

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1603
Summary Calendar

BOBBIE MCKILLIP, Individually,
and as Executrix of The Estate of
Troy Lee McKillip, Deceased, JERRY
DON MCKILLIP, CAROLYN ANNE MCKILLIP
ROGERS, KENNETH LEE MCKILLIP, and
MARK ALLEN MCKILLIP,

Plaintiffs-Appellants,

versus

FORD MOTOR COMPANY,

Defendant-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(1:92-CV-90)

(October 20, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

The relatives of decedent Troy McKillip sued Ford Motor Company because of his fatal accident while driving a 1973 Ford Model 2000 low profile tractor, unequipped with roll-over protection, backwards up a steep embankment. The jury found that

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the tractor was not defectively designed, that no warranty was breached, and that McKillip was contributorily negligent. On appeal, appellants assert error in the district court's jury instructions, the admission of evidence, the grant of partial directed verdict on certain theories of liability, and the submission of a contributory negligence issue. Finding no error, we affirm.

The trial revolved around appellants' contentions concerning the legal consequences of the tractor's lacking a roll-over protection system when McKillip's accident occurred in 1990. The tractor was manufactured in 1973. A principal theory of liability was that the tractor was defectively designed according to Texas products liability law. The appellants complain that in addition to defining "design defect" for the jury in terms of the risk-utility test authorized by the Texas Pattern Jury Charges, the court's charge also erroneously defined an "unreasonably dangerous product" in terms of an "ordinary consumer" test that has allegedly been rejected by Texas courts. We disagree that the charge was erroneous. Contrary to appellants' position, the Texas Supreme Court has not held that the expectation of an ordinary consumer is an inappropriate consideration for the jury in a products liability case based on a design defect. See Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 n.2 (Tex. 1980) ("In Turner, this court stated that a number of evidentiary factors may be considered in determining whether a product's design is defective. . . . [T]he expectations of the ordinary consumer are [among] some of these

factors. Turner v. General Motors Corp., 584 S.W.2d 844, 849 (Tex. 1979)"). A federal court has broad discretion in framing jury issues in an Erie case and should be reversed only if an instruction misstates applicable state law. Turlington v. Phillips Petroleum Co., 795 F.2d 434, 441 (5th Cir. 1986). The trial court here defined a "unreasonably dangerous product" in a way that would not have been permissible in Texas courts because it added the consumer expectation factor to the risk-utility instruction that the Texas Supreme Court has expressly approved. Turner, supra, Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984). While such an addition apparently constituted an erroneous jury charge under Texas law, and might better have been avoided, see Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1142 (5th Cir. 1985), it was not a reversible error in federal court. The jury instruction did not misstate Texas law and therefore was acceptable.

Appellants next contend that the court erred in permitting questions about the lawsuit they previously filed against McKillip's employer. Appellants characterize this challenged evidence as prejudicial evidence of a partial settlement. This is plainly incorrect, for no testimony was admitted on the outcome of that other lawsuit, but only on the substance of its allegations. More to the point, appellants appear to contend that the prejudicial effect of the evidence seriously outweighed its probative value. We disagree, at least to the extent that the district court did not abuse his discretion in allowing testimony concerning appellants' allegations in the other

lawsuit, which took the position that McKillip's accident was caused by the actions of other parties. Appellants have cited no case in which the introduction of testimony of this sort has been held to be reversible error. It was up to the district court to evaluate the relevance and prejudice associated with this evidence in the first instance; despite a prejudicial potential, the evidence was relevant to challenge appellants' credibility and theory of causation. There was no reversible error.

Appellants also contend that the district court erroneously granted Ford's motion for directed verdict and refused to submit jury issues concerning their claims for § 402(A) marketing defect, misrepresentation, and violations of the Texas Deceptive Trade Practices Act. The trial court granted a directed verdict apparently because appellants failed to establish the circumstances under which the seventeen-year old Ford tractor was sold. Evidence of Ford's general sales instruction or warning practices in 1973 was insufficient to demonstrate that Ford failed to warn or misrepresented any characteristic of this truck at the time of its distribution. Further, appellants introduced no evidence to demonstrate that the tractor was sold without a rollover protection system or after the inception of the Texas Deceptive Trade Practices Act. Appellants proffered no evidence to establish that the sales transaction involving the trailer even occurred in the state of Texas. The predicate for these types of claims rests on events at the date of product distribution.

Appellants produced no evidence to demonstrate the circumstances surrounding distribution of this tractor.

Finally, appellants assert that the trial court erred by submitting the question of McKillip's contributory negligence to the jury. The jury found that McKillip's own negligence contributed to the accident. It is unnecessary to decide this question in light of the jury's additional dispositive finding that the Ford tractor had no design defect at the time of manufacture that was a producing cause of the injury sustained by McKillip.

For the foregoing reasons, the judgment of the trial court is AFFIRMED.