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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002295-MR

HAVEN STEEL PRODUCTS, INC. APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 03-CI-00084

CHRISTOPHER W. COWAN,
COURTNEY N. COWAN, AND
ANTHEM HEALTH PLANS OF
KENTUCKY, INC. APPELLEES

OPINION REVERSING
AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Appellant, Haven Steel, appeals from a judgment in favor of Appellees, Christopher and Courtney Cowan, in the sum of approximately $5.9 million in

[1] Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

compensatory and punitive damages. Haven raises several issues on appeal. For the reasons stated herein, we reverse and remand for proceedings consistent with this opinion.

In June 2002, Cowan traded with a friend for a M&W 15-foot model 1530 batwing mower, a product manufactured by Alamo Group.[2] The blades were worn out, so Cowan purchased replacement blades at G&G Motors and had a friend, Daniel Loy, install them. The blades were sold and packaged under the Alamo name but were manufactured by Haven.

On July 25, 2002, Cowan had been mowing his property for two hours when he took a break to use the bathroom. He stopped the mower but failed to press the PTO button, which stops the blades from spinning for 45 seconds. Almost immediately upon descending the tractor, one blade broke off the spinning batwing and slashed the bone just below Cowan's left knee.

Cowan's injuries were serious. His treating physician, Stephen Henry, testified that Cowan has difficulty bending his left leg and recommends a knee replacement in four or five years, which should eliminate the majority of Cowan's pain.

Although physically unable to do everything he could before the accident, the income from Cowan's farm has increased every year with his gross income increasing from $126,580 in 2000 to $324,951 in 2004.

Haven manufactures rotary cutter blades and other implement pieces for the agricultural industry. On average, it produces about 50,000 blades a month and sells the

[2] Alamo Group was a party in this action but has since settled with the Cowans.

blades to companies like Alamo, Bush Hog, and John Deere. Haven uses "5160 steel," the industry standard for blades.

When Alamo wants Haven to manufacture a blade, it submits an order with a print containing blade specifications, essentially dimensional criteria. Haven stamps the blade with the customer's symbol and part number and then places the blade on a conveyor line where it goes through a "high heat furnace" until the blade reaches a specific temperature. The blade is then thrown into "quench oil" for hardening. Finally, the blade is tempered in a draw furnace. Haven "quenched" Cowan's blade on July 16, 2001.

On April 7, 2003, Cowan filed suit against Haven and Alamo under the theories of strict products liability and negligence. All three parties hired expert metallurgists to perform destructive testing on the subject blade. As a result of the testing, Cowan's metallurgist, Dr. Alan Johnson, determined that the blade broke as a result of an internal "quench crack," which occurs during the blade heat-treating process. The jury agreed with Dr. Johnson's conclusion.

After a nine-day trial, the jury awarded Cowan approximately $5.9 million in compensatory and punitive damages. It apportioned 50% fault to Haven, 40% to Alamo, and 10% to Cowan. Judgment was entered on July 19, 2005, and this appeal followed.

Haven first argues that the trial court erred in denying its Rule 14 motion for a third party claim against Daniel Loy. We agree.

Pursuant to Rule 14.01, "[a] defendant may move for leave as a third-party plaintiff to assert a claim against a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." The purpose of this rule is "to avoid circuity of action and to settle matters in one litigation as far as practicable." *Jackson & Church Division, Yorkshipley, Inc., v. Miller*, 414 S.W.2d 893, 894 (Ky. 1967) (citing Moore's Federal Practice, Second Edition 503-05).

A trial court's ruling on a Rule 14 motion is reviewed on an abuse of discretion standard, taking into account the liberal policy underlying the rule. *Id*. When a third party complaint asserts issues of contribution among tortfeasors, the action should be allowed unless it would unduly complicate the issues before the jury. *Id*.; *Nally v. Boop*, 428 S.W.2d 607, 609 (Ky. 1968). Kentucky also holds that, absent a showing of inordinate delay or subterfuge, denial of a Rule 14 motion is an abuse of discretion. *See, e.g., American Hardware Mutual Ins. Co. v. Fryer*, 692 S.W.2d 278, 283 (Ky.App. 1984).

At the discovery deposition of Dr. Johnson on January 26, 2005, Haven learned that Daniel Loy was the only person in possession of pictures and other pertinent information regarding the blades involved in the accident. Subsequently, at Loy's deposition on February 15, 2005, photos were produced that should have been propounded by Cowan through discovery requests made by Haven in August 2003. Haven immediately filed a motion for leave to assert a third-party complaint against Loy. On March 15, 2005, the trial court denied Haven's Rule 14 motion, although the order is silent as to why.

Haven's Rule 14 motion was denied a full four months before trial. Moreover, the trial date had only been set one month before the Rule 14 motion was filed. There are no facts nor is any reasoning offered by the trial court to suggest that Haven was seeking relief as subterfuge or to delay trial. On the other hand, Haven was palpably prejudiced by the denial of its motion. All evidence and arguments of installation errors were rendered useless without Loy's joinder, and Haven was denied its right to apportionment of fault. *See* KRS 411.182. Therefore, under the totality of the circumstances, we find that the trial court abused its discretion in denying Haven's Rule 14 motion.

Haven's second argument is that the trial court improperly allowed Cowan to use evidence of irrelevant warranty claims. Haven moved *in limine* to exclude this evidence as irrelevant and unfairly prejudicial as for any purpose, but the court overruled its motion. Haven contends that it was deprived of its right to due process. We agree.

The standard of review for admission of evidence is whether the trial court abused its discretion. *Brewer v. Commonwealth*, 206 S.W.3d 313 (Ky. 2006). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* When considering the relevance of other product incidents in a product liability case, the analysis centers on whether the incidents are "substantially similar" to the accident at issue. *See Harris v. Thompson*, 497 S.W.2d 422, 429 (Ky. 1973). Specifically, "the accidents must have occurred under similar circumstances or share the same cause." *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989). The burden of demonstrating substantial similarity rests

squarely with the offering party. *Montgomery Elevator Co. v. McCulough*, 676 S.W.2d 776, 783-84 (Ky. 1984); KRE 104. When an offering party cannot make this preliminary showing of relevance, the evidence of other incidents or accidents must be excluded. KRE 402.

Because of the risk of prejudice and jury confusion, evidence of other accidents is only admissible if found relevant "to certain limited issues, such as the existence or causative role of a dangerous condition, or a party's notice of such a condition." *Harris*, 497 S.W.2d at 429. Indeed, "[t]he degree of similarity needed depends upon the purpose for which the evidence is offered, with a higher degree of similarity needed to prove dangerous propensities than to prove notice of product defect on the part of the manufacturer." Lawson, *The Kentucky Evidence Law Handbook*, §2.40 at p. 125 (4th.ed. 2004).

The trial court allowed Cowan to introduce evidence of eleven warranty claims, with documentation of only seven, submitted to Alamo between 1996 and 1999 but not passed on to Haven. Cowan introduced the warranty claims to: "(1) prove Alamo was on notice that Haven was making defective blades; (2) show the danger of the blade and explain the cause of Cowan's accident; and (3) contradict the testimony of Alamo's and Haven's corporate representative at trial." Therefore, Cowan needed to show a "high degree of similarity" in order to use this evidence to "show the danger of the blade and cause of Cowan's accident." However, Cowan failed to show the "high degree" of substantial similarity needed for this purpose.

First, the warranties were claimed between 1996 and 1999, and Cowan offers no explanation for the time gap between the claims and this incident in 2001. Additionally, the claims say nothing about quench cracks, and Cowan offers no proof that the incidents are related causally except to try and shift the burden to Haven to prove that they were not caused by quench cracks. This is an improper burden shift. If we permitted this to stand as meeting the burden of substantial similarity, we would be significantly undermining the foundation of our rules of evidence.

As it stands, there was no proof offered that the blades at issue in the warranty claims were causally linked to Cowan's blade, and Cowan admitted Haven had no notice of the warranties. Therefore, we find that the trial court abused its discretion in admitting this evidence for such broad purposes thereby severely prejudicing Haven.

Haven also contends that the court erred in admitting evidence of Haven's 1998 recall of a specific batch of mower blades. We disagree.

The recall bulletin was issued because a representative sample of the blades failed a "bend test" performed by Alamo, indicating a manufacturing defect. The recall involves the same blade type at issue in this case, and it is offered to prove that Haven inadequately responded to product failures of this kind and had a reckless lack of quality control in contradiction to the testimony of its corporate representative. This appears to meet the necessary "substantial similarity" requirement and is submitted for limited purposes. Therefore, we find that the court did not abuse its discretion in allowing the 1998 recall evidence.

Haven finally argues that the punitive damage award arose from unfairly prejudicial evidence and lacked the requisite element of malice. We need not address this argument as it must be reconsidered by the trial court in light of the evidence produced upon retrial.

Accordingly, the judgment of the Adair Circuit Court is reversed and remanded for proceedings consistent with this opinion..

STUMBO, JUDGE, CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: Because I conclude that there was no error or abuse of discretion by the trial court, I would uphold the verdict of the jury and affirm the judgment.

First, the majority holds that the court committed reversible error by not granting Haven Steel's CR 14 motion to allow it to file a third party claim against Daniel Loy. The majority bases reversal on this ground on the fact that Haven Steel did not learn until it deposed Dr. Johnson on January 26, 2005, that Loy had pictures and other pertinent information regarding the blades. However, Haven Steel knew from early in the litigation that Loy had installed the blades, and it immediately claimed that the accident was caused by his faulty blade installation, not by a defective product. Yet, it did not depose him until approximately four months before trial and then moved the court for a continuance. Furthermore, Haven Steel representatives were given the opportunity to photograph the blades themselves when they visited the Cowans's farm in September

2002, and they had the opportunity to learn other information known by Loy when they deposed him, which they waited until February 2005 to do.

The majority also states that evidence of errors in the installation in the blades was rendered useless when the court denied Haven Steel's motion. I disagree. Haven Steel's entire case at trial was predicated on proving that the blade broke as a result of improper installation. Haven Steel was in no way deprived of evidence and arguments in this regard, in my opinion, as the majority contends.

"It is within the sound discretion of the trial court to permit third party relief," *American Hardware*, 692 S.W.2d at 283, and I conclude that such discretion was not abused in this case. Haven Steel knew early in the case that Loy had installed the blades, and yet it waited until only four months before trial to depose Loy and then file its motion. Had the court granted the motion, the trial of the case would surely have been continued to allow Loy and his counsel to take discovery and prepare for trial.

Second, the majority opinion agrees with Haven Steel that the trial court erred in allowing the Cowans to introduce evidence of other warranty claims against Haven Steel. I disagree for two reasons. First, there is broad discretion in the trial court in regard to the admissibility of evidence of such matters. *See Bush v. Michelin Tire Corp*., 963 F.Supp. 1436, 1450 (W.D.Ky. 1996). I see no abuse of discretion here. Second, the evidence was admitted for other valid reasons. It was admitted against Alamo to show notice of product defect and to contradict evidence of witnesses from Haven Steel and Alamo that their companies' quality control processes work well.

Finally, the majority declines to address the punitive damages argument because it has been rendered moot by the reversal of the judgment on the two aforementioned grounds. While I agree that the issue is now moot, I believe the majority should have addressed it because it is likely to occur again in a second trial. Further, I conclude that the evidence was sufficient to warrant the punitive instruction to the jury. Lastly, the majority remands the matter of punitive damages to the trial court for further consideration. Since the verdict and judgment have been reversed, there is nothing for the trial court to reconsider.

In conclusion, I respectfully dissent and would affirm the jury verdict and trial court's judgment.

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