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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001338-MR

ROBERT NEIHOFF — APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-CI-00918

TICK BROTHERS, INC., D/B/A
TBI STEEL; CENTRAL STEEL AND
WIRE COMPANY; CHAPARRAL STEEL
COMPANY; AND CO-STEEL LASCO, INC. — APPELLEES

AND: NO. 2000-CA-001486-MR

ROBERT NEIHOFF — APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 98-CI-00918

BIRMINGHAM STEEL CORPORATION — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: In November 1997 while on the job as a metal worker for VMV Enterprises of Paducah, Kentucky, Robert Neihoff

suffered a compound fracture of his left femur when a steel bar he was attempting to fashion into a locomotive part broke and a portion of it sprang back against him. He brought suit for damages against several sellers and manufacturers of industrial steel, alleging negligence, breach of warranty, and strict liability. By summary judgments entered April 25, 2000, and April 28, 2000, the McCracken Circuit Court dismissed Neihoff's complaint against the named defendants on the ground, apparently, that he had failed adequately to allege which defendant was responsible. In appeal number 2000-CA-001338, Neihoff contends that he has narrowed the field of potentially responsible parties enough to shift the burden of proof to them and that the trial court erred by failing to so rule.

By summary judgment entered May 25, 2000, the trial court also dismissed "all claims" against Birmingham Steel Corporation, another manufacturer of industrial steel and a potential maker of the bar that injured Neihoff. Not long before the April summary judgments, Birmingham had been named a third-party defendant, and Neihoff had sought leave to add to his complaint a claim against it. In appeal number 2000-CA-001486, Neihoff contends that the trial court erred by denying, in effect, his motion to amend his complaint. The two appeals have been consolidated for our review. In both, we affirm.

No. 2000-CA-001338

Neihoff first filed his complaint in September 1998 against Tick Brothers, Incorporated (TBI), an industrial-steel merchant. He alleged that TBI had supplied the steel bar that

injured him. On December 3, 1998, Neihoff amended his complaint by adding claims against Central Steel and Wire Company (Central), a second steel supplier, and against steel manufacturers Chaparral Steel Company and Co-Steel Lasco, Incorporated. He now alleged that either TBI or Central had sold the bar to VMV and that, if TBI had supplied it, then one of the two named manufacturers had made it.[1] Trial was scheduled for July 2000, with discovery to be completed by the preceding May.

In February 2000, the trial court granted Central leave to file a third-party complaint for indemnity against Birmingham, the alleged manufacturer of steel bars Central had sold to VMV. At roughly that same time, all the defendants filed motions for summary judgment on the ground, among others, that Neihoff had failed to state a claim against any of them by failing to specify either the bar's manufacturer or its supplier. Relying on Bryant v. Tri-County Electric Membership Corporation,[2] the trial court granted the motions for summary judgment, thereby prompting this appeal.

The general rule, of course, is that the plaintiff in a tort action has the burden of proving not only that he or she has been injured, but also that the defendant committed a tort and that the tort caused the injury.[3] Generally, lack of proof of

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[1]Neihoff's amended complaint also included claims against manufacturers Bayou Steel Corporation and Nucor Corporation, but subsequent discovery showed that neither of these companies had made this particular bar.

[2]844 F. Supp. 347 (W.D.Ky. 1994).

[3]Perkins v. Trailco Manufacturing and Sales Company, Ky., 613 S.W.2d 855 (1981);
(continued...)

any of these elements defeats the plaintiff's claim. In particular, the plaintiff has the burden of proving legal causation, or proximate cause. Proximate cause has been defined in terms of the substantial factor test: was the defendant's conduct a substantial factor in bringing about the plaintiff's harm?[4] Causation may be proved by circumstantial evidence, but "there must be sufficient proof to tilt the balance from possibility to probability."[5]

In Bryant v. Tri-County Electric Membership Corporation, the court applied this general rule to a lumber business's claim for damages arising from a fire. The fire had been caused, the business alleged, by a defective electrical transformer. It admitted that it could not identify the particular transformer's manufacturer, but argued that it should not have to do so inasmuch as it had identified (and sued) one of six potential manufacturers and the manufacturer was in a better position than the plaintiff to provide evidence of the transformer's origin. In rejecting this argument and dismissing the claim against the manufacturer, the court cited Cox v.

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[3](...continued)
Huffman v. SS. Mary & Elizabeth Hospital, Ky., 475 S.W.2d 631 (1972); King v. Ford Motor Company, 209 F.3d 886 (6th Cir. 2000) (citing Morales v. American Honda Motor Company, Inc., 151 F.3d 500 (6th Cir. 1998). We shall limit our discussion to tort actions because that is the focus of both Neihoff's complaint and his appeal. As the cited cases indicate, however, the requirement that a plaintiff identify a responsible defendant applies to breach of warranty actions as well.

[4]Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980).

[5]Huffman, *supra,* 475 S.W.2d at 633.

Cooper,[6] a negligence action, in which the general rule with respect to causation was expressed as follows:

> Though it may be uncontroverted that either A or B or both were negligent and that such negligence caused C's injuries, a verdict against either one must be predicated on the jury's belief from the evidence that he in particular was negligent. The certain knowledge that one or both were guilty cannot sustain the burden against either individual. That burden begins with the plaintiff and remains with the plaintiff. If he does not succeed in convincing the jury that A was guilty, or that B was guilty, or that both were guilty, he is not entitled to a verdict. The practical result of the type of instruction under discussion is to shift the burden to the defendants, and that is wrong. The onus cannot be thrust upon the jury to decide something the plaintiff has failed to prove to its satisfaction.[7]

Neihoff concedes that he cannot identify the particular manufacturer or the particular supplier of the steel bar that injured him. There being no dispute about this lack of proof, we agree with the trial court that, under the general rule just discussed, Neihoff's claim must fail as a matter of law. Summary judgment was therefore appropriate.[8]

Against this conclusion, Neihoff observes that courts have recognized various exceptions to the general rule that a plaintiff must prove causation with particularity and argues that this case, too, is exceptional. He claims that all of the potential defendants are before the court and that the odds that a particular defendant either made or supplied the injury-causing

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[6]Ky., 510 S.W.2d 530 (1974).

[7]*Id.* at 534.

[8]Steelvest, Inc. v. Scan Steel Service Center, Inc., Ky. 807 S.W.2d 476 (1991).

instrument are greater here than they were in Bryant. These differences, he insists, should serve to shift to the defendants the burden of proving their freedom from responsibility. We disagree.

Although courts have fashioned exceptions to the causation rule, these exceptions are narrow. Doctrines such as concurrent liability, enterprise liability, or alternative liability, have justified relaxing the plaintiff's burden of proof in certain instances, but each such doctrine still requires the plaintiff to show that he was injured by a tortfeasor.[9] Where the plaintiff can show that there was more than one tortfeasor, but it is not clear which one or ones caused the injury, one or another of these doctrines will sometimes shift to each tortfeasor the burden of proving that his or her conduct did not cause the injury.[10] Here, however, Neihoff has not alleged that more than one of the defendants committed a tort. He is asking, not that several tortfeasors be required to sort out responsibility among themselves, but that utterly innocent defendants be required to prove their freedom from liability. There is no exception to the general rule in these

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[9]Dawson v. Bristol Laboratories, 658 F. Supp. 1036 (W.D.Ky. 1987); Smith v. Eli Lilly & Company, 560 N.E.2d 324 (Ill. 1990).

[10]Farmer v. City of Newport, Ky. App., 748 S.W.2d 162 (1988); Murphy v. Taxicabs if Louisville, Inc., Ky., 330 S.W.2d 395 (1959); Summers v. Tice, 199 P. 2d 1 (Cal. 1948). Neihoff also refers us to Ybarra v. Spangard, 154 P. 2d 687 (1944), an often cited application of the doctrine of *res ipsa loquitur.* In Dobbs, *The Law of Torts*, § 175 (2001), professor Dobbs cautions against confusing the causation exceptions with this doctrine. In any event, it is clear that the doctrine of *res ipsa loquitur* has no application to this case.

circumstances.[11] The trial court did not err, therefore, by dismissing Neihoff's claims against the named defendants.

2000-CA-001486

Nor did the trial court err by denying Neihoff's motion to add to his complaint a claim against Birmingham Steel Corporation. The pertinent limitations period had expired,[12] and CR 15.03, which in some instances allows an amendment to a pleading to relate back to the date of the original, does not apply. There is no indication that Birmingham received actual notice of Neihoff's suit within the limitations period; and Birmingham's relationships to the named defendants, including its relationship as independent supplier to Central Steel and Wire Company, were not such as to require the trial court to impute to Birmingham the notice given to the others.[13]

If Birmingham cannot be brought into the suit at this point, Neihoff contends, then Central Steel and Wire Company, Birmingham's alleged retailer, should not be allowed out. After all, Neihoff argues, additional discovery may yet show that Birmingham manufactured the injury-causing bar and that Central

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[11]Wood v. Eli Lilly & Company, 38 F.3d 510 (10th Cir. 1994); Tirey v. Firestone Tire & Rubber Company, 513 N. E. 2d 825 (Ohio Ct. of Com. Pleas 1986); Cousineau v. Ford Motor Company, 363 N. W. 2d 721 (Mich. App. 1985); Layton v. Blue Giant Equipment Company of Canada, 599 F. Supp. 93 (E.D.Penn. 1984); Sheffield v. Eli Lilly and Company, 192 Cal. Rptr. 870 (Cal. App. 1983).

[12]KRS 413.140 requires that personal-injury actions be brought within one year after the cause of action accrued. In this case Neihoff was obliged to bring his action within one year after the date of the injury.

[13]Nolph v. Scott, Ky., 725 S.W.2d 860 (1987); Reese v. General American Door Company, Ky. App., 6 S.W.3d 380 (1998).

supplied it. Does not justice, as well this state's cautious approach to summary judgments, require that the case go on?

Against this contention, Central relies primarily upon KRS 411.340, which shields wholesalers, distributors, and retailers from products liability "if the manufacturer is identified and subject to the jurisdiction of the court." Neihoff contends that the statutory protection should not apply to Central because Central did not identify Birmingham, its manufacturer, until the limitations period had expired. By that time, Neihoff claims, Birmingham had ceased, in effect, to be subject to the court's jurisdiction.

Were there any evidence that Central had improperly hampered Neihoff's timely discovery of Birmingham, we would be inclined to agree that Central had waived KRS 411.340's protection. But that is not the case. Neihoff was in a better position than any of the defendants to identify VMV's suppliers. He knew, the record indicates, or could have known of Central's role at any time, and it behooved him, of course, to inquire promptly into Central's sources. We have not been informed when, or even if, he made that inquiry, but in the absence of an allegation that he would have discovered Birmingham within the limitations period had Central not improperly interfered, we must presume that Central did not interfere. While KRS 411.340 may impose a duty on a would-be beneficiary of the statute to cooperate with the plaintiff, it does not require him or her to prove the plaintiff's case.

In these circumstances, therefore, we believe that KRS 411.340 applied. Birmingham was identified as the manufacturer of the steel Central supplied to VMV. And the fact that Birmingham had acquired a defense to Neihoff's attempt to add it to the case did not, within any ordinary meaning of the term, remove Birmingham from the trial court's jurisdiction. Central was thus entitled to the statutory protection. The trial court did not err, therefore, by awarding Central summary judgment even though it also denied Neihoff's motion to add Birmingham to the complaint.

In sum, we are sympathetic to Neihoff's plight. What good is a cause of action if the cost of proving the claim is as great as or greater than the remedy? This is a hard practical question confronting many plaintiffs as well as a hard theoretical question confronting our society. We do not pretend to have a general answer. In the circumstances of this case, however, we are not persuaded that Neihoff's plight justifies relaxing or shifting his burden of proof. He admits that he is unable to meet that burden. The trial court did not err, therefore, by granting the motions for summary judgment. Accordingly, in both appeal number 2000-CA-001338 and appeal number 2000-CA-001486, we affirm the judgments of the McCracken Circuit Court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

David V. Oakes
Saladino, Oakes & Schaff
Paducah, Kentucky

BRIEF FOR APPELLEE TICK BROTHERS INCORPORATED:

Laura L. Pamplin
Fine & Hatfield
Evansville, Indiana

BRIEF AND ORAL ARGUMENT FOR APPELLEE CHAPPARAL STEEL COMPANY:

Richard L. Walter
Boehl Stopher & Graves, LLP
Paducah, Kentucky

BRIEF FOR APPELLEE CO-STEEL LASCO, INC.:

J. David Boswell
R. Brent Vasseur
Boswell & Sims
Paducah, Kentucky

BRIEF FOR APPELLEE BIRMINGHAM STEEL CORPORATION:

Jonathon Freed
Wm. Robert Long, Jr.
Bradley and Freed, PSC
Paducah, Kentucky

ORAL ARGUMENT FOR APPELLEE BIRMINGHAM STEEL CORPORATION:

Jonathon Freed
Paducah, Kentucky

ORAL ARGUMENTS FOR APPELLEE TICK BROTHERS INCORPORATED:

Lin Shannon
Evansville, In

ORAL ARGUMENT FOR APPELLEE CO-STEEL LASCO, INC.:

R. Brent Vasseur
Paducah, Kentucky

ORAL ARGUMENT FOR APPELLEE CENTRAL STEEl:

Burke B. Terrell
Paducah, Ky