

Denver Law Review

Volume 66
Issue 4 *Tenth Circuit Surveys*

Article 38

February 2021

Torts

Denver University Law Review

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Recommended Citation

Denver University Law Review, Torts, 66 Denv. U. L. Rev. 807 (1989).

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TORTS

Amoco Production Co. v. Jicarilla Apache Tribe, 842 F.2d 1200

Appeal from district court's determination that appellant failed to state a cause of action against handgun importer for death and personal injury resulting from criminal use of gun. Affirmed.

The Tenth Circuit held that appellant failed to show the handgun was defective for purposes of establishing strict product liability. Sellers of handguns are not liable under New Mexico's interpretation of the ultrahazardous activity doctrine and there is no duty on a manufacturer of firearms not to sell its products merely because there is potential that such weapons may be used for criminal purposes. To apply the Maryland Supreme Court's doctrine of strict product liability for "Saturday Night Specials" to New Mexico would amount to an act of judicial legislation, particularly when there is no other guidance from local courts.

Platte Pipe Line Co., v. United States, 846 F.2d 610

In 1982, Platte, a carrier of crude oil, suffered a leak of about 3,880 gallons from its pipelines between Illinois and Wyoming. Platte filed a complaint against the United States in an attempt to recover cleanup costs and other expenses. Basing its claim on the Federal Tort Claims Act (FTCA), Platte claimed the United States was independently negligent and vicariously liable for the rupture of the pipeline. The district court dismissed the action.

The Tenth Circuit ruled that if Platte were allowed to bring an action for cleanup costs under the FTCA the intent of Congress, as reflected in the Clean Water Act, would be frustrated. Therefore, the dismissal of the cleanup was not affirmed, however, Platte's non-cleanup costs were cognizable under the FTCA. Because the district court did not differentiate among Platte's various claims the posture of the case precluded appellate review of the merits of Platte's FTCA claims. Dismissal affirmed in part and reversed in part.

Zaccardi v. Zale Corp., 856 F.2d 1473

Appellant Zaccardi was discharged from his position with Zale for refusing to sign a consent form for a polygraph examination. Zaccardi claims that Zale violated New Mexico public policy by firing him for refusing to sign a form that contained false statements. He also claims Zale breached his employment contract by failing to have his discharge approved by senior management as required in a personnel policy manual.

The district court granted Zale's motion for summary judgment on the wrongful discharge claim, denied Zaccardi's motion for partial summary judgment on that claim, and granted Zale's motion for summary

judgment on the breach of contract claim. The Tenth Circuit held that there are genuine issues of material fact precluding summary judgment of Zaccardi's claim for breach of contract, but no such issues on his claim for wrongful discharge. Thus, the court affirmed the district court's summary judgment on the wrongful discharge claim and reversed the lower court on the breach of contract claim.

Bills v. United States, 857 F.2d 1404

Appellant Bills brought a case under the Federal Tort Claims Act as personal representative of Mrs. Lamb, a waitress who injured herself while working on an Air Force Base. Mrs. Lamb had been scheduled for an exploratory cancer operation the next day and was treated for burns and cancer simultaneously. The complaint admitted she died of cancer and not as a result of claimed negligence of the United States.

The Tenth Circuit affirmed a trial court dismissal for failure to prosecute. The court noted there was little reason for attempting to find abuse of discretion in order to excuse Bills lack of diligence in pursuing his claims, when on the merits his case was *prima facie* weak because he stipulated that Mrs. Lamb died as a result of a cause other than the injury received.

Shaw v. United States, 854 F.2d 360

Plaintiff, a member of the armed services, brought this action under the Federal Tort Claims Act (FTCA), for damages arising out of the alleged negligent operation of a military vehicle by another member of the Army. The district court determined the United States was immune from liability and dismissed for lack of subject matter jurisdiction. The Tenth Circuit affirmed.

The court held that plaintiff's injuries arose out of or were sustained in the course of activity incident to his military service and considerations underlying the *Feres* doctrine militated against maintenance of the suit. In *Feres v. United States*, 340 U.S. 135 (1950), the United States Supreme Court decided that the FTCA does not waive the United States' immunity from liability for such injuries. The *Feres* doctrine bars all suits of service members against the government when based on service-related injuries. The three rationales underlying this doctrine are: (1) the distinctive federal nature of the government and members of its armed forces; (2) the availability of alternative military compensation systems; and (3) the fear of damaging the military disciplinary structure. Plaintiff meets each one of these rationales since he was an active member of the armed forces, he received medical treatment and rehabilitation at military facilities and is eligible for disability benefits under the military compensation system and, lastly, because maintenance of the suit could have a detrimental effect on military discipline and decisions. Accordingly, the court held that plaintiff's claim under the FTCA is barred by the *Feres* doctrine. Affirmed.

Burnette, et al., v. Dow Chemical, et al., 849 F.2d 69

Appellants appeal an order granting the motions for summary judgment of defendants Dow Chemical, Nalco Chemical and Independent Tank.

On June 17, 1981 a storage tank being filled with chemicals exploded at a refinery operated by Total Petroleum.

The tank was originally manufactured by Independent as an atmospheric tank. It was tested to withstand pressure to ensure that it would not leak. After delivery to Nalco, Independent had no further contact with the tank. Total modified the tank and had it filled with the chemical DEA, manufactured by Dow. When the DEA was delivered it came with papers including a product label, safety sheet and an emergency information sheet. After the accident, the tank was again tested and the relief valve did not open until pressure reached beyond its original pressure point.

The Tenth Circuit affirmed the district court's reasoning holding that Nalco, the supplier and original manufacturer, was not liable on a design defect theory for explosion of the tank that occurred *after* Total had converted the tank into a pressure tank. Such a conversion and the type of malfunction that occurred were not frequent or even periodic occurrences, and thus the court was unwilling to require suppliers to reasonably foresee the possibility that the tank would be modified in such a way. The court affirmed summary judgment for Independent based on the same reasons.

Regarding Dow, however, the court found that material fact issues existed as to the nature of the warnings on the DEA product label, safety sheet and, warnings emergency sheet and whether these were adequate. Thus, summary judgment was precluded. (The adequacy of the description of the chemical as merely "irritating" should have been for a jury to decide.)

Continental Casualty Co. v. Southwestern Bell Telephone Co., 860 F.2d 970

On appeal, plaintiff-appellant contended that the amount of damages awarded by the jury on tortious interference of contract claim was so low that the verdict was, on its face, inconsistent with the evidence at trial. The panel held that the jury's damage award is clearly, decidedly, and overwhelmingly against the weight of the evidence, such that a trial judge abused his discretion in denying a new trial.

The appellant based its second claim of error on the district court's determination that statements made by appellee were not libel per se. The statements were made to appellee's independent contractors, informing them that bids would no longer be accepted from contractors who are insured by appellant. The panel found that the statements published by appellee to third persons were libelous per se under Oklahoma law.

The panel found that the trial court did not commit error in its ad-

mission of testimony and exhibits at trial. The panel remanded to the district court for a new trial on the damage and libel claim.

Gruntmeir v. Mayrath Industries, Inc., 841 F.2d 1037

Appellee Gruntmeir was injured by an auger manufactured by the appellant company. The auger's shield had been removed either by Gruntmeir's employer or by the first owner.

Mayrath argued on appeal that the district court should have granted its motion for directed verdict on the exemplary damages issue. The Tenth Circuit held that a jury verdict was not improper because evidence showed that Mayrath knew the auger was likely to be used unshielded and that accidents similar to Gruntmeir's were common. The court affirmed the denial of a directed verdict on Mayrath's affirmative defense of assumption of the risk, and affirmed the refusal to join Gruntmeir's employer as a third-party defendant.

Mussett v. Baker Material Handling Corp., 844 F.2d 760

This is an appeal from a district court order granting defendant's motion to dismiss on the grounds that a release signed by the plaintiff released defendant from all liability. Affirmed.

Plaintiff brought a products liability action against the manufacturer of a pallet jack for injury she sustained while attempting to unload a truck at a third party's store. The Tenth Circuit held that the release executed by the plaintiff and the owner of the property where the accident occurred, in which the plaintiff agreed to release the property owner "and all other persons, firms, and corporations" from any claims arising out of the accident, unambiguously barred any products liability action against the manufacturer of the jack. When a release is unambiguous, the court must interpret the contract as a matter of law and is precluded from looking beyond the contract.

Day v. Memorial Hosp. of Guymon, 844 F.2d 728

Approximately two years after being treated, Plaintiff brought a medical malpractice action against hospital owned and operated by the county. The district court granted defendant's motion for summary judgment based on plaintiff's failure to comply with the notice provision of the Oklahoma Political Subdivision Tort Claims Act (Act). The district court found that the hospital was a political subdivision under Oklahoma law and thus was entitled to notice. Affirmed.

The Tenth Circuit held that the notice provision of the Act does not violate equal protection on the grounds that it does not treat tort victims equally. Notice of claim provisions serve legitimate state interests, including the reduction of spurious claims, allowing the government to prepare its defense and ensuring that proper officials are notified of dangerous conditions. The right to sue the government in Oklahoma is a

right granted by statute. As such, the legislature may place reasonable restrictions on that right.

The court held that the notice provision did not violate the section of the Oklahoma Constitution requiring that the subject of the statute be clearly expressed in its title. The court also held that the hospital was a "political subdivision" within the meaning of the Act since it was owned and operated by the county and the hospital did not waive its right to receive notice under the Act by purchasing liability insurance.

McMurray v. Deere and Co., 858 F.2d 1436

Appellant McMurray's husband attempted to start a tractor manufactured by the appellee by touching a screwdriver to the terminals on the starter and the starter solenoid. By doing this, he bypassed the tractor's neutral start switch. This caused the tractor to lurch forward when the starter engaged, which killed the appellant's husband. A jury returned a verdict for appellee Deere and Co. McMurray appealed, alleging that the district court's instructions to the jury on assumption of risk and misuse were prejudicial. Reversed and remanded.

The court of appeals held that to assert the defense of assumption of risk, there must be a showing that the user knew of a defect in the product that was unreasonably dangerous in nature, yet still chose to use the product. To use the defense of misuse, the court of appeals held that it must be shown that the person used the product for some purpose for which it was not intended. The court went on to indicate that McMurray's husband did not use the tractor for an unintended purpose but rather in a careless manner. This, the court said, constituted mere contributory negligence, which was not a defense in a strict product liability action. Since it was possible for the jury to find the tractor defective but still hold the decedent's actions as a complete bar to recovery, the instructions given by the district court were prejudicial and a new trial was required.

Miller v. Cudahy Co., 858 F.2d 1449

Appellee Miller and several other farmers brought suit against a subsidiary of the appellant Cudahy Co., alleging that an underground salt mining operation owned by the appellant's subsidiary had polluted an underground aquifer, thus damaging their crops and lowering their crop yields. The district court found appellant liable for temporary damages to crops and awarded \$3 million in actual damages and \$10 million in punitive damages. After a period of three years, the lower court rejected a motion to dismiss and taxed upon appellant additional costs for the calling of an expert witness. Affirmed in part, remanded in part.

The court of appeals agreed with the district court that the appellant's operation constituted a continuing nuisance which was causing temporary damages to the appellees. The court also held the award of

punitive damages was supported by the evidence, but did agree with the appellant's position that it should not be forced to pay the expert witness fee since the district court had ordered the remedial plan.