

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002456-MR

DAVID ALLEN HESS

APPELLANT

v. APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NO. 00-CI-00005

BARNES LUMBER AND HARDWARE, INC.

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, SCHRODER, and TACKETT, Judges.

COMBS, JUDGE: David Hess appeals the October 18, 2001, summary judgment and order of the Pendleton Circuit Court dismissing his complaint against the appellee, Barnes Lumber and Hardware, Inc. (Barnes Lumber). Having reviewed the record, we vacate and remand.

On January 16, 1999, Hess sustained a serious injury to his right hand when it was trapped in a hydraulic wood splitter that he had rented from Barnes Lumber. At the time of the accident, Hess was in front of the machine in a kneeling position

C in a manner contrary to the manufacturer's recommendation that the operator stand at the back of the machine by the controls. Hess's hand became caught in the stripper bar as it was retracting, and he could not reach the controls to stop the continued movement of the bar in time to prevent his injury. The record reveals that prior to Hess's injury, the manufacturer had learned of several incidents involving the wood splitter where injuries occurred to its users who got caught in the stripper bar. Consequently, the manufacturer sent a service bulletin warning all registered owners of the wood splitter to remove the stripper bar. However, because Barnes Lumber had not purchased the wood splitter from the manufacturer, it alleged that it was not aware of any defect and had not, therefore, made the suggested modifications to the machine.

Hess filed a complaint in the Pendleton Circuit Court naming as defendants both Barnes Lumber and the manufacturer of the equipment, Rohr Manufacturing Group, Inc. He alleged that his injury was the Adirect and proximate result@of

the defective and/or improper manufacture,
construction, design, formulation, assembly,
warning, instructing, marketing, advertising,
packaging, labeling, assembly, and/or testing
. . . of the Ram Hydraulic Wood Splitter[.]
(Emphasis added.)

Hess subsequently settled his claim with the manufacturer.

After taking several discovery depositions, Barnes Lumber moved for summary judgment, arguing that: (1) it could

not be liable under the Kentucky Products Liability Act, KRS¹ 411.300 et seq., because it was not the manufacturer of the wood splitter; (2) it did not warrant that the machine was not in a defective state when it leased it to Hess; even if it had, Hess~~s~~ son acknowledged that the log splitter was in good operating condition when he returned it the day following the injury; (3) there was no evidence that the wood splitter was defective or that Barnes Lumber knew or should have known that it was in a defective condition; and (4) Hess~~s~~ contributory negligence barred any recovery under the Kentucky Products Liability Act.

In his response to the motion for summary judgment, Hess argued that his claim against Barnes Lumber was not predicated on any statute but was based on common law negligence theories. He alleged that Barnes Lumber was negligent in two respects: (1) in failing to instruct him properly on the operation of the machine and (2) in failing to register the equipment with the manufacturer so as to enable the manufacturer to notify the rental company of any defects or recalls. The trial court granted the motion for summary judgment without explanation or elaboration.

Our standard of review on appeal of a summary judgment focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving

¹Kentucky Revised Statutes.

party was entitled to judgment as a matter of law. CR² 56.03; Scifres v. Kraft, Ky.App., 916 S.W.2d 779 (1996). Mindful that a summary judgment is to be cautiously granted, we must independently determine whether the record supports the judgment. We must review the evidence in the light most favorable to the non-moving party. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). We will uphold the grant of a summary judgment only when it appears--as a matter of law--that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Moore v. Mack Trucks, Inc., Ky.App., 40 S.W.3d 888, 890 (2001).

In his appeal, Hess relies on Lloyd v. Lloyd, Ky., 479 S.W.2d 623 (1972), and Burke Enterprises, Inc. v. Mitchell, Ky., 700 S.W.2d 789 (1985), for the principle that as a supplier of dangerous equipment, Barnes Lumber had a duty to provide him with instructions for the proper use of the machine and to warn him of its potentially dangerous condition. He contends that Barnes wholly failed to fulfill that duty. Through the testimony of Michael L. Rohrbacher, the former owner of Rohr Manufacturing Group, Inc., Hess introduced evidence that he was unknowingly failing to use the wood splitter in a manner consistent with the manufacturer's recommendations. He maintains that the employee who assisted him with the rental merely made certain that there

²Kentucky Rules of Civil Procedure.

was gasoline in the machine and demonstrated how to start and kill the engine. He testified that he was not given any written materials explaining the proper manner of operation of the machine nor any detailed verbal instructions. He contends that if he had been provided with the instructions, ~~He~~ would not have been crouching on his knees in front of the machine and that he very likely would have avoided injury.

Barnes Lumber argues that it was entitled to summary judgment because it satisfied its duty to instruct Hess in the proper manner of operating the wood splitter. It contends that at the time Hess rented the machine, he told a Barnes employee that he was familiar with wood splitters C thus making any further explanation unnecessary. Barnes also points to several prominent stickers on the machine itself as providing sufficient warning of the dangers inherent in operating the machine. In short, Barnes Lumber contends that Hess's injury was solely caused by his own negligence rather than by any failure or omission on its part.

Our examination of the record does not support Barnes's contention that it was in any way discouraged, prevented, or cut short from providing Hess with instructions on how to operate the machinery properly. Hess testified that he had used other types of wood splitters in the past and that he told the employee at Barnes Lumber that he had previously used wood splitters. However, there is no evidence that he refused any instructions

from the employee of the rental supplier or that he indicated in any manner that he was not interested in being informed about the proper use of that particular machine. Furthermore, despite the presence of various warning labels on the machine, we believe that whether Barnes Lumber gave Hess sufficient instructions and warnings to satisfy its duty to the users of its equipment presents a classic question of material fact for a jury to decide rather than being prematurely disposed of by means of a summary judgment. See Burke Enterprises, citing *Restatement (Second) Torts Sections 388, 390 and 408*, 700 S.W.2d at 793-94.

Finally, Hess argues that Barnes Lumber was negligent in failing to register the wood splitter with the manufacturer. The primary purpose for registering such products is to obtain warranty information. Although common sense would dictate that an owner of a product with a warranty would attempt to register it with the manufacturer, Hess has not cited any case law or statutory law in support of his assertion that a supplier has a duty to so register such a product, and our own research has uncovered no pertinent precedent on this issue.

The summary judgment of the Pendleton Circuit Court is vacated, and the matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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