ORAL ARGUMENT - 12/12/95
95-0652
REDMAN HOMES V. IVY

KUHNE: May it please the court; counsel. The first judgment in this case should be reversed, and judgment rendered for the defendant Redman, petitioner here, because there is no legal and sufficient evidence to support the jury finding, the damage issue, which is question No. 6. The plaintiff in this case sustained two types of damages: 1) to the mobile home itself; and 2) to the personal property contents. Plaintiff chose to submit all those damages in one issue rather than submitting them in 2 issues. The jury found $79,000 in response to that issue.

We have cited a case in our supplemental brief Stewart & Stevenson v. Serv Tech, Inc., 879 S.W.2d 89, which holds that where the plaintiff has more than one type of damage or there is more than one defendant, that the plaintiff has the burden to submit separate damage issues. Here as we've said the plaintiff chose to submit all those damages in one issue. There was one other damage issue inquiring as to mental anguish, but that's not relevant here, because the jury found none on that.

The CA found and the plaintiff admits that there was no evidence of probative weight with respect to the mobile home itself. The only testimony offered on the mobile home was the cost of the mobile home, the home was about 10 months old at the time of the damage. And a case as cited in the court, it's opinion in another case to say that there is no evidence of probative weight as to the market value.

GONZALEZ: The court granted point of error on preemption, and also on TRAP Rule E1. What do you have to say about preemption, what the court granted on?

KUHNE: The points the court granted it on? This court granted writs on point 2 and 3. Point 2 is that the CA erred in sending and remanding this case to the TC solely on the issue of damages. The court found that there was insufficient evidence to support the damages. We submit that there is none, that Rule 81(b)(1) specifically talks about remanding in part specifically says provided that a separate trial on liquidated damages alone shall not be ordered if liability issues are contested. Of course there is no question here that liability issues were contested. Clearly the damage issues were unliquidated. And there are numerous opinions including one by Judge Baraha who wrote the opinion in the present case stating that you cannot remand solely the issue of damages where damages are unliquidated and liability is contested.

GONZALEZ: If we assume for the sake of argument that that's true, where does that leave us with regards to preemption?

KUHNE: If the court does not sustain our point that there is no evidence for damages, and since they weren't broken down, clearly there is no evidence. We submit that the judgment should be reversed and rendered, because when there is no evidence defendant is entitled to rendition. If the court doesn't agree with that, then the entire case liability damages and everything must be remanded to the TC because it is undisputed that the damages aren't supported.

GONZALEZ: We would only remand to the TC if we make a judgment that is not preempted. So I am asking you, I am trying to get you to argue about preemption. How does the DTPA...

KUHNE: The preemption point is under the federal act, which is another ground for rendition in addition to the damage issue. The statute itself specifically says that no state shall have authority to

provide any standard which is not identical with the federal standard. In fact, the state has adopted the federal standards in 52.21(f)(4), and that's pointed out in a federal supplement case of Wooldridge v. Redman Homes. In this case therefore the state's statute and the federal statute on standards are the same.

GONZALEZ: If they are the same we don't have a problem then? If the statute and the federal statute do not conflict there is no preemption problem.

KUHNE: Well we submit there is a problem, because they tried to submit...they pled and did submit breach of warranty and DTPA. But if the mobile home we submit the undisputed evidence establishes that the mobile home complied with the federal standards, which means it also complied with the state's standards then it could not be a violation of DTPA or breach of implied warranty.

GONZALEZ: How is a DTPA and a breach of warranty claim construction or safety standards?

KUHNE: Well if the home wasn't in violation of the state standards, then we submit there could be no breach of implied warranty or DTPA, that the evidence is undisputed that each home was inspected, that this home specifically was inspected, and met the requirements of the Act, and received a stamp or certificate which it had to receive before it could leave the factory and be sold.

PHILLIPS: What was the precise nature of the claim?

KUHNE: The precise nature of the claim was that the wiring in the home was defective, and the defective wiring caused...

PHILLIPS: A design defect, or a manufacturing defect?

KUHNE: They are claiming that the wiring was defective when the home was manufactured.

PHILLIPS: That it was designed badly? I mean they had wires too close to a heat source or that merely there was a problem with this particular piece of wire that made it more likely to have a problem.

KUHNE: The pleadings weren't that specific. They didn't specifically allege design. So I presume they were claiming that this particular wire was defective.

PHILLIPS: So what you are saying is if the federal government inspects, and if there is a stamp that a product has been inspected, then even if there is a latent defect in it, there can be no lawsuit, that's an end to it?

KUHNE: Well if there was evidence of probative weight that in spite of that inspection that didn't meet inspection, it was defective, possibly there could be. But that is another problem in this case, with the plaintiff's case. There was no evidence that the wiring was defective, and that it didn't meet federal standards. There were several witnesses that testified specifically that it was not. The only evidence that they claim supports the contention that it was defective was a witness by the name of Lutz and he testified he didn't find any defect in the wiring. But he said he went through the other aspects and he couldn't find anything else that caused it and, therefore, in his opinion the wiring must have caused it.

PHILLIPS: That used to be known as res ipsa loquitur.

BAKER: Isn't that some evidence though?

KUHNE: We submit that it doesn't rise to a scintilla, that it's really in the context of his testimony it's nothing more than speculation.

PHILLIPS: Why isn't that a res ipsa case? It's something that doesn't happen ordinarily in the absence of negligence and every other cause has been negated.

KUHNE: The home was in the possession of the plaintiffs; had been in the possession of the dealer, then it had been in possession and had been lived in by the plaintiffs for 10 months before the fire happened. And res ipsa was not pled and was not submitted in any event.

CORNYN: It was alleged that Redman breached an express warranty that the electrical system would be free from substantial defects for a period of 12 months. Why doesn't Mr. Lutz's testimony along with that warranty support the judgment, absent your concern about damages? Why doesn't that support the liability finding?

KUHNE: We submit that there is no even legally sufficient testimony that the wiring was defective.

CORNYN: You concede that Mr. Lute(?) did give an opinion to that effect?

KUHNE: He gave an opinion to the effect that in his opinion it was defective on the ground that he couldn't find any other cause.

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RESPONDENT

BURNETT: May it please the court, counsel. The court agreed to hear the petitioner's point of error No. 2. And I on behalf of my clients although reluctantly so announced that I am at least in part in agreement with the petitioner that Rule 81(b)(1) of the Rules of Appellate Procedure would call for the remand of the entire case if there is a question of the sufficiency of the evidence and unliquidated damages. As the petitioner has pointed out the property damages were submitted conjunctively, that is as to the market value of the building, and that of the personalty. And the appellate court found that the evidence was insufficient to support a verdict on the entire property damages, and remanded. I am not keen on being quoted as finding fault with an appellate court ruling that was in my favor.

GONZALEZ: I appreciate your candor. But in essence you are saying the El Paso CA blew it?

BURNETT: Well I am trying to do that artfully.

PHILLIPS: So you are waiving your argument that this court has the authority to render a lesser judgment?

BURNETT: The best that I can tell even with our offer of remitter that the clearest move would be to remand the entire case because the damages are unliquidated. It seems to have been a sufficiency issue in El Paso. And the court did find sufficient evidence to support part of the property damages, that is the personalty. And I think the case law is pretty clear on that in Texas, that an owner can testify as to the market value of his or her own property if they indicate some experience or knowledge about the property value. And although Mr. Ivey might have been a little bit better witness than he did in that area, the appellate court noted and in fact quoted the testimony he gave particularly when asked to tell what he thought the property would sell for, what a reasonable person would pay to buy the items. Mr. Ivey testified that he understood that and he then proceeded to testify item for item what he thought a reasonable

purchaser would pay for those items.

PHILLIPS: Didn't he on voir dire admit that he really didn't have any knowledge about the market value?

BURNETT: At one point he indicate he was asked, I think I asked him, no I think on voir dire he was asked if he knew what these items would sell for or a question sort of to that affect. And I think at one time he did answer: Well not really.

PHILLIPS: Do you think he was rehabilitated from that or is that a finding...

BURNETT: Well I think so when asked directly the question which is sort of a question of art: Do you understand that you are being asked if you have some knowledge of the value of these articles? He answered: Yes. And then he was asked: Do you believe you have an idea of what a reasonable person would pay for these? And he answered: Yes. And then there is a long, I remember a tediously long session of question and answer where he went through item by item and spoke many times about: Well I think this would bring, or a person would pay this or that for this particular item. There were some of the items that I think fell under a kind of personalty for which the doctrine of intrinsic worth might be appropriate. At any rate it is a situation where the evidence supports a portion of the damages, and the appellate court has found that it does not support sufficiently another portion. I have a difficulty arguing otherwise. It may be that the appropriate procedure or the following would be to remand the entire case.

PHILLIPS: That being the case would you then speak to the other point we specifically granted on federal preemption?

BURNETT: Yes, in fact I would like to spend the rest of my time doing that. It seems to be the position of the petitioner that the National Manufactured Housing Construction and Safety Regulation Act absolutely preempts any kind of state civil remedy for a homeowner, and this is despite the fact that there is no apparent conflict between the Texas Consumer Laws and that Act. Their second position seems to be that where one of these homes is certified with a seal of approval applied by a state or some sort of government inspector that that establishes as a matter of law that the home is in compliance with the federal standards.

OWEN: What evidence was there that there was a defect and what kind of defect did you contend there was?

BURNETT: The evidence was that this particular home had failed inspection once, and it had failed where there were leaks found in the bathroom, and one in the wash basin and another in the bathing area.

PHILLIPS: What types of leaks?

BURNETT: They were leaks I believe the one in the wash basin was at the drain...

PHILLIPS: But of gas, water?

BURNETT: No, water. There were water leaks in both places. And eventually this unit was tagged as having passed inspection.

PHILLIPS: By whom?

BURNETT: A state inspector. Mr. Lutz testimony, the expert who testified on behalf of the plaintiff testified that there was some likelihood that despite the fact that the unit had passed inspection ultimately, there was still a latent defect at one or both of these places. And that a leak still existed. He noted that the origin of the fire, his opinion was is in the bathroom, and under the floor at a place where it's undisputed there was circuitry. He testified that for a person who is educated and qualified to investigate and to render opinions on fire origins, it's very often a process of elimination and deduction. And particularly where there is a fire as extensive as this one was it's primarily a situation of ruling out. The fire he said originated under the floor in the bathroom at a place where there was circuitry, the circuitry was burned pretty much beyond a point where it could supply any information about its short. But where there was an indication that there had been a problem with this unit, that the problem was a leakage of water. It's common knowledge that water and circuity are not a good combination, that there is some probability that this circuitry failed either because it was exposed to moisture, or for some other reason.

OWEN: He said some probability. Did he go further than that?

BURNETT: He indicated that the only probative evidence at the site, and he was at the site I think within a few days of the fire, was that the fire originated at a point of circuitry, and the only evidence was that it would have been a failure of the circuitry. There was just no evidence of anything else. I think the defendants' expert testified that he thought that an iron had fallen on the floor. But it became a conflict of experts. In the Shorter case which we cited although it's not a Texas case has an interesting footnote on page 338, where they indicated that certification is just a piece of evidence which may or may not support the defendant's position that the construction was in compliance. And where you have a battle of the experts, the fact that the house has been tagged is not established conclusively that it's in compliance.

HECHT: So do you say that it was or it was not in compliance?

BURNETT: We say that it was not, that it got through the wicket that there was an undiscoverable defect, there was a problem with the house that it was not identified at the time that it was being inspected. And our position is that certification does not establish conclusively.

HECHT: Is it your position that if it had been in compliance, the damage would not have occurred?

BURNETT: No, because I think that's not...I don't think that's an issue that we need to reach since there was expert testimony that there was a problem with the house, and that it was a problem in an area which the manufacturer warranted would be safe.

HECHT: So then would there have to have been more done than the federal standards require?

BURNETT: No, not at all. I think we are in a situation where we are not in our pleadings, and this is distinct from the case of McMillan, we are not pleading in any way that the federal standards are incomplete, or that there is an area not covered by those standards that is pertinent to this case.

HECHT: We are just saying the home didn't meet it?

BURNETT: The home didn't meet it.

HECHT: And if it had, it might not have burned down.

BURNETT: Might not have burned down, and that it is appropriate in a state case, a DTPA

action or a consumer protection action, it's appropriate to suggest that there was a defect despite the fact that it passed inspection. We are not finding fault with the federal regulations at all. I don't think that the legislation when enacted was intended to mean that once the sticker is on the house, the position is the inspector is infallible.

HECHT: You concede that there is a different preemption problem if your position is it met the federal standards but that's not good enough there is still liability; or, it didn't meet the federal standards and it should of and, therefore, there should be liability for that?

BURNETT: Absolutely, and that's where the McMillian case is interesting because apparently the plaintiffs in that case made a decision at some point to allege a defect which the federal government had considered and rejected or a criteria to use in trying to protect the consumer from formaldehyde exposure, and the court there had decided that the measure would be of the emission from the materials used: the plywood and the particle board rather than the level of formaldehyde in the atmosphere because atmospheric changes, climate changes made that they believe an unreliable measure. And apparently in McMillan the plaintiffs permitted to that standard and stuck with it. In Woolridge by distinction is one where there is no complaint of a defect or a failure to reach a standard which is not identical with that promulgated by the federal statute and the federal agency.

GONZALEZ: So you're not trying to impose a different standard?

BURNETT: Absolutely not.

GONZALEZ: We can move to preemption again. Are you familiar with American Airlines v. Woolen?

BURNETT: Somewhat. Yes, sir.

GONZALEZ: How does this case distinguish from Wolens?

BURNETT: You have a situation where there is no remedy provided by the federal regulation, and you have a situation where the pleadings are so...

GONZALEZ: In what instance? I am not following you.

BURNETT: Well I may not be able to provide a cogent argument for that.

GONZALEZ: In Wolens the SC seemed to say that a federal statute similar or arguably similar to the DTPA was preempted, that the state statute was preempted by federal regulation.

BURNETT: Wasn't that a state statute that had something to do with...

GONZALEZ: A federal statute preempted a DTPA type like remedy.

BURNETT: Did the federal statute have a provision for remedy of its own?

GONZALEZ: I don't recall.

BURNETT: I am not sure about that and I would hate to pretend I know something I don't. The defendants cited English v. General Electric, which is a whistle blower type of case; and cited in that opinion is the famous Silkwood v. Kerr McGee opinion. I had forgotten but the SC there noted that there

was no preemption even where there was a state claim for damages, the result of a condition which the federal government had intended to preempt. And that may be the closet analog to what we have here. We have people who claim to be damaged by the quality of the construction of a home. And that's certainly covered by the federal regulations. But there is no allegation that suggests that there should have been a standard met that was greater than or different from federal regulations.

GONZALEZ: Do the implied warranties are they synonymous with such a standard?

BURNETT: Since the implied warranties are not specific to construction standards and since the state of Texas has adopted identically the standards of the federal statute I think read together all that the consumer protection act or the DTPA is suggesting is that where this item, this product does not have a defect, which is inconsistent with the federal standards, then there could be a state action.

CORNYN: Are you suggesting that if the DTPA is inconsistent with the federal statute that it would also have to necessarily be inconsistent with the Texas statute for Manufactured Housing Standards Act?

BURNETT: No. And I haven't really thought of this question in that way. I really had looked at this throughout as a situation where the SC seems to say repeatedly that where there is no conflict, that a state remedy is not inappropriate if it's not in conflict or doesn't put us in a situation where a defendant cannot comply with both. In the English case there is even language that the federal regulatory scheme should not cause one to presume that there is preemption. And where there is no apparent conflict between federal and state law there certainly should be an effort to construe one.

OWEN: On special issue No. 2 where the jury found there had been a false, misleading or deceptive act, is there any evidence to support that finding other than the breach of warranty?

BURNETT: Well if the evidence is that there is a probability of some defect in the wiring, either the circuity or because of a combination of the circuitry and they leak in the floor, then the consumer is not getting the product that has been advertised to him both in the materials that accompany the product and the advertising done by the seller. And that's the case that we have here. We have expert testimony that there is a defect. There is a probability that the fire started as a result of this defect: burned the whole house down. And no real evidence to the contrary. And the house is advertised as being electrically sound, and in compliance, no leaks.

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REBUTTAL

KUHNE: With respect to preemption we agree that certainly there are types of cases which would not have been preempted, which could be brought. For example: there was a claim made by the manufacturer that this house will last for 50 years or something like that, which would be outside of the scope of the inspection standards of the federal statute. But there is not any pleading of anything like that. They are basically pleading that the mobile home was defective, and it didn't meet the federal standards when it was manufactured. And we submit the evidence of _____ that it did.

CORNYN: Do you concede that the Texas Manufactured Housing Standards Act expressly adopts the federal standards?

KUHNE: Yes, that's correct your honor.

CORNYN: And so how could this cause of action be preempted unless this cause of action

conflicted with the Texas standard, which is identical to the federal standard? In other words, logically your argument would seem to be that there can be no DTPA cause of action because it conflicts with the Texas statute that adopts the federal standard.

GONZALEZ: In other words, where does the state statute conflict with the federal statute? Where is the conflict?

KUHNE: I am just saying that if there was a claim which came outside of either statute, that it would be preempted.

CORNYN: So there is no conflict?

KUHNE: There is no conflict between the state standards and the federal standards.

CORNYN: Because the state expressly adopts the federal standards?

KUHNE: That's right.

CORNYN: But I guess my question is, and perhaps Judge Gonzalez's is: You argue that this cause of action is preempted by the federal standard, but if the federal standards are the same as the state standard...

KUHNE: We are really not arguing it's preempted by federal standards. We are arguing that the evidence establishes that it complied with federal standards and state standards, and there is no claim that it was some other type DTPA claim that would fall outside of those. So the evidence shows that there is no violation.

CORNYN: So rather than a preemption of state law by a federal law you are arguing that your product complied with both standards and therefore there can be no liability?

KUHNE: With both state and federal law and that this isn't...there are types of claims which we submit would not be preempted by either state or federal law, but this isn't one of them. There is no allegation that they made some kind of representation as I said that the product will last 50 years or something. It wouldn't come under the state.

SPECTOR: Do the standards require that the manufacturer give a warranty? In other words that the wiring be warranted for 1 year?

KUHNE: I can't answer that your honor. I don't know whether or not the standards specifically address wiring. I know that in this case there was an express warranty which excluded other implied warranties.

GONZALEZ: This is a position inconsistent with the one you took in your brief. In your brief you were arguing preemption. Point 3 I believe in the brief argues that this state law claim is preempted by the federal Manufactured Home Construction And Safety Standards Act. Are you waiving the preemption argument in your brief?

KUHNE: I may not have stated it _____ your honor. But I think if you will read all the way through under the whole thing I think it is consistent with what I am trying to say today that it complies with the state statute and by virtue of the evidence that it complied with the state and federal statute. There is no basis for a claim.

BAKER: The respondent argues that the federal act provides a standard but no remedy; do you agree with that?

KUHNE: I am not that familiar with the state statute your honor. As far as I know it provides no remedy.

BAKER: I understand your point. You are relying on the federal safety act in mobile home construction. And his response is it doesn't provide a remedy. Do you agree with that argument?

KUHNE: I assume that it neither the state or the federal act provide a remedy.

BAKER: Well then my next question is if it doesn't provide a remedy what is your claim if there is a violation of the federal standards under the act? And the next question is if there is none why can't you use a state statute or common law remedy to satisfy a breach of the federal standard too since they are both the same?

KUHNE: I assume that the federal remedy would apply if there is no statute.

BAKER: The first question was do you agree or disagree whether there is no remedy provide by the federal act?

KUHNE: I am not that familiar with the federal act your honor.