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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2000-CA-001867-MR

TOTAL DISTRIBUTION SERVICES, INC. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 95-CI-005211

CSX TRANSPORTATION, INC. APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND KNOPF, JUDGES.

EMBERTON, CHIEF JUDGE. Paul Tucker was an employee of Kentucky Auto Ramp Service whose duties included driving Ford Explorers from a holding area at the Ford Plant in Louisville and loading them onto automobile transport railcars owned by CSX Transportation. Ford Motor contracted with Total Distribution Services, Inc., to load the Explorers onto the railcars and Total Distribution subcontracted the entire job to Kentucky Auto

Ramp Service. Tucker was injured when an Explorer he drove onto a railcar slid from the railcar ramp.

Tucker filed a complaint against CSX, the parent company of CSX Transportation, and prior to trial settled his claim for $4.3 million.[1] Under a contract between CSX Transportation and Total Distribution, both were to share liability equally if they were found jointly liable for Tucker's injuries. The case went to trial on the question of allocation of fault between Total Distribution and CSX. The jury found Tucker one percent at fault; CSX Transportation nine percent at fault; Kentucky Auto Ramp forty percent at fault; and Total Distribution forty percent at fault. CSX Transportation obtained a judgment on its third-party complaint against Total Distribution for $2.15 million, an amount equal to one-half of CSX Transportation's settlement with Tucker. On appeal Total Distribution maintains: that it had no duty to supervise the employees of its subcontractor, Kentucky Auto Ramp; that the jury instructions were improper; that evidence was improperly admitted concerning seatbelt usage; and that the trial court erroneously excluded testimony regarding the cause of Tucker's injuries.

Kentucky Auto Ramp employees drove the Explorers from a transition lot adjacent to the Ford Plant to a small rail

[1] Tucker did not file a claim against Total Distribution or Kentucky Auto Ramp, workers' compensation being his exclusive remedy.

yard, then Kentucky Auto Ramp's drivers drove the automobiles up an adjustable ramp onto transport railcars called autotracks, which had upper and lower decks. Tucker alleged in his complaint that CSX Transportation failed to apply the handbrakes on one of the autotracks causing his injury. CSX Transportation maintains that even if its crew failed to set the handbrakes, it was Kentucky Auto Ramp's responsibility to check them before loading, and that it was Total Distribution's responsibility to ensure that Kentucky Auto Ramp was checking the handbrakes.

Total Distribution contends that as a matter of law it had no duty to Tucker. And, under the contract with Kentucky Auto Ramp, it could not supervise the procedures employed by Kentucky Auto Ramp's employees. The contract between Total Distribution and Kentucky Auto Ramp provides:

> **AUTOMOBILE TERMINAL OPERATION AGREEMENT:**
>
> 4. Independent Contractor.
>
> Contractor (Kentucky Auto Ramp Services, Inc.) shall be and remain an independent contractor with respect to performance of the Terminal Services and Contractor (KARS) shall have the full, complete and exclusive authority to employ and direct all persons engaged in the performance thereof. Terminal (Total distribution Services, Inc.) shall have no authority to supervise or direct the manner in which Contractor performs the Terminal services; provided, however, Terminal reserves the right to review Contractor's performance and to recommend changes to assure compliance with industry standards.

Despite the contractual language to the contrary, the record reveals that Total Distribution maintained a presence at the Kentucky Auto Ramp work site. It had an office at the site, a manager on duty, and gave Kentucky Auto Ramp its standard operating procedure safety rules. James Cumming, Total Distribution's manager, also testified that he was on the site on a daily basis and was familiar with the loading operation and function of the handbrakes on the autotracks. There was also evidence that Total Distribution had authority to contact CSX Transportation if there was a problem with the autotracks. In summary, the evidence indicates that Total Distribution maintained ability to control, and in fact exerted control, over the procedures of Kentucky Auto Ramp. The involvement of Total Distribution with Kentucky Auto Ramp's procedures was further evidenced by Mr. Cumming's actions subsequent to Tucker's accident when he inspected the railcar and instructed a Kentucky Auto Ramp employee to make sure the handbrakes were set.

Total Distribution relies heavily on King v. Shelby Rural Electric Cooperative Corporation,[2] where the court held that an owner was not vicariously liable for injuries suffered by employees of its independent contractor. In Caskey v.

[2] Ky., 502 S.W.2d 659 (1973).

Hammonds Constr., Inc.,[3] the scope of King was clarified. In that case the widow of an electrocuted worker filed suit against the subcontractor/employer as well as against the owner of the transmission lines. The court rejected the owner's contention that King precluded the action, stating that: "The opinion does not hold that an employee of an independent contractor may not recover from the owner in those instances where the negligence of the owner causes the injury or death of the employee of the independent contractor."[4] King does not preclude recovery from a negligent independent contractor but only precludes vicarious liability.

Total Distribution is correct in its general assertion that it cannot be liable to either Kentucky Auto Ramp or Tucker, and consequently, could not be made to share in liability with CSX Transportation unless it had a duty to either Kentucky Auto Ramp or Tucker. Without an obligation or duty owed the plaintiff or defendant, there can be no liability for negligence.[5] However, under Restatement (Second) of Torts, §324A, Total Distribution, despite contractual recitations to the contrary, can be liable if it assumed a duty to be performed by another to a third party and did so without exercising

[3] Ky., 536 S.W.2d 449 (1976).

[4] Id. at 451.

[5] Kirschner v. Louisville Gas & Electric Co., Ky., 743 S.W.2d 840 (1988).

reasonable care. In Thomas v. Tennessee Valley Authority,[6] an employee of the J. A. Jones Company was killed when he fell through a cable guardrail while working on a steam plant that Jones was constructing under a Tennessee Valley Authority contract. Shortly before the accident a TVA inspector inspected the project and addressed the guardrails and open-ended scaffolds with Jones's safety engineers. Although the contract between TVA and Jones stated that none of Jones's employees were those of TVA, the court noted the Restatement (Second) of Torts, §324A had been cited with approval in Kentucky cases, and despite contract language to the contrary, TVA could be liable.[7]

In this case, there is ample evidence upon which the jury could conclude that Total Distribution assumed a duty to Kentucky Auto Ramp's employees, including Tucker. Unlike the situation in King where the contractor had no control over the activities of its independent contractor, Total Distribution maintained a presence on the work site, supplied safety procedures, and was consistently present when the Explorers were loaded. We find no error in the trial court' failure to direct a verdict in favor of Total Distribution.

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[6] 769 F.2d 367 (6th Cir. Ky. 1985).

[7] Id. at 370. No liability was found because TVA did not assume a duty to correct the hazard.

Total Distribution also contends that the trial court erroneously excluded the testimony of Dr. Rodney Chou regarding the effect of Tucker's failure to wear a seatbelt and who testified by avowal that Tucker would have sustained the same injuries had he been wearing a seatbelt. Dr. Chou acknowledged that he had not conducted personal studies on seatbelt usage and was not aware of any such studies conducted by other experts. Dr. Chou specializes in physical medicine and rehabilitation and because of his work demonstrated a general knowledge of seatbelt usage and the prevention of spinal cord injuries. However, he demonstrated no special knowledge, skill, experience, training, or education in the area of seatbelts.[8] We find no abuse of discretion in excluding his testimony.[9] In contrast, CSX Transportation's expert, Dr. Steven Batterman a forensic engineer and biomechanics consultant, has a long list of work in the field of automotive safety, including seatbelts. He testified that if Tucker had been wearing a seatbelt he would not have sustained the severe injuries he sustained. We find no error in the admission of Batterman's testimony.

[8] Kentucky Rules of Evidence (KRE) 702.

[9] Transit Authority of River City (TARC) v. Vinson, Ky. App., 703 S.W.2d 482, 484 (1985).

Total Distribution argues that Tucker's use of a seatbelt was irrelevant because KRS[10] 189.125 requires the use of a seatbelt only on a public roadway, and at the time of his accident, Tucker was on the grounds of the Ford Motor Plant. CSX Transportation's argument at trial was that Total Distribution was negligent in not instructing Kentucky Auto Ramp's employees on the use of seatbelts and did not relay on KRS 189.125(c). It introduced evidence of the Ford Explorer's operating manual recommending the use of seatbelts and that Total Distribution's operating procedures stated it would comply with all of the manufacturer's rules pertaining to vehicle operation. Total Distribution's contention that the opportunity to use the seatbelt was obvious so that Tucker had no need for instruction as to its use is without merit. Total Distribution cites Straw v. Esteem Construction Co.,[11] for the proposition that a general contractor is not liable for a patent defect on the premises but is required to take precaution against latent dangers which the contractor's employees could not have reasonable discovered. The present case is not a premises liability case and the issue is whether the use of a seatbelt under the circumstances was a safety precaution that Total

[10] Kentucky Revised Statutes.

[11] Wash. App., 728 P.2d 1052 (1986).

Distribution should have instructed Kentucky Auto Ramp's employees to undertake. We find no error.

Having considered the arguments raised by Total Distribution, we affirm the judgment of the trial court.

ALL CONCUR.

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