

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-7214  
Summary Calendar

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MANUEL PEREZ, and  
MARIA CONCEPTION PEREZ,

Plaintiffs-Appellants,

VERSUS

BUCYRUS-ERIE COMPANY, ET AL.,

Defendants,

BUCYRUS-ERIE COMPANY,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CV-L-89-18)

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December 21, 1993

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

In the 1930s and 1940s, the Bucyrus-Erie Company ("Bucyrus-Erie") began designing and manufacturing the Model 1050-B, stripping shovel to remove overburden and extract coal from the ground. The particular shovel involved in this case was

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\* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

manufactured by Bucyrus-Erie in 1952, and originally sold to Ayrshire Collieries Corporation in Indiana. The shovel was sold by Ayrshire to Farco Mining Company, which has been the owner and possessor of the shovel since 1979 and has been operating this stripping shovel near Laredo, Texas. On May 23, 1987, Manuel Perez ("Perez"), a Farco employee, was severely injured while performing his duties as an oiler on the shovel, when he lost his footing and his hand slipped through a triangular opening in the steel guard protecting the gear mesh or "nip" point, and his hand was amputated by the gears. The shovel, as originally designed and manufactured, was equipped with a solid metal guard covering this nip point. However, sometime prior to Perez's accident, some unknown third party, for an unknown reason, cut away a portion of this protective guard. Perez brought suit on a theory of strict products liability in state court, and Bucyrus-Erie removed the case to the federal district court on diversity of citizenship. Following a two-day trial, the jury returned a verdict in plaintiff's favor, and the district court entered judgment initially on the verdict. Bucyrus-Erie timely filed a Motion for Judgment pursuant to Fed. R. Civ. P. 50 and briefs and reply briefs in support and opposition to this motion were subsequently filed with the court. The district court ultimately issued its memorandum, order and judgment in favor of Bucyrus-Erie on the grounds that the evidence, even when viewed in the light most favorable to Perez, fails to establish any objectively foreseeable grounds for the removal of the triangular portion of the guard covering the dangerous nip point. The trial

court further found that the entire guard was on the shovel when it was manufactured by Bucyrus-Erie and when it left Bucyrus-Erie's control; and that had the triangular portion of the guard not been removed Perez would not have been harmed.

We have carefully reviewed the briefs, the reply brief, the record excerpts and pertinent portions of the transcript of testimony; and have concluded that, for the reasons set forth in the trial court's memorandum and order filed under date of February 10, 1993, the trial court correctly granted Bucyrus-Erie's motion for judgment pursuant to Rule 50 F.R.C.P. See also Daberko v. Heil Co., 681 F.2d 445, 450 (5th Cir. 1982), Trevino v. Yamaha Motor Corp., U.S.A., 882 F.2d 182 (5th Cir. 1989); Melton v. Deere & Company, 887 F.2d 1241 (5th Cir. 1989); and Lloyd v. John Deere Co., 922 F.2d 1192 (5th Cir. 1991).

Accordingly, we AFFIRM the judgment entered by the trial court.