

SUPREME COURT OF ILLINOIS

Springfield, Illinois, December 18, 2008

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

No. 104983 - Connie Mikolajczyk, Indv., etc., appellee, v. Ford Motor Company et al., appellants. Appeal, Appellate Court, First District.  
Petition for rehearing denied.  
Kilbride, J., took no part.

Fitzgerald, C.J., dissenting upon denial of rehearing.

Dissent attached.

## **Dissent Upon Denial of Rehearing**

CHIEF JUSTICE FITZGERALD, dissenting:

Among plaintiff's arguments on rehearing under Supreme Court Rule 367(b) (210 Ill. 2d R. 367(b)) are that the court "overlooked or misapprehended" the faultiness of the defendants' instructions and the majority silently overruled prior precedent of this court as found in *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007), *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420 (2002), and *Lamkin v. Towner*, 138 Ill. 2d 510 (1990). I agree with these points and additionally find that they are not reargument of the case. I therefore respectfully dissent upon denial of rehearing.

Plaintiff first asserts that defendants' alternate instructions misstated the law in seven respects, including some of those I noted in my dissent. Defendants' instructions improperly: (1) required plaintiff to prove there was an alternative feasible design in existence at the time defendant sold the product in order to impose liability; (2) misstated the law for proving risk-utility in that they stated that the burden shifts to defendants to prove that the benefits of the design outweighs its risks; (3) failed to correctly state the majority's "integrated test" because defendants' instructions did not include any reference to consumer expectation; (4) required the plaintiff to prove the product was "unreasonably dangerous" without a definition of the phrase; (5) required the plaintiff to prove both that the vehicle had a "design defect" and the vehicle was "unreasonably dangerous"; (6) used the phrase "not reasonably safe," which this court rejected as an inadequate substitute for "unreasonably dangerous"; and (7) contained an argumentative reference to a product being reasonably safe even if it is not "accident proof." I note that these liability instructions were the topic of extensive discussion before and during the trial. Therefore, unaddressed by the majority opinion is the trial court's consideration of whether plaintiff would have suffered serious prejudice had the trial court opted for defendants' instructions. A principal result of this omission is that the majority opinion can be read as approving defendants' instructions. For that reason alone, plaintiffs have presented a strong case to grant rehearing in order to remove this court's possible imprimatur on defendants' instructions.

The failure to examine defendants' instructions also leads to a misapprehension of the extent the trial court's decision allowed for a

fair, although imperfect, trial for both parties. The trial court used IPI instructions that generally, although not specifically (see *Hansen v. Baxter Healthcare Corp.*, 309 Ill. App. 3d 869, 884 (1999); see also slip op. at 8), provided for consideration of risk-utility evidence by the jury. The trial court allowed defendants to argue risk utility to the jury. As I stated in my dissent, shortcomings within the jury instructions may be remedied in closing argument. See slip op. at 44 (Fitzgerald, C.J., concurring in part and dissenting in part) (citing *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260 (2002), *Carrillo v. Ford Motor Co.*, 325 Ill. App. 3d 955 (2001), and IPI Civil (2006), at xxii (foreword to the first edition)). I also believe that rehearing should be granted to consider the role that argument to the jury could have lessened or removed any possible prejudice to defendant.

Plaintiff next claims that the majority opinion departed from this court's decision in *Deal v. Byford*, 127 Ill. 2d 192, 202-03 (1989). Under *Deal*, a party claiming error in instructions must submit "a correct instruction" stating the law for which he argues on appeal to avoid waiver. *Deal*, 127 Ill. 2d at 202, citing 107 Ill. 2d R. 239(b). Here, defendants' instructions were not "correct" by reason of the errors listed above. Left unanswered by the majority opinion is the role of the trial court when submitted incorrect instructions which would have prejudiced the opposing party. Importantly, plaintiff suggests that she may not have objected had the trial court given a neutral instruction such as:

"When I use the expression 'unreasonably dangerous,' I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product."

Thus, the majority decision may have been entirely different if defendants had additionally offered such an "integrated" instruction to the trial court instead of attempting to submit fatally flawed instructions which denied plaintiff's theory of the case, namely, consumer expectation. Therefore, I believe a proper examination of defendants' instructions must also include discussion of whether defendant properly submitted a "correct" instruction under *Deal* and

what role the submission of an incorrect instruction played into the trial court's exercise of discretion.<sup>2</sup>

Plaintiff next argues that the majority's adoption of the "integrated test" ignores this court's past precedent allowing a plaintiff to prove strict liability under alternate theories of liability, *i.e.*, the consumer-expectation theory and the risk-utility theory. I note that, in general, a plaintiff is entitled to jury instructions embodying her theory of the case. *Snelson v. Kamm*, 204 Ill. 2d 1, 27-28 (2003); *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 406-07, 414-15 (1998). Similarly, the majority held that a party has the right to have the jury instructed on each theory supported by the evidence and referred to decisions of this court over the past two decades. Slip op. at 26 (citing *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007), *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420 (2002), and *Lamkin v. Towner*, 138 Ill. 2d 510, 529 (1990)). Here, plaintiff tendered consumer-expectation instructions and, since the evidence supported that claim, the trial court was required to instruct the jury on her theory.

The majority, however, held that the trial court abused its discretion in giving the IPI instructions that properly set forth plaintiff's theory of the case. Therefore, as the plaintiff correctly points out, the majority's statement that the consumer-expectation test still exists as a separate theory is illusory. It also calls into question the holdings of *Lamkin*, *Hansen*, and *Calles* that a plaintiff may pursue her strict liability case either under the consumer-expectation test, the risk-utility test, or both.

This question arises from the incorrect assumption that defendants had a case to prove. Defendants had no case to prove; they had a case to defend. If there were affirmative defenses raised by the evidence, defendants would have been entitled to choose whether to ask for an instruction on any one or all of them. Here, I believe that the general instructions provided by the IPI along with defense counsel's argument specifically concerning risk-utility adequately provided a fair trial. Instead, the majority improperly erased all of the lines drawn in

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<sup>2</sup>Plaintiff makes a similar argument concerning *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002). However, I believe the debate over that case was adequately set forth in my dissent.

our decisions in *Calles*, *Hansen*, and *Lamkin* delineating a plaintiff's ability to choose between the consumer-expectation test and the risk-utility test.

In sum, we are left with the still unresolved question of the role of a trial judge when given a general IPI jury instruction on the one hand, and flawed jury instructions on the other. Because the majority has "overlooked" the problem presented by defendants' badly flawed instructions, I believe the majority has arrived at a similarly badly flawed solution and rehearing is required under Rule 367(b) (210 Ill. 2d R. 367(b)). The majority's resolution of the jury instructions issue also leaves in doubt whether the consumer-expectation test remains a viable alternative and whether portions of *Lamkin*, *Hansen*, and *Calles* have been overruled. As a result, because I believe the majority wrongly found the trial court abused its discretion, I would reach the issue of remittitur. I therefore respectfully dissent upon denial of rehearing.