

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Darel K. Hardin v. Manitowoc-Forsythe Corporation and Columbus McKinnon Corporation

691 F.2d 449 (10th Cir. 1982) · No. Nos. 80-1522, 80-1562 · Decided November 3, 1982

SUMMARY

The United States Court of Appeals for the Tenth Circuit addresses whether Kansas comparative-fault law permits apportionment of fault among nonparty or “phantom” parties in a products-liability action. The court holds that comparison of fault was substantively permissible and that the issue concerning Manitowoc Engineering was tried by consent, but the inclusion of Lummus Company lacked adequate notice and evidentiary support. The judgment is reversed and the case is remanded for a new trial.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	McKay, Circuit Judge; Barrett, Circuit Judge; Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation
JURISDICTION	Federal
DECIDED	November 3, 1982
DOCKET	Nos. 80-1522, 80-1562
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff appealed from a judgment in a diversity products-liability action, and Manitowoc-Forsythe cross-appealed the denial of its motions for summary judgment and directed verdict.
STANDARD OF REVIEW	The court reviewed the trial court's determination that an issue was tried by consent for abuse of discretion. It reviewed the denial of summary judgment and directed-verdict motions for error under the applicable standards, while applying Kansas substantive law and the Federal Rules of Civil Procedure to procedural issues.
PRECEDENTIAL VALUE	published
PARTIES	Darel K. Hardin v. Manitowoc-Forsythe Corporation, Columbus McKinnon Corporation

TOPICS

products liability

comparative fault

civil procedure

appellate procedure

standard of review

PRACTICE AREAS

products liability

torts

civil procedure

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether Kansas law permits comparison of fault among defendants, the plaintiff, and nonparty 'phantom parties' in a strict-products-liability action.
2. Whether the fault of Manitowoc Engineering and Lummus Company was tried by consent under Federal Rule of Civil Procedure 15(b), permitting their inclusion as phantom parties despite the pretrial order.
3. Whether the district court abused its discretion by submitting Lummus Company's fault to the jury.
4. Whether the district court properly denied Manitowoc-Forsythe's motion for summary judgment based on the foreseeability of Hardin's alleged abnormal use of the jack.
5. Whether the district court properly denied Manitowoc-Forsythe's motions for a directed verdict concerning evidence that it sold the crane and jack.

HOLDINGS

1. Kansas law permits the comparison of the causal fault of nonparties with that of the plaintiff and defendants in products-liability actions, including strict-liability actions.
2. Kansas law requires comparison of all types and degrees of causal fault, including strict products liability, ordinary negligence, and the plaintiff's own fault.
3. The district court did not abuse its discretion in finding that the issue of Manitowoc Engineering's fault was tried by consent and that the pretrial order was thereby impliedly amended.
4. The district court abused its discretion by submitting Lummus Company's fault to the jury as a phantom party.
5. The entire case, rather than merely the apportionment issue, required retrial because the issues were so intertwined that a limited retrial would not adequately correct the error.
6. The district court did not err in denying summary judgment because reasonable minds could differ on whether Hardin's alleged abnormal use of the jack was reasonably foreseeable.
7. The district court properly denied the directed-verdict motions because Manitowoc-Forsythe's opening statement constituted a judicial admission that it sold the crane and jack involved in the case.

KEY QUOTATIONS

"We therefore reject plaintiff's contention that the fault of phantom parties cannot be compared under Kansas law." (¶ 13)

"We therefore hold that plaintiff did consent to the trial of the issue of Manitowoc Engineering's fault, thereby

impliedly amending the pretrial order.” (¶ 24)

“The trial court abused its discretion in ruling that plaintiff consented to the trial of the issue of the fault of Lummus.” (¶ 28)

“Since our judgment is that Lummus was improperly included as a phantom party, it is not necessary to reach the numerous other issues raised on appeal.” (¶ 31)

FACTUAL BACKGROUND

Hardin was injured in an on-the-job accident allegedly caused by a defectively designed push-pull jack attached to a Manitowoc crane. The crane was leased to Hardin's employer, Combustion Engineering, and the jack was manufactured by Columbus-McKinnon; Manitowoc-Forsythe allegedly sold the crane and jack. Hardin sued only Manitowoc-Forsythe and Columbus-McKinnon, while the jury was permitted to allocate fault among those defendants, Hardin, and several nonparties.

PROCEDURAL HISTORY

Hardin sued Manitowoc-Forsythe and Columbus-McKinnon for injuries allegedly caused by a defectively designed push-pull jack. The district court permitted the jury to compare the fault of the defendants, Hardin, and several nonparty or 'phantom' parties, including Manitowoc Engineering and Lummus Company. The jury assigned fault to Columbus-McKinnon, Hardin, Combustion Engineering, Manitowoc Engineering, and Lummus, but not Manitowoc-Forsythe; the district court entered judgment against Columbus-McKinnon for \$20,250. The Tenth Circuit held that Lummus was improperly submitted as a phantom party and ordered a new trial on the entire matter.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Grant a new trial on the entire matter. On retrial, the trial court must apply the court's interpretation of Kan. Stat. Ann. § 60-258a set forth in *Greenwood v. McDonough Power Equipment, Inc.*

CASES CITED

- *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)
- *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)
- *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980)
- *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981)
- *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978)
- *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978)
- *Forsythe v. Coats Co., Inc.*, 230 Kan. 553, 639 P.2d 43 (1982)
- *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982)

- *Monod v. Futura, Inc.*, 415 F.2d 1170 (10th Cir. 1969)
- *Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979), cert. denied, 445 U.S. 964 (1980)
- *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970)
- *Dell v. Heard*, 532 F.2d 1330 (10th Cir. 1976)
- *Hopkins v. Metcalf*, 435 F.2d 123 (10th Cir. 1970)
- *Branding Iron Club v. Riggs*, 207 F.2d 720 (10th Cir. 1953)
- *Simms v. Andrews*, 118 F.2d 803 (10th Cir. 1941)
- *Cook v. City of Price*, 566 F.2d 699 (10th Cir. 1977)
- *Cox v. Fremont County Public Building Authority*, 415 F.2d 882 (10th Cir. 1969)
- *Hicks v. United States*, 486 F.2d 325 (10th Cir. 1973), cert. denied, 416 U.S. 938 (1974)
- *Knudson v. Boren*, 261 F.2d 15 (10th Cir. 1958)
- *Gallegos v. Stokes*, 593 F.2d 372 (10th Cir. 1979)
- *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977)
- *Radio Corp. of America v. Radio Station KYFM, Inc.*, 424 F.2d 14 (10th Cir. 1970)
- *Kaye v. Smitherman*, 225 F.2d 583 (10th Cir. 1955), cert. denied, 350 U.S. 913 (1955)
- *Chesapeake & Ohio Railway v. Newman*, 243 F.2d 804 (6th Cir. 1957)
- *Greenwood v. McDonough Power Equipment, Inc.*, 437 F. Supp. 707 (D. Kan. 1977), aff'd, 687 F.2d 338 (10th Cir. 1982)