Court of Common Pleas of Ohio,
Montgomery County.
Jeffrey A. TIREY, Plaintiff,
v.
FIRESTONE TIRE & RUBBER CO., et al., [FN*] Defendants.

FN* No appeal has been taken from the decision of the court.

No. 85-2110.
Dec. 5, 1986.

Employee injured while mounting split rim tube tire brought action against rim manufacturers. The Court of Common Pleas, Montgomery County, Meagher, J., held that: (1) employee could not recover against manufacturers under theories of alternative liability, market-share liability, industry-wide liability, or concert-of-action; (2) employer's alleged failure to properly train employee how to change and mount tires was not intentional tort so as to allow employee to bring action against employer; and (3) manufacturer was not liable under theories of strict liability, negligence, or misconduct in absence of evidence as to which manufacturer manufactured allegedly defective product. Summary judgment for defendant.

West Headnotes

[1] KeyCite Notes

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak39 k. Persons Liable and Persons Entitled to Sue. Most Cited Cases

Plaintiff seeking damages for personal injuries sustained while mounting allegedly defective split-rim tube tire which was irretrievably lost could not recover against manufacturers under theory of alternative liability, in absence of evidence that all manufacturers acted tortiously toward plaintiff.

[2] KeyCite Notes

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak35.1 k. In General. Most Cited Cases
(Formerly 313Ak35)

Plaintiff seeking damages for personal injuries sustained while mounting allegedly defective split-rim tube tire which was later irretrievably lost was not entitled to collect damages against manufacturers, in absence of proof of defect in product.

[3] KeyCite Notes

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak39 k. Persons Liable and Persons Entitled to Sue. Most Cited Cases

Plaintiff seeking damages for personal injuries sustained while mounting allegedly defective split-rim tube tire which was later irretrievably lost was not entitled to recover against manufacturers under theory of industry-wide liability.

[4] KeyCite Notes 

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak39 k. Persons Liable and Persons Entitled to Sue. Most Cited Cases

Plaintiff seeking damages for personal injuries sustained while mounting allegedly defective split-rim tube tire which was later irretrievably lost could not recover against manufacturers under theory of concert-of-action.

[5] KeyCite Notes 

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2093 k. Willful or Deliberate Act or Negligence. Most Cited Cases

Employer's alleged failure to properly train employee as to changing and mounting of tires was not intentional tort so as to preclude applicability of exclusive remedy provision, where employer did not act with any deliberate intent to injure employee. R.C. § 4121.80(G).

[6] KeyCite Notes 

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak35 Automobiles
313Ak39 k. Persons Liable and Persons Entitled to Sue. Most Cited Cases

Manufacturer of wheel parts was not liable for injuries sustained where tire exploded while worker was mounting tire, in absence of evidence that manufacturer manufactured allegedly defective product.

***826 *50** **Keith M. Karr,** Michael Garth Moore, Columbus, for plaintiff.
William Wendell, Columbus, for Defendant Firestone Tire & Rubber.
Edward J. Cass, Cleveland, for defendant Kelsey-Hayes Co.

Christopher F. Johnson, Dayton, for defendants Goodyear Tire & Rubber and Motorwheel Corp.
Louis E. Gerber, Columbus, Geoffrey Myers, Potomac, Md., for defendant Redco Corp.
Robert S. McGeough, Warren, for defendant Ohio Fast Freight.
Gordon D. Arnold, Dayton, for defendants Rubber Mfrs. Assn. and National & Wheel & Rim Assn.
Edward K. Halaby, Cincinnati, for defendant The Budd Co.
David L. Parham, Cleveland, for defendant Alcoa.
Clarence Emery, Nanty Glo, Pa., pro se.
Leo F. Krebs, Dayton, for defendant Interpoint Corp.
Jeffrey M. Brown, Columbus, for defendant National Wheel & Rim Assn.
Cathy Miller, bailiff.
FNV, Inc., defendant c/o J. Kelly Agent, Cleveland Hts.

DECISION, ENTRY & ORDER

MEAGHER, Judge.
This matter comes before the court on motion for summary judgment filed by defendants: The Firestone Tire & Rubber Company, The Budd Company, Kelsey-Hayes Company, The Goodyear Tire & Rubber Company, Aluminum Company of America, FNV, Inc., Redco Corporation, Motor Wheel Corporation, National Wheel & Rim Association and Rubber Manufacturers Association; and on motion for summary judgment filed by defendant Interpoint Corporation; and on motion for summary judgment filed by defendant Aluminum Company of America.
The facts indicated that the plaintiff, Jeffrey A. Tirey, began his employment with Interpoint Corporation ***51** on September 16, 1982. Plaintiff's deposition further indicates that he had received education relating to changing and mounting tires and that he knew the proper procedures and the risks involved in changing a split rim tube tire.
While mounting a wheel on to a truck on July 21, 1983, an explosion occurred resulting in injuries to the plaintiff. After the accident, the rim parts were mounted on the truck of Clarence Emery and have been irretrievably lost.
The issues before the court in this motion are whether the court should reject plaintiff's theories of alternative liability, industry-wide liability and concert-of-action.
First, defendants move for summary judgment on plaintiff's theory of alternative liability. The Ohio Supreme Court adopts this theory of recovery when:
(1) Two or more defendants have committed tortious acts and were present either in person or by the presence of their product at the occurrence;
(2) Plaintiff was injured as a result of the wrongdoing of one of the defendants; and
***827** (3) There is uncertainty as to which defendant has caused the harm. *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, 15 OBR 511, 473 N.E.2d 1199.

[1] The Ohio Supreme Court clearly stated in *Minnich* that alternative liability "does not apply in cases where there is no proof that the conduct of more than one defendant has been tortious." *Id.* at 397, 15 OBR at 512, 473 N.E.2d at 1200. It is clear to the court that there is no proof that all of the defendants acted tortiously towards the plaintiff. Thus, since plaintiff cannot establish an essential element on this theory, defendants are entitled to summary judgment on the alternative liability allegations of plaintiff's complaint.

[2] Defendants also move for summary judgment on plaintiff's theory of market share liability. This theory is based on the idea that if a particular industry produces similar generic products, then liability should be apportioned according to each manufacturer's contribution to that product market. Neither the Ohio Supreme Court nor any Ohio statute has accepted the doctrine of market-share liability when a non-fungible product is involved like a multipiece wheel. Moreover, even if this doctrine is accepted in

this case, one of the primary policy considerations for adopting the market-share theory, that the defect in the product was responsible for the loss of the product, is not present here. Therefore, defendants' motion for summary judgment regarding the theory of market liability is sustained.

Defendants move for summary judgment regarding plaintiff's theory of industry-wide liability (enterprise liability). This theory, like market-share liability, has not been adopted by the Ohio Legislature. Many jurisdictions have rejected this theory and this court will follow suit. As explained by the Superior Court of New Jersey when it rejected the theory of enterprise liability:

"Adoption of this legal theory would, of necessity, result in total abandonment of the well settled principle that manufacturers are responsible only for damages caused by a defective product upon proof that the defective product was defective and that the defect arose while the product was in the control of defendant." *Namm v. Charles E. Frosst & Co.* (1981), 178 N.J.Super. 19, 35, 427 A.2d 1121, 1129.


[3] In this case, since the wheel parts are irretrievably lost and will never be before this court, proof that the product was defective is impossible. Absent such proof, what occurred on the day of the accident is left largely to ***52** conjecture. The court, therefore, sustains defendants' motion for summary judgment on plaintiff's allegation of enterprise liability.


[4] Finally, defendants move for summary judgment based on plaintiff's theory of concert-of-action. Once again, this court rejects plaintiff's theory as a viable cause of action. If this theory were accepted in this case, it would hold any one of the defendants liable for a defect of one of its competitor's products. This court is unwilling to endorse such an aberrant result and therefore, grants defendants' motion on this issue.

In sum, defendants', The Firestone Tire & Rubber Company, The Budd Company, Kelsey-Hayes Company, The Goodyear Tire & Rubber Company, Aluminum Company of America, FNV, Inc., Redco Association, Motor Wheel Corporation, National Wheel & Rim Association and Rubber Manufacturers Association, motion for summary judgment on the theories of alternative liability, market-share liability, industry-wide liability and concert-of-action is sustained.

Interpoint Corporation "Interpoint" moves for summary judgment based on plaintiff's first cause of action regarding the allegations that Interpoint improperly trained the plaintiff. Plaintiff claims that the absence of proper warnings and lack of proper training constitute an intentional tort.

The recent Workers' Compensation law, R.C. § 4121.80, provides that an action may be brought by an employee for an intentional tort of his employer. This section of the law defines an "intentional tort" as "an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur." Furthermore, the section defines "substantially certain" to mean those actions taken by an ***828** employer with "deliberate intent to cause an employee to suffer injury ..." R.C. § 4121.80(G).


[5] Applying the facts of this case to the law, it is clear that Interpoint did not act with any deliberate intent to injure the plaintiff. Thus, Interpoint's motion is sustained.

Aluminum Company of America moves for summary judgment on plaintiff's second, third, fourth, and fifth causes of action regarding the theories of strict liability, negligence, and willful, wanton and reckless misconduct.

Aluminum Company of America claims that plaintiff cannot meet his burden of proof under any of these theories, by showing that it manufactured the product which caused the injury. Aluminum Company of America correctly points out that:

Regardless of the theory which liability is predicated upon, whether negligence, breach of warranty, strict liability in tort, or other grounds, it is obvious that to hold a producer,

manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold or was in some way responsible for the product ..." Annotation (1973), 51 A.L.R.3d 1344, 1349.

[6] In this case, the wheel parts have been irretrievably lost and there is no way to determine who manufactured the alleged defective product. Plaintiff cannot possibly meet an essential element of his case regarding his second, third, fourth or fifth causes of action. Therefore, Aluminum Company of America's motion for summary judgment is well-taken and is sustained.

In accordance with the foregoing, all eight causes of action on behalf of the plaintiff are hereby dismissed. Judgment is therefore entered in favor of the defendants and against the plaintiff herein.

Summary judgment for defendant.

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33 Ohio Misc.2d 50, 513 N.E.2d 825