EFiled: May 14 2013 10:03AM EDT
Filing ID 52262500
Case Number 44,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODNEY L. MACDOUGALL and DIANE M. MACDOUGALL,	:	
	:	Case No. 44, 2013
Plaintiffs Below, Appellants,	:	
v.	:	
MAHAFFY & ASSOCIATES, INC., a Delaware Corporation and SCHNEIDER ELECTRIC USA, INC., a Delaware Corporation,	:	
Defendants Below, Appellees.	:	

PLAINTIFFS BELOW, APPELLANTS, RODNEY AND DIANE MACDOUGALL'S REPLY BRIEF

Appeal from the Decision of the Superior Court in and for Sussex County, C.A. No.: S10C-06-010 THG

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Dated: May 14, 2013

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I. MAHAFFY AND SCHNEIDER OWED A DUTY

A. The Negligent Design Created the Duty

On the existence of a duty owed to MacDougall, the lower Court's opinion is misleading, confusing and contradictory. The Court recognized the following facts:

- "The State hired Mahaffy to be the engineer of the project responsible for designing the new electrical system at DHCI." Ex. A, p. 2;
- "Mahaffy had Schneider perform some of the design work." Id.
- "Schneider authorized a Short Circuit and Protective Device Coordination Study ('Study') to be used in the design of the system." Id.
- "Basically, Mahaffy and Schneider worked together to come up with a design plan including the equipment to be installed." Id.
- "Schneider determined it had made a mistake and agreed to absorb the costs of a new breaker to replace the 'nuisance tripping' breaker that was previously installed in the upgrade." Id. at 3.
- "Everyone acknowledges that Mahaffy and Schneider incorporated an improperly selected breaker into the total design package and the breaker needed to be replaced." Id. at 4.

Mahaffy owed a duty. Applying these facts, the Court initially stated, "Plaintiff fails to establish any duty owed to Plaintiff by either defendant that was breached and proximately caused Plaintiff injuries." Id. at 4. The Court then contradicted that finding and concluded,

> Because of Mahaffy's negligent design (by incorporating Schneider's work product), a duty was created upon Mahaffy to coordinate and

> direct the replacement. This much the Court agrees with. Mahaffy was required to fix its error.

Id. at 10. The law of this case, which remains undisturbed on appeal, is that Mahaffy owed a duty to coordinate and direct the replacement of the breaker.

Schneider owed a duty. With regard to Schneider, the lower Court initially stated, "Plaintiff has not established a duty owed by Schneider to Plaintiff that was breached and which proximately caused Plaintiff's injuries." Id. at 8, n. 1. The Court's statement simply recites three elements of any negligence claim, but fails to properly assess and consider each element individually, separate and apart from one another, and apply each element to the facts. Thus, it is difficult to understand the Court's rationale. It is unclear whether the Court found that Schneider 1) owed no duty; or 2) owed a duty but that the Plaintiffs have failed to establish a breach of that duty; or 3) owed a duty that was breached but that Plaintiffs have failed to properly establish proximate cause.

Further confusing the issue, the lower Court ultimately concluded that "Schneider supplied the faulty information on which the wrong breaker was installed. *Therefore,* Schneider agreed to be responsible for the cost of the breaker replacement." Id. at 10 (emphasis added). By implication, the Court's statement suggests a duty on the part of Schneider was created as a consequence of its mistake. The Court clearly determined that Schneider, like Mahaffy, erred by producing the flawed study which resulted in the installation of an incorrect

breaker. Consistent with the Court's ruling as to Mahaffy, Schneider's error imposed a duty upon it. The Court infers the duty was discharged when Schneider simply agreed to pay for the replacement breaker.

Appellants agree that duty is an issue of law and submit that the lower Court correctly determined that Schneider's negligence created a duty.

The negligence was joint and Schneider's duty was parallel to Mahaffy's.

Even assuming, *arguendo*, that a plain reading of the lower Court's opinion suggests Schneider owed no duty, the Court's failure to impose a duty upon Schneider ignores the factual record and is fundamentally inconsistent with its conclusions as to Mahaffy.

It is undisputed that the electrical system was negligently designed by both Mahaffy *and* Schneider. The negligent design necessitated the replacement. It is critical to note that the Court's recognition of a duty by Mahaffy is not based in contract and thus does not derive from the relationship between the parties. Rather, the duty arises by virtue of the negligent design. In this regard, Schneider is identical to Mahaffy. Once the Court concluded that the negligence created a duty upon Mahaffy to coordinate and direct the replacement, the Court erred by not finding that Schneider owed a parallel duty. The Court recognized the design error was joint but required only Mahaffy to take action. The Court's opinion is void of any factual basis to distinguish Mahaffy's negligent conduct from that of

Schneider. Therefore, it was in error for the Court to find that Mahaffy, by virtue of its role in the negligent design, had a duty when Schneider did not.

B. Mahaffy's Duty is Not Contractual

Mahaffy argues that "by determining the breaker needed to be replaced, Appellants cannot claim this creates a new duty that requires Mahaffy to be involved and onsite for the replacement, when the agreed upon Contract does not require this." Mahaffy AB at p. 23. Absent its contract being re-written or expanded, Mahaffy contends it could not have owed a duty to MacDougall. Id.

The lynchpin of Mahaffy's contention is that the replacement work was required by Tudor's contract. To bolster its argument, Mahaffy restates multiple paragraphs of the contract which address both its' and Tudor's contractual obligations. Id. at 9-11, 17-18.[1] Mahaffy cites to nine cases all of which, in some variation, address responsibility for the means and methods of AIA contract work performed by contractors, architects and engineers in the context of attempts to "re-write" an existing AIA contract. Id. at 18-24. Mahaffy's entire argument rises and falls on the applicability of the contract. If the replacement work is deemed to be within the scope of Tudor's original contractual obligations, Mahaffy contends that

[1] Appellees can cite to no provision of Tudor's contract which required Tudor to assume the responsibility for work beyond punch list or warranty items, or repair the Mahaffy/Schneider design error.

it cannot be held responsible for the means and methods of MacDougall's work and that it was not required to be involved in the breaker replacement. Id.

Schneider likewise argues that the replacement work was required by Tudor's contract. Schneider relies solely on the deposition transcript of Robert H. Tudor, MacDougall's employer. Schneider AB at pp.7-8. Schneider ignores and fails to address the abundant factual record which confirms that the replacement was not part of Tudor's original contractual obligations.

1. Tudor's Contract Work Was Substantially Complete and Accepted by the State and Mahaffy *Before* Notice of the Design Flaw and Therefore Was Not Within the Scope of the Contract

Tudor was awarded the bid for the DHCI work on January 30, 2006. AR-1. It was obligated to prepare the physical site at DHCI to receive a pre-purchased housing unit containing new electrical equipment, prepare the buildings at DHCI to accept the new electrical system and to demolish certain existing structures and fixtures that would be replaced. AR-3-11.[2] As an example of the work Tudor was contracted to perform, it was responsible for overseeing the grading and

[2] Tudor's contract work consisted of "base bid" work and alternate nos. 1-3 which are identified at AR-2, 5 and described at AR-10-11. The scope of the work did not include correcting the Mahaffy/Schneider design error. Tudor's original contract work, excluding punch list and warranty items, was complete January 2, 2008 and Certificates of Completion were effective that date. AR-12-13.

installation of a concrete pad on which the housing would be placed, and ensuring a chain link fence was installed around the building. AR-10-11.

The work required of Tudor pursuant to its contract was complete and accepted by the State and Mahaffy on January 2, 2008. A-151-152, AR-12-13. Correspondence from Tudor confirmed: "[a]t the time of the accident, the project was substantially complete, working and accepted by the State and the engineer as of January 2, 2008. AR-14. Bybee explained the significance of substantial completion stating, "[t]his means that Mahaffey represented to [the State] that the Tudor installation is complete and accepted by Mahaffy. . . ." A-187.

Mahaffy, Schneider and the lower Court ignored Bybee's opinions regarding the importance of the January 2, 2008 substantial completion date. According to Bybee, the substantial completion date is critical as it represents the date upon which Tudor's obligations under the original contract were fulfilled. It also represents the date upon which the State and Mahaffy accepted Tudor's contract work as being complete and satisfactory. Beyond January 2, 2008, Tudor's contractual obligations were limited only to punch list items and warranty issues. Specifically, those obligations did not encompass replacement of a faulty breaker which was a direct consequence of the Mahaffy/Schneider error.

2. The Replacement Was Mahaffy's and Schneider's Responsibility

Four months *after* the date upon which Tudor's work was accepted by the State and the one year warranty had commenced, Tudor provided notice that a breaker was nuisance tripping. A-153. It is undisputed that the cause of the nuisance tripping was unrelated to Tudor's work and not a punch list or warranty item. This fact was readily accepted by the lower Court which held, "[e]veryone acknowledges that Mahaffy and Schneider incorporated an improperly selected breaker into the total design package and that breaker needed to be replaced." Ex. A, p. 4.

Bybee testified, "Tudor is **not** responsible, in any way, for the errors or omissions in either [Mahaffy's] design nor the selection, specification or suitability issues concerning the [Schneider] coordination study." A-187 (emphasis in original). The replacement was necessary because of Mahaffy's and Schneider's joint design flaw. Correcting the problem was their responsibility. According to Robert Tudor, "[w]e feel this work [the replacement] was above and beyond the contract, *not part of the contract.* No change order was ever issued to change out this breaker. This was a mistake in the design after the contract item was completed." AR-17 (emphasis added).

Bybee opined that Mahaffy was not permitted to "suddenly change Tudor's position and scope of work six months, four months after substantial completion

certificates had already been signed." A-252, p. 143. When a design error is made by an architect, "then he is not allowed to unilaterally push that over onto the contractor to correct." Id. at 142. Bybee testified that since the replacement "was to correct a deficiency in the calculations and equipment" Mahaffy and Schneider had the responsibility to direct and coordinate this work. A-254, p. 150.

Mahaffy was obligated to deliver to the State a fully functional and operational electrical system. This required the nuisance tripping -- caused by the jointly flawed design -- to be corrected. Tudor could not have bargained for the breaker replacement work as part of its original contract. This was Mahaffy's and Schneider's error and, as the lower Court ruled as to Mahaffy, a duty was owed to coordinate and direct the replacement -- to "fix its error." Ex. A, p. 10.

II. BREACH OF DUTY IS AN ISSUE OF FACT

A. Whether Mahaffy Discharged Its Duty is an Issue of Fact

The lower Court improperly ruled that Mahaffy discharged its duty. The court stated Mahaffy, "coordinated the replacement, per its obligation, by directing Tudor, the contractor, to replace the faulty breaker with the new one being shipped." Ex. A, p. 10. The Court held the simple act of assigning the work to Tudor via email satisfied Mahaffy's duty to MacDougall.

The Court erred. The issue is whether, when viewing the facts in a light most favorable to MacDougall, it was proper for the lower Court to conclude that Mahaffy discharged its duty. Mahaffy has failed to advance any facts, evidence or other support that it satisfactorily discharged its duty to "fix its error."[3]

When Tudor was awarded the contract in January of 2006, it understood the nature and scope of the work it was contracted to perform. It represented to the State and Mahaffy that it possessed the training and skills necessary to complete the work contemplated by the contract. The vast majority of its contract work was prior to installation of the pre-purchased housing and well before the upgrades and equipment were energized and operational.

The replacement work was substantively much different and far more complex. Tudor did not have the opportunity to review and understand the scope

[3] This issue is addressed in the Opening Brief at pp. 9-17.

of the replacement work it was directed to perform. Unlike its contract work, to perform the replacement work assigned by Mahaffy (work "above and beyond" the contract), Tudor would be required to lead a multi-employer complex lock-out/tag-out of an energized and operational electrical system that was brand new and under the State's ownership and control. AR-17. To perform the replacement, NFPA 70E required a coordination meeting, the creation of a written plan and lock-out/tag-out procedure, and the identification of qualified personnel who were specifically trained to denergize the *exact* equipment installed at DHCI. Also critical was to have representatives from the equipment manufacturers, including CPS, present so that the shut down did not invalidate any of the State's warranties.

As noted, Mahaffy did nothing more than simply send an email to Tudor directing it to shut down the system and replace the breaker. Mahaffy needed to do far more. Mahaffy designed the system. Fayda was the quarterback of the project having led every effort since the bids were accepted. He knew and understood how to properly denergize the system. To discharge its obligation, Fayda should have, at a minimum, led the effort, overseen the creation of a written plan and lock-out/tag-out protocol, ensured that Schneider and any other manufacturer was involved in the process and confirmed that the necessary tasks were performed by qualified contractors and personnel pursuant to NFPA 70E.

This Court does not need to reach the issue of what would properly satisfy Mahaffy's duty. However, what was required of Mahaffy in light of Mahaffy's error is an issue of fact for the jury to decide.

B. Whether Schneider Discharged Its Duty is an Issue of Fact

Schneider agreed to absorb the cost of the breaker, $8,446. By doing so, Schneider contends that its "work was done and nothing more was asked of it" and therefore owed MacDougall no duty. Schneider AB at pp. 13 and 15, n. 11. Schneider's argument is misplaced and continues to ignore the fact that its negligent design of the system necessitated the replacement.

Once the need for the replacement became apparent, Schneider had an obligation to play an integral role in coordinating the replacement to ensure that it was to be carried out by qualified personnel.[4] What is particularly relevant is the fact that Schneider had superior knowledge of the equipment. Schneider knew

[4] The Court noted that MacDougall was a master electrician and that he had "done similar work, including 'racking out' similar electrical equipment . . . ." Ex. A, p. 3. However, the Court specifically found that despite his status as a master electrician and prior experience, he "had not 'racked out' this particular brand or model." Id. The Court recognizes that MacDougall had not previously denergized the specific equipment involved in the replacement. There is no evidence that MacDougall was trained on how to denergize the newly operational electrical system or the specific equipment installed thus making him not "qualified" as required by NFPA 70E.

what was involved to replace the breaker. Specifically, it knew that NFPA 70E required a meeting be convened to coordinate the work and create a written lock-out/tag-out protocol. It knew the shut down needed to be completed by "qualified" personnel trained in the "construction and operation of equipment or a specific work method and be trained to recognize and avoid the electrical hazards that might be present with the respect to that equipment or work method." NFPA 70E §110.6(D)(1), A-172. Schneider specifically knew how the equipment installed at DHCI worked in the context of the upgraded electrical system. Schneider had technical, institutional knowledge that neither Tudor, nor any other contractor at DHCI, possessed. Additionally, Schneider employed qualified personnel equipped to denergize the system and replace the breaker in compliance with NFPA 70E. At a minimum, it knew, or should have known, that the State employees and Tudor did not possess the requisite training. Schneider's active involvement in the design and specification of the electrical equipment when combined with its negligence required it to do much more than simply provide a replacement breaker. Schneider breached its duty.

This Court need not reach the conclusion that Schneider breached its duty. Specifically, what was required of Schneider and whether it discharged its duty are issues of fact for the jury.

III. BYBEE'S OPINIONS WERE NOT PROPERLY CONSIDERED

A. Bybee Makes No Attempt to Expand the Contract or Change the Relationship Between the Parties

The Court's sole limitation on Bybee's expert opinions is found in the following statement: "[a] 'because I say so' statement by an expert does not change the relationship between the parties." Ex. A, p. 10.

Neither Appellants nor Bybee attempt to expand, re-write or change the contractual relationship between the parties. By the time the replacement work was assigned to Tudor, it had completed its contract work and substantial completion had occurred. When considering the facts most favorably to Appellants, to rule that the replacement was governed by Tudor's contractual obligations is factually incorrect and in error.

Bybee's opinion that Mahaffy and Schneider needed to be involved in the replacement work is premised upon the fact that this was new work, outside of the scope of Tudor's contract, was substantively much different than the work it was originally hired to complete and was *only* necessary because of the flawed design. Thus, Mahaffy and Schneider cannot hide behind the language of the original contract to escape their duty to play a more pivotal role in the breaker replacement.

Likewise, Appellees cannot expand or re-write the contract to make Tudor responsible for the breaker replacement. Bybee exposed Mahaffy's efforts in this regard: "Mahaffy is intentionally being intellectually dishonest with Tudor

regarding Square D's admission of error and that Square D agreed to pay for a replacement circuit breaker." A-196. "Mahaffy's unilateral decision to require Tudor to be responsible for replacing the defective circuit breaker is outrageous and unprofessional. . . ." Id.

B. Bybee's Opinions Have Not Been Precluded

Mahaffy argues that Bybee's opinions were considered, rejected and deemed inadmissible from an evidentiary standpoint. The statement that, "Appellants have not appealed that part of the determination from the decision below" is incorrect and mischaracterizes the lower Court's ruling. Mahaffy AB at pp. 16-17.

Similarly, Schneider incorrectly argues that the lower Court ruled Bybee's expert opinions inadmissible which "effectively forecloses all of their arguments against Schneider on questions of duty (all of which are premised on their inadmissible 'expert')." Schneider AB at p. 8.

The lower Court improperly disregarded Bybee's opinions without a Daubert challenge or analysis of his qualifications, competency or bases for his opinions. Rather, the Court concluded only that expert opinion could not change the contractual relationship of Mahaffy and Tudor. Ex. A, p. 10. The Court's statements concerning Bybee's opinion and the contractual relationship of Tudor and Mahaffy should not limit or preclude Bybee's opinions regarding Schneider's improper conduct.

IV. MAHAFFY'S AND SCHNEIDER'S FAILURE TO DO MORE WAS A PROXIMATE CAUSE

The Court ruled, "Plaintiff did not receive his workplace injury because of the design flaw." Ex. A, p. 4. Appellants agree. Mahaffy and Schneider's negligence caused the design flaw which necessitated the replacement. Their joint negligence created a duty upon them which required coordinating and directing the replacement, and/or ensuring that it was carried out by qualified personnel. Both Mahaffy and Schneider breached their respective duties and it is their failure to take reasonable steps in replacing the breaker -- fixing their error -- that proximately caused MacDougall's injuries.

A. MacDougall's Conduct Was Foreseeable Because He Was Not Qualified

The lower Court erred by concluding MacDougall's conduct was a superseding cause and therefore was the sole proximate cause of his injuries. For the lower Court to determine superseding causation as a matter of law, it was required to find that reasonable minds could not differ that MacDougall's conduct was unforeseeable and therefore was the sole proximate cause of his injuries. The Court has taken a leap too far by confusing the doctrine of comparative negligence with conduct that is so abnormal, unforeseeable or extraordinarily negligent that, as a matter of law, it is a sole proximate cause of an accident. The fact that it may be

argued that MacDougall was comparatively negligent in proximately causing his injuries does not warrant disposition of his claims as a matter of law.

NFPA 70E, *Standard for Electrical Safety in the Workplace* (2004), requires that a "qualified person" be "trained and knowledgeable of the construction and operation of equipment or a specific work method and be trained to recognize and avoid the electrical hazards that might be present with respect to that equipment or method." §110.6(D)(1), A-172. With regard to a complex lock-out/tag-out procedure, the person in charge must be a "qualified individual who is specifically appointed with overall responsibility to ensure that all energy sources are under lockout/tagout and to account for all persons working on the job/task." §120.2(D)(3)(b), A-180.

MacDougall's employer addressed this issue when a dispute arose as to who was responsible for the cost to repair the equipment damaged in the MacDougall incident:

> Since the State of Delaware pre-purchased this equipment, we had no instructions on how this unit operated. To the best of our knowledge, if there was any training or instructions given on this unit, it was directly with the manufacturer of the pre-purchased equipment and the State of Delaware employees. Our knowledge on this equipment was limited to electrical connections; operation was by others. Training, instructions and warranty were directly between the State employees and the manufacturer. We do not know if training was ever provided to the State employees on the breaker in the pre-purchased equipment that re-energized, and if they had been trained, how could we be held responsible. Also, if the State was never given instructions, this could possibly be the responsibility of the generator manufacturer. Square

D [Schneider] possibly should have been involved in the breaker change-out.

AR-17.

Bybee's expert opinion is that MacDougall was unable to determine whether he was qualified to do the work because he was not trained on the specific electrical system or the exact equipment involved. In support of his opinion, Bybee, relies in part, on experience, industry standards and the requirements of NFPA 70E. "The [unqualified] employee doesn't have enough information or training or experience to determine whether they have enough information. And as I say in my report, if you can't recognize and understand the hazard, you can't guard against it." A-226, pp. 37-38.

Mahaffy and Schneider remain unwilling to accept the fact that MacDougall was not qualified. Ironically, Appellees' own experts *agree* with Tudor and Bybee. When asked whether MacDougall should have recognized the hazards and stopped working to replace the breaker and ask for assistance, Mahaffy's expert opined, "[s]ometimes you don't know what you don't know." A-299, p. 66.

Schneider's expert also opines that, more likely than not, if MacDougall's statements are to be taken as true, he was "not qualified to work on the Schneider Electric/Square D switchboard equipment due to his lack of knowledge about the

design of the equipment and his ability to recognize and avoid the hazards involved." A-346.[5]

The collective opinions of the experts support the fact that MacDougall's conduct was entirely foreseeable. Mahaffy and Schneider rely heavily on MacDougall's deposition testimony regarding his past experiences as a master electrician and hazards of electricity. MacDougall's post incident reflection about his experience, qualifications and electrical training is irrelevant to his ability to perceive the specific hazard he faced on June 14, 2008. Appellees' retrospective analysis on this issue is misguided. If he was properly qualified as required and understood the risk he encountered, the accident would never have happened unless MacDougall was intentionally trying to harm himself.

MacDougall was not qualified as required by NFPA 70E to complete Mahaffy's directive to shut down the system and replace the breaker. The Court's ruling that "[t]here is nothing in the record to suggest or infer that Tudor [MacDougall] did not know what it was doing as the contractor" is contrary to its own conclusions, the factual record and demonstrates that all inferences were drawn against MacDougall and in favor of the moving parties. Ex. A, p. 11.

[5] Lickiss stated he believed that MacDougall testified truthfully reinforcing his opinion that he was not qualified. A-376, p. 112.

B. Because Reasonable Minds Differ, Superseding Causation Cannot Be Decided as a Matter of Law

Appellees fail to apply the facts of this case to well established Delaware law on superseding causation. Both Mahaffy and Schneider ignore the holdings in Baker and Sims and entirely disregard Appellants' arguments regarding superseding causation.[6]

In Baker and Sims the Court ruled the plaintiffs were the sole proximate cause of their injuries because they both understood and appreciated the hazards, and consciously and affirmatively disregarded the known risk of harm. In Baker, the plaintiff purchased a door alarm that emitted an audible sound and the Court ruled it was unforeseeable that when the sound was activated it could "cause him to panic to such an extent that he would forget that he was unable to walk without assistance" which "directly caused his injuries." Baker, 2011 Del. Super Lexis 508, *10-11 (Del. Super. Nov. 15, 2011). In Sims, the Court ruled that the plaintiff appreciated the danger of driving her care in an unsafe condition but drove it anyway, knowingly disregarding hazards she understood. Sims, 2007 Del. Super. Lexis 561, *4 and *9, (Del Super. June 29, 2007) aff'd 945 A.2d 1169 (Del. 2008).

[6] Both cases are addressed at pp. 24-28 of the Opening Brief. The cases and the entirety of Appellants' superseding causation analysis are addressed at pp. 19-28.

The factual record and expert opinions establish that reasonable minds do, in fact, differ on the issue of whether MacDougall was properly qualified to understand and appreciate the hazards he confronted and protect himself against the harm. The lower Court has ignored the factual record and expert opinions regarding MacDougall's lack of qualification. Because MacDougall was not properly qualified and adequately trained, it was impossible for him to consciously disregard a known risk, thus making his conduct foreseeable. Appellants have demonstrated that there is an issue of fact as to whether MacDougall was the sole proximate cause of his injuries. On these facts, superseding causation cannot be decided as a matter of law.

WHEREFORE, for the reasons set forth in the Opening Brief and above, Appellants Rodney and Diane MacDougall respectfully request that this Honorable Court reverse the lower Court ruling and remand this matter for trial.

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