states:

> "The manufacturer of a product is liable

> for injuries a proximate cause of which was a defect in its design which existed when it left possession of defendant provided that the injury resulted from a use of the product that was reasonably foreseeable by the defendant. P A product is defective in design unless the benefits of the design of the product as a whole outweigh the risk of danger inherent in the design or if the product failed to perform as safely as an ordinary consumer of the product would expect when used in a manner reasonably foreseeable by the defendants. P In determining whether the benefits of the design outweigh such risks you may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternative design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternative design."

****926** Plaintiffs' instructions, which were rejected by the trial court, purportedly were based on this court's opinion in Self v. General Motors Corp., 42 Cal.App.3d 1, 116 Cal.Rptr. 575, and in essence would have told the jury (1) that International in designing its unit was required to foresee a high-speed accident with subsequent overturning, and (2) that International had a duty to so design its unit as to minimize unreasonable risks of injury or death from such an event.

The instructions proffered by plaintiffs here attest to the validity of the observations in a number of Court of Appeal opinions that direct quotations of selected language from appellate opinions rarely produce satisfactory jury instructions. (***868**Sand v. Mahnan, 248 Cal.App.2d 679, 56 Cal.Rptr. 691;Merlo v. Standard Life & Acc. Ins. Co., 59 Cal.App.3d 5, 130 Cal.Rptr. 416;Bell v. Seatrain Lines, Inc., 40 Cal.App.3d 16, 115 Cal.Rptr. 76.)

[4] In Self v. General Motors Corp., supra, this court's opinion was essentially directed to the element of causation and the weighing of design decisions. The language seized upon by plaintiffs concerning the foreseeability of high-speed collisions and the duty to mitigate the seriousness of particular crash related injuries was simply this court's paraphrasing of what we understood to be the existing law that some degree of abuse or misuse of a product is to be anticipated. Our opinion was not designed to set the parameters of foreseeability or absolutely fix for all cases specifically foreseeable events. Those remain matters of fact to be determined in each case.

In the case at bench International contended that under the circumstances of this particular accident, the fire would have resulted no matter where the fuel tanks were located, thus creating a factual issue concerning causation as in Self.

The language in Self, which plaintiffs seek to turn into a principle of law upon which a jury must be instructed in automobile design cases, was dicta and if used in this case would have compelled a verdict for plaintiffs on the keenly contested factual issues of the foreseeability of the circumstances of this particular accident and the resultant causation for failure to design for such accident.

In summary, the plaintiffs' instructions purported to tell the jury that International was guilty of defectively designing its truck because the accident which produced the injury was the very type of accident which International had a duty to anticipate and design to prevent, without considering the weighing process which Self and Barker v. Lull Engineering Co., supra, mandate.

Additionally, this case involves a fact not present in Self, to wit, that International's unit was designed with the specific intent that it would be modified and augmented by Luer in a fashion entirely beyond International's control. Self dealt with a completed

vehicle totally designed by the defendant manufacturer.

[5] There was no claim here that any part of International's unit was defectively manufactured. Nor was their any evidence that the unit was ***869** defectively designed for the use intended, i.e., to be used as a component part of a truck to be fabricated by Luer. It appears to us that in the final analysis, Luer's failure, if any, to design the truck which it ultimately placed on the road, in such a fashion as to minimize the danger of damage to the fuel tank and the resultant fire, was the cause of the injury and superseded any causative factor involving International's conduct.

In concept, this case is analogous if not identical to Wiler v. Firestone Tire & Rubber Co., 95 Cal.App.3d 621, 157 Cal.Rptr. 248.There the Court of Appeal affirmed a summary judgment in favor of a tire manufacturer in an action for wrongful death in a vehicle crash following a tire failure. The evidence disclosed that Firestone manufactured the tire free of defects and sold it to Ford Motor Company. Ford in turn manufactured and attached a valve stem-the apparent villain in decedent's accident.

The court there held that Firestone could reasonably expect that Ford would take appropriate measures to insure proper design and installation of the valve stem.

****927** [6] Here International could reasonably expect that Luer would take appropriate measures to insure proper design to cover and protect the fuel tanks. (See Prosser, Strict Liability to the Consumer in California (1966) 18 Hastings L.J. s 9.)

[7] In a civil case a court has no duty to instruct, sua sponte, on any issue. (Montez v. Ford Motor Co., 101 Cal.App.3d 315, 161 Cal.Rptr. 578;Willden v. Washington Nat. Ins. Co., 18 Cal.3d 631, 135 Cal.Rptr. 69, 557 P.2d 501.)Nor does the court have any duty to modify or correct instructions proffered by a party. (Hyatt v. Sierra Boat Co., 79 Cal.App.3d 325, 145 Cal.Rptr. 47.)

[8] While a litigant has a right to have the jury properly instructed on its theory of the case (Self v. General Motors Corp., supra) the instructions proffered on that theory must accurately state the law and must not be argumentative in overemphasizing or stressing selective items of evidence. (Slayton v. Wright, 271 Cal.App.2d 219, 76 Cal.Rptr. 494.)

[9] Since plaintiffs' offered instructions attempted to impose a duty on International to foresee the very accident which occurred, ignored ***870** the weighing concept of Barker v. Lull Engineering Co., supra, failed totally to deal with the role of Luer in the chain of production and in effect attempted to fix liability totally on International, they were properly rejected. The instructions that were given were in fact more favorable to plaintiffs than required under the circumstances.

The judgment is affirmed.

ROTH, P. J., and BEACH, J., concur.
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127 Cal.App.3d 862, 179 Cal.Rptr. 923

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