4-26-1977

Cameron v. District Court In and For First Judicial District

IN THE SUPREME COURT IN AND FOR THE

STATE OF COLORADO

Case No. ~~27956~~
27596

ROLAND DALE CAMERON,	)	
	)	
Petitioner,	)	Original Proceedings
	)	Trial Court:
vs.	)	
	)	Roland Dale Cameron, Plaintiff,
THE DISTRICT COURT IN AND	)	
FOR THE FIRST JUDICIAL DISTRICT	)	vs.
OF THE STATE OF COLORADO and	)	Direct Sales Tire Company, et al. Defendants.
THE HONORABLE GEORGE G. PRIEST,	)	
ONE OF THE JUDGES THEREOF,	)	
	)	Jefferson County District Court
Respondent.	)	Civil Action No. 46823, Div. 2

REPLY

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April 22, 1977

IN THE SUPREME COURT IN AND FOR THE

STATE OF COLORADO

Case No. 27956

ROLAND DALE CAMERON, Petitioner, vs. THE DISTRICT COURT IN AND FOR THE FIRST JUDICIAL DISTRICT OF THE STATE OF COLORADO and THE HONORABLE GEORGE G. PRIEST, ONE OF THE JUDGES THEREOF, Respondent.	)	Original Proceedings Trial Court: Roland Dale Cameron, Plaintiff, vs. Direct Sales Tire Company, et al. Defendants. Jefferson County District Court Civil Action No. 46823, Div. 2

REPLY

COMES NOW the Petitioner, ROLAND DALE CAMERON, by and through his attorneys, the law firm of LEVINE, PITLER & WESTERFELD, P.C., and hereby make reply to the answer of the Respondent.

That contained in the answer of the Respondent is a statement of such a form that Petitioner respectfully disagrees with the assertions and therefore sets forth a brief statement.

Petitioner herein filed his Complaint for personal injuries grounded on the concept of negligence, strict liability and breach of contract resulting from injuries he sustained when a defectively manufactured tire which had been used and retreaded was mounted to a rim. Because of a defective bead, the tire gave way and was propelled by the force of air escaping from the fissure against the Plaintiff, breaking and tearing the bones in his leg, arm and back, and rendering him unconscious.

The tire was originally manufactured for passenger use by the Third Party Defendant, Uniroyal, Inc. The tire was distributed by National

Cooperative which was a distributor wholesaler and was sold somewhere in the United States to an ultimate consumer. The tire was used, and when the tread was worn down it was sold and recycled by Kearns Tire Company. A new tread (re-tread) was placed upon it to be used as a snow tire.

Kearns Tire Company is not a retail outlet, but rather is a manufacturer specializing in retreading tires. The tire after going through the retreading process was sold to the Defendant, Direct Sales Tire Company, who then sold the tire, along with a mate, on August 10, 1972, to the Plaintiff.

It is asserted by the Petitioner that Kearns Tire Company failed to properly inspect this tire and did improperly and defectively retread same and distributed this defective product in the stream of commerce. Plaintiff further asserts that Direct Sales Tire Company gave implied warranties of merchantability as well as those contractual warranties described in the Uniform Commercial Code of the state of Colorado.

It was further alleged said tire was originally manufactured improperly, in that the bead which is composed of metal wires, was defective and subject to injuring persons. As a direct and proximate result of the actions of the Defendants and Third Party Defendants, the Plaintiff has sustained grievous bodily injury.

Plaintiff was a carpenter at the time of the occurrence and was also selling real estate. Because of the injury he was no longer able to maintain his employment and during the course of these proceedings has been attending Metropolitan State College in order to obtain sufficient education to take on a new and different occupation. However, to the date of this Reply, the Petitoner has not been able to be gainfully employed and has undergone two (2) or three (3) surgeries and will require some surgeries in the future due to the nature and the way his bones are presently fusing.

On the day in question the Petitioner took the tire and went

to Goudge's Phillips 66 station. The Petitioner had worked their previously, and was an accomplished mechanic. He had changed tires before on the equipment at the station, and pursuant to his usual conduct he entered the station with the tires and mounted one without incident and then commenced to mount the other. In the process of mounting, the Petitioner discovered that the bead did not fully set to the rim. He removed air and applied various and different techniques which were common in the industry. The tire was standing on the ground, after being bounced on the floor with approximately 15 pounds of air in it with a valve core in the stem, the Petitioner then put more air into the tire. The Petitioner asserts he had the air chuck against the valve core stem for no more than 5 seconds and no more than 30 pounds, total, was in the tire. At this time the bead wires which are wrapped in a very hard sleve of rubber and nylon gave way. The tire split open and the air escaped. The tire literally leaped off of the ground, being propelled by the jet stream of air, striking the Petitioner in the cheek, arm and leg, hurling him bodily through the air against the wall and cabinet on the other side of the room. He was rendered unconscious and rushed to the hospital.

As stated at Page 2 of the Answer, prior to the initiation of suit, the Petitioner allowed the Defendant, Kearns, through its insurance carrier, to examine the tube, tire and rim. These items were shipped to O. Edward Kurt and Associates, but they were physically examined in Denver, Colorado by William Bice. Of course the Court by virtue of the Petition of the Petitioner has the report of Edward Kurt, and attached herein as Exhibit F is the updated report of William Bice.

As the Court can observe, the crucial question which is presented by all of the expert opinions is whether or not the bead failed because of an inherent weakness in the tire, or because the Petitioner pumped too much air into said tire.

The quoted expert opinion at Page 2 of Respondent's Answer comes from a report of O. Edward Kurt & Associates. The person who

examined said tire, however, was William Bice, and he disagrees with the report which was later written by O. Edward Kurt. O. Edward Kurt did not examine said tire. Hence, those paragraphs quoted by the Respondent fail to take into consideration the subsequent report of Mr. Bice as represented by Exhibit F herein.

The bead, in this particular case, was of a tubeless tire. However, to insure against leakage a tube may be used with said tire without any adverse or ill affect. In either a tube or tubeless tire the bead portion of the tire must properly seat against the flange of the rim, and hence the bead is one of the more crucial areas of the tire. Injuries caused by defective beads resulting in the tire exploding are common.

At Page 4, the Respondent describes the chronology of the Pre-Trial. The matter of the examination of the tire by Mr. Mangone, was brought to the attention of the Court, not by the Plaintiff, but rather by Mr. Borrows representing Kearns Tire Company. The objection to the examination was seconded by Gordon Greiner who represents Uniroyal, Inc.

LAW AND ARGUMENT

The arguments set forth by the Respondent as to the issue fails to take into consideration the fact that the testing desired by the Petitioner would be more accurate and would eliminate the probabilities which all other experts are using in reaching their conclusion. From the reports of expert witnesses which have been submitted, it is clear the parties are hypothesizing as to the cause of the break. No person either by previous report or by affidavit now submitted asserts metallurgical testing would not yield the result of accurately describing the exact reason why the break in the wire. It is clear, and a fact to which this Honorable Court may take judicial notice, metallurgical testing is the most scientific method to determine why metal fails. Not one of the expert witnesses which have submitted reports for any party to the proceedings at the Trial Court level claim or assert that they have any metallurgical background.

The affidavits which are submitted in the Answer are conclusionary in form. If metallurgical testing will more definitely determine why the metal broke, then to deny the Petitioner of the right to present the more accurate evidence would clearly be improper. No where is it denied by the Respondent metallurgical testing would yield the most accurate result. In fact, the Response is without one statement concerning the evidentiary value of metallurgical testing. Instead the objections are based upon conclusions which are submitted in affidavits without any underlying reliability. Also the objections are grounded upon the view that the trial date is too near. That argument no longer is supported by the facts.

Can it be seriously contended that photographic science has not sufficiently reached the point to where the jury may be able to observe the exact condition of the tire as it existed before the metallurgical testing? Can it be seriously contended as in the affidavits that the photographs could not be used to demonstrate the exact condition of the tire? Medical books are replete with finite human conditions of almost infinite variety all well documented and portrayed in photographs. Photographic science has reached such a state that with a proper lens, camera and lighting almost any surface can be reproduced to virtually an exact detail. Clearly the argument is without merit.

The arguments that the request was not timely, igonores the issues. In the first instance, there was no request on the part of the Plaintiff, your Petitioner herein, to make said test. It was a matter of courtesy that counsel for the Defendant were informed so that they could have whatever expert they desired present when the testing took place. This is the property of the Petitioner. It was the objection of the Defendant, "seconded" by the Third Pardy Defendant, Uniroyal, Inc., that prevented the test from taking place.

The Petitioner had delivered this tire to every party who desired it. Both Defendants and Third Party Defendant, Uniroyal, Inc.,

had examined it. The other Third Party Defendants did not deem it necessary. The last test being conducted by the Defendant was in March of 1977. The tire had just been returned to the Petitioner and he had given every other party to this action an opportunity to examine it. Finally, the bead wire test was the last test to be performed to which the Petitioner had a right. It would have been done much earlier had the other parties completed their examinations sooner. Again, the Petitioner did not request the Court's permission, the Court stopped the Petitioner based upon the request of the Defendants herein. Any delay or any prejudice was due to the Defendants' own actions. The Respondent herein improperly sustained an objection in derogation of his jurisdictional or discretionary powers.

The so called argument that the Defendants and Third Party Defendants would have inadequate time to prepare is clearly not correct. There was no amendment to the Complaint; the defective manufacturing of the tire has been asserted through out the entire proceedings. From the very begninning the first report by Direct Sales Tire Company through its expert indicated that there was a defect in the manufacturing process. It is long been the majority opinion that the defect in the product anywhere in the chain of distribution renders all parties in that chain strictly liable.

Hence, the Respondent's position as shown in Objection 3 at Page 4 is truly unintelligible. As stated, the bead wire is encased in rubber prior to vulcanization and is compressed. During the process the wire is pushed inward and is an intrical part of the tire itself.

It is asserted that Toll v. City and County of Denver, Colo. 340 P.2d 862 (1959), confers jurisdictional authority over the item upon the Respondent Court. Toll, supra, involved a condemnation proceeding wherein the City and County of Denver attempted by way of condemnation to condemn certain flowage easement and channel improvement right in the South Boulder Creek upon lands owned by the Plaintiff, Toll. The

movant before this Court asserted that the Gilpin County District Court did not have jurisdiction when the condemning authority is the City and County of Denver, since the District Court in and for the County of Denver would be the only proper Court. This Court rejected that argument and discharged the Rule. The case has absolutely no bearing or meaning to the instant problem except it supports the concept of original proceedings in the nature of prohibition to restrain a District Court from acting in excess of its jurisdiction or abusing its discretionary power.

The question presented was not one of discovery. The issue is whether or not the Trial Court had the power to prevent a test. The Defendants had completed their discovery and were advised of the final test. The case does not present a question to prevent the destruction or alteration of evidence as asserted by the Respondent, but rather whether the Court could prevent a test which will lead to evidence of why the metal bead failed. It is, in effect, the Respondent's Order, which would have prevented the evidence from being discovered. It was the objection of the Defendants at the Trial Court level which sought to prevent evidence from being discovered and disclosed. The tire was not in evidence; it was not a matter of discovery, and it was not within the Trial Court's jurisdiction.

Respondent cites Scully v. Farragut Refrigeration Co., 140 N.Y.S. 2d. 614 (1955), as supportive of his argument. The case comes out of the Supreme Court of the State of New York concerning a Plaintiff who was injured by a chain which broke. The Plaintiff was seeking possession of the chain, and the Defendant refused to grant it to the Plaintiff for the purpose of testing. The Court granted the motion for discovery, but stated that the Plaintiff could not alter the Defendant's evidence unless said alteration would be necessary to determine exactly the source of the defect. Besides, Scully, supra, being supportive of the Petitioner's argument in the instant case, it also shows that the jurisdictional limitation

of the Court is relative to discovery, and which is not the facts in the instant case. That is, the Court may compel a party to produce evidence pursuant to rules of discovery, but the Court has no jurisdiction to do acts which would limit the discovery of evidence. In Scully, supra, the property in question was within the jurisdictional ambit of the Court because of discovery rules of procedure. Whereas in the instant case at Bar the discovery had been completed by the Defendants and they were invited to participate in the final test. In Scully, supra, the Court also held that the search was to find out the source of the defect and an alteration of the chain would be permitted if that would produce evidence showing the reason for the failure.

Sarver v. Barrett Ace Hardware, Inc., 63 Ill. 2d. 454, 349 N.E. 2d. 28 (1976), is supportive of the Petitioner's position, and is recited by the Respondent. In Sarver, supra, the Court permitted "destructive" testing (again of the Defendant's evidence after request of the Plaintiff) of the defective hammer saying that it was permissible when it was the feasible and reasonable way to determine the cause of the defect. The Court further held that if such testing was to take place, all attorneys and other experts should be made aware of the testing date so that they could prepare and be in attendance to draw their own conclusions about the testing. Sarver, even if used to support jurisdictional right in the Respondent, which it does not, is distinguishable in that jurisdiction was grounded upon discovery which is not the facts of the instant case.

The citation of Apollo Tire, Inc. v. United Bank Of Lakewood National Association, 531 P.2d 976 (Colo. App. 1974) and Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967), shed no light in the instant case. Therefore, in conclusion it is respectively submitted that in the first instance the Respondent Court had no jurisdiction over Plaintiff's evidence that was not a matter of discovery, and even if it could be argued that there was proper jurisdiction, such jurisdictional authority was blatantly abused in failing to allow a test which would be determinative as to the cause of the defect. The arguments concerning delay or the like

are not dispositive. There is no trial date to which the Respondent refers. Nor are there new issues being injected into the trial proceeding. Certainly, the Defendants at the trial level may have any expert witness available to conduct the test side by side with Mr. Mangone.

For those reasons it is respectfully requested that the Order to show cause which was issued herein be made absolute and that Petitioner receive such other and further relief as the Court deems just and proper under the circumstances of the case.

Respectfully submitted this 25 day of April, 1977.

LEVINE, PITLER & WESTERFELD, P.C.

By _____
Robert L. Pitler
Attorney For Petitioner
Registration No. 1139
1150 Delaware Street
Denver, Colorado 80204
Telephone: 892-5891

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the above and foregoing, Reply, correctly addressed and postage prepaid, to the following:

Clerk of the District Court
County of Jefferson
Hall Of Justice-Room 200
Golden, Colorado 80419

The Honorable George G. Priest
Jefferson County District Court
Hall Of Justice
Golden, Colorado 80419

Mailed this 25th day of April, 1977.

_____

TIRE CONSULTANT
William H. Bice
467 RUDY ROAD
MANSFIELD, OHIO 44903
419/529-6989

March 24, 1977

Attorney Barclay L. Westerfeld, Esq.
Number One Delaware Plaza
1139 Delaware Street
Denver, Colorado 80204

RE: Your Client File # 765

Dear Attorney Westerfeld:

As you requested I reviewed the copy of the report titled "Retreaded Passenger Tire with Broken Bead Wires" referenced " Our File 74-008 May 13, 1974 O. Edward Kurt and Associates".

It is my recollection that Dr. Kurt prepared the report as presented although I gathered the background information and probably wrote an initial draft.

The conclusions reached are therefore subject to modification by me and these modifications are as follows:

1. The serial side bead of this tire was partially broken or weakened during the vulcanization of the tire in the tire factory.

4. Initial inspection and final inspection by retreader with bead only partially broken or weakened would not have detected such condition.

6. Subsequent to retreading, when the tire was mounted on the involved rim, it was subjected to air pressure which caused the remaining wires to break thus permitting the tire to blow off the rim.

I have deleted Conclusion No. 7 and am in agreement with Conclusions 2, 3, and 5 as they stand.

If you have any questions with regard to this letter please let me know.

Very truly yours,

William H. Bice

William H. Bice

EXHIBIT F