2018 IL App (1st) 170095-U

SIXTH DIVISION
December 7, 2018

No. 1-17-0095

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TARICK LOUFTI, Independent Administrator of the Estate of MIKAYLA KING, Deceased, and BRYANT KING, Individually,	)	Appeal from Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 11 L 5001
A.O. SMITH CORPORATION, a Delaware Corporation, and AMERICAN WATER HEATER COMPANY, a Nevada Corporation, a subsidiary of A.O. SMITH CORPORATION,	)	Honorable James Snyder, Judge Presiding.
Defendants-Appellants.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort concurred in the judgment.
Justice Harris specially concurred.

ORDER

¶ 1 *Held:* The trial court abused its discretion in making certain evidentiary rulings and committed reversible error in denying defendant's request for a special interrogatory; reversed and remanded.

¶ 2 Tarick Loutfi, the independent administrator of the estate of Mikayla King, brought a claim for products liability against American Water Heater Company (defendant), a subsidiary of A.O. Smith Corporation, after one-year-old Mikayla died from injuries she sustained after being

scalded in the bathtub at her home. The water heater in her family's home was manufactured by defendant. Following a jury trial, defendant was found liable under a strict product liability theory and judgment was entered in plaintiff's favor for $10.7 million. On appeal, defendant contends that: (1) its water heater was not unreasonably dangerous as a matter of law; (2) the trial court improperly excluded material evidence including warning labels and the water heater's instruction manual; (3) the trial court improperly barred defendant from challenging the reasonable foreseeability of the injury; and (4) the trial court improperly denied defendant's request for a special interrogatory. For the following reasons, we find that the trial court abused its discretion in making certain evidentiary rulings and committed reversible error in denying defendant's request for a special interrogatory. We remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Prior to trial, plaintiff filed several motions *in limine*. Plaintiff's motion *in limine* #1 sought to bar evidence of contributory negligence, since contributory negligence is irrelevant in a strict products liability claim. Specifically, plaintiff argued that defendant should not be allowed to introduce evidence that the tub was filled up to five inches, or that the child was in the tub for four minutes. Plaintiff stated that one of defendant's experts, George Wandling, had opined that Mikayla was in 120-degree to 124-degree water for 4 minutes or maybe even longer. Plaintiff argued that how Mikayla got into the water was also irrelevant, and evidence of those circumstances would only serve to improperly introduce contributory negligence which would not be permitted in a strict products liability matter. The trial court granted plaintiff's motion to bar any evidence of plaintiffs' alleged contributory negligence.

¶ 5 Plaintiff's motion *in limine* #17 sought to bar evidence of the water heater's warning labels and instruction manual. Plaintiff argued that his claims related to the water heater's

defective design, not defendant's failure to warn, and therefore warning labels and instruction manuals were irrelevant. Plaintiff argued that if the water heater was unreasonably dangerous, the warning labels would not provide protection to defendant from liability. Plaintiff also argued that evidence of the water heater warnings would allow the jury to improperly blame the consumer. The trial court granted motion *in limine* #17 as to the water heater manual, but denied it as to the water heater warning labels. Plaintiff then filed a motion to reconsider, arguing that evidence of a water heater warning label only serves as evidence of plaintiff's contributory or comparative negligence. Plaintiff noted that one of the warnings affixed to the water heater stated, "Temperature Limiting Valves available, see manual," which would allow a jury to speculate about the water heater manuals, which had been barred. The motion to reconsider was denied.

¶ 6 Trial began on July 19, 2016. We will discuss only the testimony relevant to the claims on appeal. During opening statements, defense counsel attempted to display a photo of the warning label that was affixed to the water heater in question, but the trial court ruled that it was in violation of plaintiff's motion *in limine* #1, which barred any evidence of contributory negligence.

¶ 7 Jennifer King, the decedent's mother, testified that on the afternoon of February 24, 2010, she was doing laundry while her two older boys were at school. Kiera, her 4-year-old daughter, was watching television with Mikayla. At some point Kiera asked if she could take a bath, but King said she could not because they had to pick the boys up from school soon. King then heard the water running and told Kiera to turn it off. Kiera responded that she could not get the water warm enough, so King put down the laundry and walked towards the bathroom. She then heard Mikayla scream. She ran in and grabbed Mikayla out of the bathtub. Kiera was next

to the bathtub. Jennifer called 9-1-1. Mikayla was taken to Provena Mercy Hospital in Aurora, and then airlifted to Loyola Hospital's burn unit. The doctor told them that Mikayla would have to "be there for months." King learned over the course of her treatment that Mikayla's stomach had been perforated. Mikayla underwent 19 surgeries. She died on April 18, 2010.

¶ 8 King testified that during the five months she lived at the home in question, she did not have any problems with the water temperature. She had the opportunity to look at the thermostat on the water heater before Mikayla's death, but never adjusted it.

¶ 9 Virgil Thompson, an employee of defendant, testified that up until 2009, he participated in the design of water heaters. The water heater in the Kings' home was Whirlpool brand, and was manufactured in 2005. Its hottest setting was 160 degrees Fahrenheit. Thompson testified that gas water heaters, like the one in question, are subject to stacking, which permits a 30-degree variance. Thompson testified that the gas control valve has a thermal cutout if the temperature goes above 182 degrees Fahrenheit. Thompson testified that the 208-page American National Standards Institute (ANSI) gas water heater standards manual did not require a thermal mixing valve (TMV). The ANSI handbook stated that water temperatures over 125 degrees can cause severe burns or death from scald. The ANSI manual stated, "Temperature limiting valves are available."

¶ 10 Thompson testified that TMVs were not shipped with the water heater in question. They were, however, shipped with a certain Polaris model that was a "different water heater with a different application." He testified that the Polaris was a direct-vent water heater, which meant it both heated a house and heated the water for a house. The Polaris came with a TMV but the TMV was not installed on the water heater, because "then you are limiting the amount of water that you can provide to the home for other uses." Thompson testified that the warning label on

page 150 of the ANSI standard was required to be put on the water heater in question. Defense counsel asked whether defendant provided any additional labels beyond those required by the ANSI standards, plaintiff's counsel objected, and the objection was sustained.

¶ 11 Robert Hulsey, a mechanical engineer and expert for plaintiff, testified that he was asked to "come up with a mockup of a design that could have been produced at the factory and to try to represent as accurately as possible what could have been done in 2005." Hulsey admitted that he had never tested the mockup and that he never worked on internal components of a mixing valve or water heater.

¶ 12 Hulsey testified that, in his opinion, the temperature of the water that scalded the decedent was between 140 and 155 degrees Fahrenheit. He admitted that the TMV manufacturer stated that that a TMV should be installed 8 to 10 inches from the point of discharge. When asked if Hulsey was aware of any water heater manufacturer in 2005 who sold their water heaters in the configuration of his demonstrative exhibit, he responded, "No." Hulsey testified that he was aware that the police tested the water at the King residence 2 days after the incident and the upper temperature limit obtained was 138 degrees Fahrenheit.

¶ 13 Plaintiff's expert, Ronald George, testified that he was a plumbing design professional. He testified regarding the phenomenon of stacking, explaining that stacking occurs when there are multiple short draws of hot water from the tank. Cold water is then drawn into the bottom of the hot water tank, which causes the burner to come on, even though the water at the top of the heater is already above the thermostat setting. George explained that the ANSI standard allows for 30 degrees above the highest thermostat setting, which is 160 degrees. George tested the water heater in question and found that the water temperature rose up to 12 degrees above the thermostat's setting.

¶ 14 George testified that, in his opinion, Mikayla was exposed to water between 138 and 155 degrees Fahrenheit. Defense counsel asked if on the date in question, Mikayla had been burned by water that was under 155 degrees Fahrenheit, whether "stacking would have nothing to do with the incident." George responded, "Correct." When defense counsel asked if, when George inspected the water heater in question, he noticed whether any of the labeling required pursuant to ANSI was missing, plaintiff's counsel objected and the trial court sustained the objection.

¶ 15 Charles Adams, defendant's expert and an employee of A.O. Smith Corporation for 20 years, testified that he worked as vice president of design engineering for 10 years, and eventually worked as the chief engineer and then director of government affairs for the corporation. In 2005, there were approximately 110 to 120 million water heaters used every day in the United States. Adams testified that Hulsey's mockup model would not have passed the standards that were in effect in 2005 for manufacturers of water heaters.

¶ 16 Adams testified that the Polaris model was a dual application heater, meaning that it was used for heating water as well as heating the air. He further stated that a TMV is required on dual application heaters because there is "a need for simultaneous water supply at two different temperatures." Adams testified that the TMV was in the box with the Polaris as an accessory. He stated that the Polaris would not have needed a TMV in the King's house because it was not a "combi application," meaning it would not have been used to heat both water and air. Adams opined that Mikayla was burned by water that was 138 degrees Fahrenheit.

¶ 17 George Wandling, defendant's expert and owner of Wandling Engineering, testified that he performed an inspection on the subject water heater. Wandling stated that the heater was working properly and producing temperatures that would be expected of the various thermostat settings. Wandling stated that in 2003, the American Society of Plumbing Engineers Handbook

indicated that 140 degrees was required for residential dishwashing and laundry, and that 110 degrees was required for showering and bathing. Wandling testified that TMVs are required for dual application water heaters, but not for water heaters that are single applications. He explained that a TMV is not required simply because a water heater is certified for use as a dual application heater as well as a single application heater. Wandling stated that TMVs are typically installed 8 to 10 inches away from the water heater because a TMV should not take on the heat from the tank of the water heater.

¶ 18 Jury Instructions

¶ 19 The following instructions were given to the jury:

> "The plaintiff claims that the decedent Mikayla King was injured and died as a result of the use of the water heater. Plaintiff claims that there existed in the water heater at the time it left the control of the defendant a condition which made the water heater unreasonably dangerous in one or more of the following ways:
>
> a) The water heater was designed to produce and supply tap water from the bathtub faucet at dangerous temperatures of 125 degrees Fahrenheit up through 160 degrees Fahrenheit and hotter despite the defendant's knowledge of the danger of water temperatures over 125 degrees Fahrenheit causing severe burns instantly or death from scalds;
>
> b) The water heater was designed with a water heater thermostat not accurately controlling the temperature of tap water supplied by the water heater; and/or
>
> c) The water heater was designed without incorporating the Thermostatic Mixing Valve (TMV) to regulate the temperature of water in the outlet pipe of the

water heater at a maximum of 125 degrees Fahrenheit to prevent severe scald burns or death from scalds from tap water.

The defendant denies that any of the claimed conditions of the water heater made it unreasonably dangerous."

¶ 20 "Unreasonably dangerous" was defined in the instructions as follows:

"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."

¶ 21 There was also an instruction that stated "Misuse is not a defense. Therefore you must disregard any testimony that the product was misused."

¶ 22 Special Interrogatory

¶ 23 Defendant requested a special interrogatory before the verdict was returned that sought to ask, "Was the water heater designed and manufactured by American Water Heater Company in 2005 unreasonably dangerous when it left its control?" The trial court refused to give the interrogatory reasoning that it was not a specific "stated element of the burden of proof instruction."

¶ 24 Verdict

¶ 25 The jury found in favor of plaintiff and returned a verdict against defendant in the amount of $10,713,601.22.

¶ 26 JNOV

¶ 27 Following the jury verdict, defendant filed a motion for a judgment notwithstanding the verdict (JNOV). Defendant argued that the water heater in the Kings' home performed its

intended function by heating water to temperatures within the heater's design specifications. Defendant stated that the evidence established that the heater's design met all applicable codes and industry standards in place at the time of manufacturing, and that there was no evidence that the heater was broken or not working in accordance with its design. Defendant argued that the heater was hooked into a piping system that allowed for the mixing of both hot and cold water, and that prior to the accident, the homeowners had used heated water without being scalded, burned, or injured in any way.

¶ 28 Defendant noted that the product was preset to 120 degrees with the user able to adjust temperatures to suit his or her personal needs, and that the product was also designed with knowledge of the everyday commonsense use of the plumbing system, which allows users to adjust hot and cold faucets to obtain their desired temperature. Defendant further argued that there are millions of daily uses of heated water from well over 100 million water heaters in American homes, and that the number of water-burn accidents is relatively low. Defendant stated that this is because the heater was designed with a control on the heater itself to adjust the desired heat. Defendant argued that water heaters cannot be designed to keep unattended children out of baths, or to know of the unexpected and unintended presence of an unsupervised one-year-old in a bathtub.

¶ 29 Defendant asserted that no standard, regulation, or existing law prevented the sale of a product that can heat water to over 125 degrees Fahrenheit. Defendant stated that on the day of the accident, the water heater was set to 155 degrees, and the water that scalded decedent was between 138 and 155 degrees. Defendant claimed that the thermostat was working properly and correctly controlled the temperature of the water produced.

¶ 30 Regarding the issue of whether a TMV should have been included with defendant's water heater, defendant stated that the public is free to seek and purchase a water heater that heats water over 125 degrees Fahrenheit, and the focus should be on the product itself, not on the availability of additional safety devices.

¶ 31 Defendant argued that under the risk-utility test, the evidence showed that hot water was necessary for dishwashing, clothes washing, bathing, washing hands, and space heating. Defendant contended that the water heater was less likely to cause injury because of the open and obvious nature of the danger, and because it came with an adjustable dial to lower the temperature if desired.

¶ 32 Defendant further noted that none of the roughly 120 million water heaters in the United States manufactured in 2005 came with a TMV already installed on the water heater outlet. Defendant argued that the "alternative" design submitted by plaintiff's expert was not adequate. Defendant contended that the model had not been tested, would not meet ANSI standards, and would not pass certification. Defendant noted that the model could not meet the needs of the consumer market, and lacked a heat trap to keep the TMV away from the heat of the unit and keep it from improperly opening or activating. Defendant argued that Hulsey's concept of a TMV installed on the water heater would have resulted in TMV interference with the valve so close to the heat emanating from the water heater. Defendant noted that Hulsey's mockup produced water at 160 degrees, which was contrary to plaintiff's theory that a water heater that produced water over 125 degrees was unreasonably dangerous. Finally, defendant argued that there was no evidence that the water heater failed to meet the ordinary expectations of an objective consumer.

¶ 33 Defendant also contended that its motion for JNOV should be granted on a separate basis that plaintiff did not show a feasible alternative design, let alone a feasible alternative design that would have changed the outcome in this case.

¶ 34 Alternatively, defendant argued there should be a new trial on all issues of liability and damages based on the several alleged errors by the trial court, including: (1) the grant of plaintiff's motion *in limine* barring any evidence of the Kings' possible contributory negligence; (2) the grant of plaintiff's motion *in limine* barring all evidence and testimony regarding the Kings' misuse or unforeseeable misuse of the water heater; and (3) the exclusion of all evidence of warning labels and instructions.

¶ 35 Defendant also argued that a new trial was warranted because the trial court erred in denying defendant's special interrogatory which stated, "Was the water heater designed and manufactured by American Water Heater Company in 2005 unreasonably dangerous when it left its control?"

¶ 36 In response to defendant's posttrial motion, plaintiff maintained that industry standards required an anti-scald device on all dual-application water heaters, and that the Kings' water heater was unreasonably dangerous when it left defendant's control. Plaintiff argued that defendant failed to properly plead "unforeseeable misuse" and therefore waived that issue. Plaintiff contended that defendant's attempt to re-litigate the "risk-benefit analysis presented to the jury was improper, and that the court should not replace the jury's analysis with that of [defendant]'s." Plaintiff also argued that he were not required to present a "feasible alternative design" since it is only one of the many factors that may be considered by the jury in a products liability case.

¶ 37 Plaintiff also argued that defendant admitted that the injury was foreseeable, and thus the only defense would be "foreseeable misuse" which is not a defense to strict liability. Plaintiff stated that the trial court correctly rejected defendant's special interrogatory because it would have asked the jury to decide whether the water heater was manufactured by defendant and on what date it was manufactured, and those facts were not at issue. Plaintiff argued that the special interrogatory, as written, required plaintiff to prove the product was unreasonably dangerous at the time it left defendant's control, but the correct question was whether the water heater was defective when it left defendant's control.

¶ 38 A hearing was held on December 14, 2016, and the trial court denied defendant's motion for a JNOV or a new trial. Defendant now appeals.

¶ 39 ANALYSIS

¶ 40 On appeal, defendant contends that: (1) the JNOV should have been granted because the water heater was not unreasonably dangerous as a matter of law; (2) the trial court improperly excluded material evidence, including the water heater's warning labels and instruction manual; (3) the trial court improperly barred defendant from challenging the reasonable foreseeability of the injury; and (4) the trial court improperly denied defendant's request for a special interrogatory. For the following reasons, we find that the trial court abused its discretion in making certain evidentiary rulings, and remand this case for a new trial.

¶ 41 We begin with a brief overview of products liability. An injured plaintiff may allege one of two types of products liability claims: a strict liability claim or a negligence claim. *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 555 (2008); *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 497 (2010). The key distinction between the two types of claims lies in the concept of fault. *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 270 (2007);

Salerno, 402 Ill. App. 3d at 497. In a strict liability claim, the focus of the inquiry is on the condition of the product itself, while a negligence claim accounts for a defendant's fault as well as the product's condition. *Calles*, 224 Ill. 2d at 270; *Salerno*, 402 Ill. App. 3d at 497.

¶ 42 A strict liability claim may proceed under three different theories of liability: a manufacturing defect, a design defect, or a failure to warn. *Mikolajczyk*, 231 Ill. 2d at 548. A manufacturing defect occurs when one unit in a product line is defective, whereas a design defect occurs when the specific unit conforms to the intended design but the intended design itself renders the product unreasonably dangerous. *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78 (2005); *Salerno*, 402 Ill. App. 3d at 497.

¶ 43 In order to establish strict liability under the first two theories, a plaintiff must establish: (1) a condition of the product that results from manufacturing or design; (2) the condition made the product unreasonably dangerous; (3) the condition existed at the time the product left the defendant's control; (4) the plaintiff suffered an injury; and (5) the injury was proximately caused by the condition. *Mikolajczyk*, 231 Ill. 2d at 543; *Salerno*, 402 Ill. App. 3d at 498. The key inquiry is whether the allegedly defective condition made the product unreasonably dangerous. *Salerno*, 402 Ill. App. 3d at 498.

¶ 44 When proceeding under a manufacturing defect theory, we apply the consumer-expectation test to determine whether the product is unreasonably dangerous. *Blue*, 215 Ill. 2d at 90-91. That test requires a plaintiff to demonstrate that the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Lamkin v. Towner*, 138 Ill. 2d 510, 528 (1990). The test is an objective one to be viewed in light of the average, normal,

or ordinary expectations of the reasonable person. *Calles*, 224 Ill. 2d at 254; *Salerno*, 402 Ill. App. 3d at 498.

¶ 45 Under a design defect theory, we apply the consumer-expectation test as well as the risk-utility test to determine whether the product is unreasonably dangerous. *Calles,* 224 Ill. 2d at 255. Under the risk-utility test, the court must determine whether, on balance, "the benefits of the challenged design outweigh the risk of danger inherent in such design." *Lamkin*, 138 Ill. 2d at 529. In *Calles*, our supreme court noted that John W. Wade, Dean and Professor of Law, Emeritus, Vanderbilt University School of Law, had identified several factors relevant when engaging in risk-utility analysis: (1) the usefulness and desirability of the product – its utility to the user and to the public as a whole; (2) the safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and not be unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions; (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. *Calles,* 224 Ill. 2d at 255, citing J. Wade, *On The Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973). Our supreme court noted that under section 2(b) of the Products Liability Restatement, the risk-utility balance is "to be determined on consideration of a 'broad range of factors,' including 'the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of

consumer expectations regarding the product, including expectations arising from product portrayal and marketing,' ***." *Mikolajczyk*, 231 Ill. 2d at 555 (quoting Restatement (Third) of Torts: Products Liability § 2, Comment *f*, at 23 (1998)).

¶ 46 The consumer-expectation test and the risk-utility test "are not *theories of liability*; they are *methods of proof* by which a plaintiff 'may demonstrate' that the element of unreasonably dangerousness is met." (Emphasis in original.) *Mikolajczyk*, 231 Ill. 2d at 548 (quoting *Hestie v. Roberts*, 226 Ill. 2d 515, 542 (2007)). Here, plaintiff proceeded under a theory of strict liability based on design defect, and as plaintiff's counsel noted in his appellate oral argument, chose to rely on both the consumer-expectation method of proof as well as the risk-utility method of proof.

¶ 47 Evidentiary Rulings

¶ 48 We first address defendant's contention that the trial court abused its discretion in granting plaintiff's motion *in limine* #17. A motion *in limine* can be a "powerful" and "potentially dangerous" weapon because it requests to restrict evidence. *Reidelberger v. Highland Body Shop, Inc*., 83 Ill. 2d 545, 550 (1981) ("Before granting a motion *in limine*, courts must be certain that such action will not unduly restrict the opposing party's presentation of its case.") Because a ruling on the motion can restrict evidence, the motion must be specific and allow the court and the parties to understand what evidence is at issue. *Lockett v. Bi-State Transit Authority*, 94 Ill. 2d 66, 76 (1983). A trial judge has discretion in granting a motion *in limine* and a reviewing court will not reverse a trial court's order allowing or excluding evidence unless that discretion was clearly abused. *Swick v. Liataud*, 169 Ill. 2d 504, 521 (1996). Our mere disagreement with the trial court's decision will not be enough to render the decision an abuse of discretion. *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 39. Rather, the trial

court abused its discretion only if the court "acted arbitrarily, exceeded the bounds of reason, or ignored or misapprehended the law." *Id.*

¶ 49 Here, defendant contends that the trial court abused its discretion by granting in part defendant's motion *in limine* #17, which alleged that the instruction manual should be excluded as irrelevant because the claims were related to defective design and not a failure to warn. Plaintiff argues that evidence of the instruction manual would have allowed the jury to improperly blame the consumer. The instruction manual warned that temperatures over 125 degrees posed a scalding risk, especially to children and the elderly, and that "[a]djusting the thermostat past the 120 [degrees Fahrenheit] bar on the temperature dial will increase the risk of scald injury." The instruction manual also stated that it "recommends installing a tempering valve or an anti-scald device in the domestic hot water line" to "reduce the point of use temperature of the water." It stated that such valves were "readily available for use" and could be obtained from a "licensed plumber or the local plumbing authority." The instruction manual also cautioned that stacking could result "in increased water temperatures at the hot water outlet" and that an "anti-scald device is recommended in the hot water supply line to reduce the risk of scald injury."

¶ 50 Defendant claims the instruction manual for the water heater should have been admitted because it was a pertinent piece of evidence to be considered under the risk-utility test. We agree. As noted above, our supreme court has specifically stated that one of the factors to be considered in the risk-utility test includes "the instructions and warnings accompanying the product." *Mikolajczyk*, 231 Ill. 2d at 555. The instruction manual would certainly fall under this category. It is improper for a court to allow a motion *in limine* which limits or precludes the introduction of relevant evidence. *Rush v. Hamdy*, 255 Ill. App. 3d 352, 365 (1993). Because the jury was

entitled to see the instruction manual in order to weigh the risks and benefits of the water heater under the risk-utility test, we find that the trial court erred in granting plaintiff's motion *in limine* to exclude such relevant evidence.

¶ 51 Defendant also argues that even though the trial court denied plaintiff's motion *in limine* #17 as to the exclusion of the warning label on the side of the water heater from evidence, the only images allowed into evidence of the warning label were those contained in the photo of the Hulsey's mockup model, as well as in the photo of the entire water heater at issue. Defendant points out that there is no indication in the record that the jury knew that the warning label on Hulsey's model was the same warning label on the water heater in question. Additionally, the warning labels in the photographs of both the mockup model and the water heater in question are not legible. Even if they were clear, the jurors would not have known to look for the labels since defendant was barred from referencing the labels or asking about them on direct or cross-examination. As we have already noted, a factor to consider in the risk-utility test is the "warnings accompanying the product." *Mikolajczyk*, 231 Ill. 2d at 555. Accordingly, we find that the trial court also erred in barring evidence of the warning labels during trial, despite its order to the contrary.

¶ 52 Both of these evidentiary rulings were prejudicial because they affected the outcome of the case. See *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 892 (1995) ("an erroneous evidentiary ruling does not require reversal unless the error was prejudicial and affected the outcome of the trial.") Where a piece of evidence that was specifically enumerated as a factor for the jury to consider in deciding whether the water heater was unreasonably dangerous was excluded from evidence, the outcome of the case was necessarily affected. The trial court's grant of the motion *in limine* #17, and its rulings barring evidence of the water

heater's warning label, broadly prohibited defendant from introducing relevant evidence about the water heater in question, especially when the evidence was necessary in applying the risk-utility test, and thus require reversal.

¶ 53 Special Interrogatory

¶ 54 We also find that the trial court committed reversible error in rejecting defendant's requested special interrogatory. Special interrogatories are governed by section 2-1108 of the Code of Civil Procedure which states:

> "Verdict – Special Interrogatories. Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2-1108 (West 2012).

¶ 55 Our courts have strictly interpreted the word "must" in the statute and held that a trial court has no discretion to reject a special interrogatory that is proper in form. *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 30 (2003). A refusal to give a special interrogatory can amount to reversible error where there is a possibility for the verdict to be inconsistent with the special finding elicited by the interrogatory. See *id.* ("Argument may be made that since the purpose of a special interrogatory is to test the verdict, it would constitute reversible error to refuse a special

interrogatory so long as there is any possibility for the verdict to be inconsistent with the special finding elicited by the interrogatory.") A special interrogatory is in proper form when "(1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned." *Simmons v. Garces*, 198 Ill. 2d 541, 563 (2002); see also *Blue*, 215 Ill. 2d at 112. The special interrogatory should be a single question, stated in terms that are simple, unambiguous, and understandable, and should use the same language that the instructions contain. *Simmons*, 198 Ill. 2d at 563. Special interrogatories guard the integrity of a general verdict against the jury's determination as to specific issues of ultimate fact. *Id*. at 556.

¶ 56 Here, defendant requested to give the following special interrogatory to the jury: "Was the water heater designed and manufactured by American Water Heater Company in 2005 unreasonably dangerous when it left its control?" Defendant contends that a negative answer to defendant's special interrogatory would have been inconsistent with a verdict for plaintiff. The trial court refused to give the interrogatory, stating that it was "not a specific stated element of the current burden of proof instruction."

¶ 57 However, as noted above, there is simply no requirement that a special interrogatory should reflect a specific stated element of the jury instructions, and certainly not that the subject of the special interrogatory must be a specific element of the burden of proof instruction. Rather, a special interrogatory must relate to an ultimate issue of fact upon which the rights of the parties depend. Here, the special interrogatory directly related to an ultimate issue of fact – whether the water heater was unreasonably dangerous when it left defendant's control. In fact, the jury instructions stated, "Plaintiff claims that there existed in the water heater at the time it left the

control of the defendant a condition which made the water heater unreasonably dangerous in one or more of the following ways ***."

¶ 58 Plaintiff maintains that the wording of the special interrogatory had to exactly match the wording of the jury instruction. In other words, instead of it asking if the water heater was unreasonably dangerous when it left defendant's control, it should have asked if there existed in the water heater at the time it left the control of defendant a condition which made the water heater unreasonably dangerous. We do not believe that is a meaningful distinction. As discussed in this order, a strict liability claim based on a manufacturing defect "occurs when one unit in a product line is defective, whereas a design defect occurs when the specific unit conforms to the intended design but the intended design itself renders the product unreasonably dangerous." *Salerno*, 402 Ill. App. 3d at 497. Here, the strict liability claim was based on design defect, and thus we find that an ultimate question of fact in this case is whether the water heater was unreasonably dangerous when it left defendant's control. Therefore, the special interrogatory was in a proper form, and because a trial court has no discretion to refuse a special interrogatory in its proper form, we find that the trial court committed reversible error in refusing defendant's special interrogatory.

¶ 59 Because the trial court's abuse of discretion in making evidentiary rulings amounted to prejudicial error, and because the trial court committed reversible error when it refused defendant's special interrogatory, we reverse the judgment of the trial court and remand for a new trial. In light of this holding, we decline to address the additional arguments that defendant raised on appeal.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for a new trial.

¶ 62 Reversed and remanded.

¶ 63 JUSTICE HARRIS, specially concurring:

¶ 64 I concur with the judgment to reverse and remand for a new trial because the trial court committed reversible prejudicial error when it refused defendant's special interrogatory.

¶ 65 I write separately because I do not agree that the trial court abused its discretion in granting in part plaintiff's motion *in limine* #17 to exclude the instruction manual. Defendant argues that the manual is relevant because it warned that setting the thermostat past 120 degrees fahrenheit "will increase the risk of scald injury," and recommended "installing a tempering valve or an anti-scald device" which were "readily available" and could be obtained from a licensed plumber. Plaintiff, however, alleged claims of strict product liability based on defective design, not a failure to warn. Furthermore, concepts of contributory negligence generally "are irrelevant in strict product liability actions since contributory negligence does not bar recovery in strict liability cases." *Whittington's Estate v. Emdeko National Housewares, Inc.*, 96 Ill. App. 3d 1007, 1013 (1981). In particular, plaintiff's "unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect" is not a defense to a strict products liability action. *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 119 (1983). Use of the manual to show that plaintiff failed to discover or guard against scalding water would have allowed the jury to improperly blame plaintiff for negligently causing Mikayla's injuries and ultimate death. Therefore, I would find that the trial court did not abuse its discretion in excluding the manual.