UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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Tenth Circuit

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ROBERT L. HOECKER
Clerk

HOLLAND CORPORATION, Plaintiff-Appellee, vs. COOPER INDUSTRIES, INC., Defendant-Appellant.	No. 85-1099 (D.C. No. 82-2055 D. Kansas)

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Judge, LOGAN, Circuit Judge, and BOHANON, District Judge**

This is a diversity breach of warranty action governed by the Kansas Uniform Commercial Code and Kansas decisions. After a jury trial the court entered judgment on a jury verdict for the plaintiff Holland Corporation. The defendant Cooper Industries appeals.

In this appeal the issues are whether the trial court erred in (1) ruling the implied warranty of merchantability extended from Cooper to Holland when they were not in privity of contract

* This order and judgment has no precedential value and shall not be cited or used by any court within the Tenth Circuit except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**The Honorable Luther L. Bohanon, United States District Judge of the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

and (2) denying Cooper's motion for a directed verdict on certain elements and amounts of damages. We affirm.

I

In 1979, Holland Corporation's predecessor in interest purchased a hydraulic drill (the "Jumbo") from Contractors Supply Company. Cooper Industries' predecessor in interest manufactured the Jumbo.

Holland mines rock to use in its construction business and to sell. In its underground mine, Holland uses industrial drills to bore deep holes in the rock into which explosives are packed. The explosives blow the rock into pieces, which are taken above-ground and broken into various useable sizes. Originally, Holland had been using two pneumatic drills. In 1977 Holland was approached by a salesman from Contractors, a Cooper representative, about buying a hydraulic drill. Hydraulic drills were a more recent innovation than pneumatic drills and supposedly drilled much faster. Holland became interested, thinking one hydraulic drill might replace two pneumatic drills, decreasing costs and increasing profits. Eventually, Holland purchased the Jumbo.

From the day the Jumbo arrived it broke down incessantly. Holland, Contractors, and Cooper labored in vain to remedy the Jumbo's difficulties. Late in 1981 Holland informed Cooper it wanted its money back. When the parties could not settle their dispute, Holland brought this action against Cooper for breach of express warranties and the implied warranty of merchantability. Holland claimed loss of its bargain and consequential damages amounting to $610,867. Holland won a jury verdict for $465,034.

II

A. **IMPLIED WARRANTY OF MERCHANTABILITY**

Holland complained that Cooper breached the implied warranty of merchantability, inter alia. The trial judge submitted Holland's warranty claim to the jury. Jury Instructions 8 and 12. Cooper argues that Holland's implied warranty of merchantability claim should not have been submitted to the jury.

The implied warranty of merchantability, codified in the Kansas Uniform Commercial Code at K.S.A. 84-2-314 (1983), provides:

> Unless excluded or modified (section 84-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Cooper contends that, in the circumstances of this case, Holland may not invoke the implied warranty of merchantability against it because Holland and Cooper were not in privity of contract. Cooper sold the drill to Contractors. Contractors then sold it to Holland. Cooper and Holland were not in privity of contract.

Cooper relies on Professional Lens Plan, Inc. v. Polaris Leasing Corp., 675 P.2d 887 (Kan.1984). In Professional Lens, the Kansas Supreme Court held that "implied warranties of fitness and merchantability are not extended to a remote seller or manufacturer of an allegedly defective product, which is not inherently dangerous, for only economic loss suffered by a buyer who is not in contractual privity with the remote seller or manufacturer." Id. at 898-899. See also Owens-Corning Fiberglas v. Sonic Dev. Corp., 546 F.Supp. 533 (D.Kan.1982). The Jumbo was not inherently dangerous, Holland suffered only economic loss (as opposed to personal injury or property damages), and Holland was not in privity of contract with Cooper. The trial judge, however, found the Kansas Supreme Court would not require privity here, stating:

> The two cases cited above [Professional Lens and Owens-Corning] held that the implied warranty of merchantability does not extend to a remote seller or manufacturer of a defective product which is not inherently dangerous for only economic losses suffered by a buyer not in contractual privity. The facts of this case do not fit into that mold. Here [Cooper] is not a remote manufacturer but is, instead, a manufacturer intimately involved in the sale of this hydraulic drill. The close working relationship necessary for the custom designing of this drill and the training and supervision differentiates this case. Therefore, the rule of Owens-Corning and Professional Lens is inapplicable on these facts.

XV R. 1192.

In Professional Lens, the court expressed concern that allowing the buyer to invoke the implied warranty of merchantability against a manufacturer with whom the buyer was not in privity of contract would destroy the manufacturer's ability to disclaim the warranty and to limit damages. See Professional Lens, 675 P.2d at 898; K.S.A. 84-2-316, 84-2-718, and 84-2-719 (1983). A remote buyer could recover from a manufacturer for breach of the warranty even though the manufacturer had disclaimed the warranty to an intermediate buyer, who then disclaimed it to the remote buyer. Further, "[r]emote buyers may use a seller's goods for unknown purposes from which enormous losses might ensue. Since the remote seller cannot predict the purpose for which the goods will be used he faces unknown liability and may not be able to insure himself." Professional Lens, 675 P.2d at 896 (quoting White and Summers, Uniform Commercial Code § 11-6 (2d ed. 1980)).

We agree with the trial judge that, on the unique facts of this case, treating Cooper as a seller to Holland under K.S.A. 84-2-314 does not implicate the concerns underlying the holding in Professional Lens. Cooper and Holland had extensive personal contacts during the sale of this custom-made drill. Cooper could have disclaimed the warranty or limited damages during its direct, personal contacts with Holland. Further, their contacts were extensive enough to allow Cooper to evaluate the intended use of the Jumbo and potential losses Holland might incur if the drill was defective. Thus, Cooper could foresee and had ample opportunity to control its potential liability.

In the unique and limited circumstances of this case, we are persuaded that the district judge's decision on this question of state law was reasonable and proper. See Fullerton Aircraft Sales v. Beech Aircraft Corp., 842 F.2d 717, 721-22 (4th Cir. 1988); Frank's Maintanance v. C.A. Roberts Co., 408 N.E. 2d 403 (Ct. App. Ill. 1980); Richards v. Goerg Boat and Motors, Inc., 384 N.E. 2d 1084 (Ct. App. Ind. 1979).

B. DAMAGES

At the close of Holland's case, Cooper moved for a directed verdict on, among other things, the issue of damages. In its motion Cooper contended that "the submissible elements of Holland's claims for damages are limited as follows . . . " Thereafter, Cooper propounded eleven limitations which, as a matter of law, it asked the trial court to place on Holland's damage award. Cooper reasserted these limitations in its motion for judgment notwithstanding the verdict or for a new trial.

Cooper contends the trial court erred in denying the motion. This is what the trial court ruled:

> The defendant initially challenges the submissibility of certain damages claims by plaintiff Holland Corporation. The defendant does not challenge the instructions of the court as to the measure of damages, but rather the error claimed is in allowing plaintiff to argue for certain amounts of money before the jury. Defendant claims at least Four Hundred Four Thousand Six Hundred Fifty-Seven and 21/100 Dollars ($404,657.21) of the Six Hundred Ten Thousand Eight Hundred Sixty-Seven and 44/100 Dollars ($610,867.44) of damages claimed by plaintiff in its arguments to the jury are not recoverable as a matter of law. Thus, defendant claims the maximum amount recoverable under the law is Two Hundred Six Thousand Two Hundred Ten and 23/100 Dollars ($206,210.23). In particular, defendant disputes plaintiff's separate arguments that it was entitled to Three Hundred Twelve Thousand Four Hundred Ninety-Seven and 65/100 Dollars ($312,497.65) for use of supplemental pneumatic drills and Ninety-Two Thousand One Hundred Fifty-Nine and 56/100 Dollars ($92,159.56) for the purchase of rock from union quarries.
>
> In order to determine the submissibility of this evidence to the jury, the court must look at the evidence in the context of the entire trial, including the instructions.
>
> In Instruction No. 14, the court stated as follows
>
> The measure of damages for breach of an express or implied warranty is the difference between the value of the goods at the time of delivery and the value had they conformed to the warranty, unless special circumstances show damages of a different amount.
>
> If you find that other damages were incurred by the plaintiff that were the direct, immediate and probable result of the breach of express or implied warranty, then you may award plaintiff such sum as you believe will fairly and justly compensate the plaintiff for the damages you believe plaintiff sustained as a result of the breach.

> If you find that plaintiff is entitled to recover damages, in fixing the amount thereof you should not include any loss which could have been prevented by reasonable care and diligence exercised by it after the loss occurred.
>
> This instruction, which has not been challenged, is a fair reading of the law as stated at K.S.A. 84-2-714(2); Schatz Distributing Co. v. Olivetti Corp. of America, 7 Kan. App. 2d 676, 647 P.2d 820(1982).
>
> The trial was lengthy and complicated with numerous witnesses providing extensive evidence as to damages. The jury did not award to the plaintiff the full measure of damages requested by plaintiff, but rather awarded a substantially lesser amount. While the jury obviously did award an amount greater than the difference between the value of the goods at the time of delivery and the value had they conformed to the warranty, the court cannot as a matter of law say that special circumstances showing damages of a different amount did not exist. Further, the court will not reweigh the evidence on which the jury concluded that such damages were the direct, immediate and probable result of the breach of express or implied warranty. The arguments made by Cooper Industries now are essentially the same arguments made at closing argument before the jury, and these arguments go to the weight of the evidence. It was the province of the jury to decide whether such damages were the direct, immediate and probable result of the breach of express or implied warranty.

Memorandum and Order, V R. 936-938.

Our review of the trial court's denial of Cooper's motions for a directed verdict and for judgment notwithstanding the verdict is limited; "we may find error only if the evidence points but one way and is susceptible to no reasonable inferences supporting [Holland]; we must construe the evidence and inferences most favorably to [Holland]." Zimmerman v. First Federal Sav. & Loan Ass'n, 848 F.2d 1047, 1051 (10th Cir. 1988). Our review in this regard is de novo, i.e., we apply the same standard applied by the district court. Guilfoyle v. Missouri, Kansas and Texas Railroad Co., 812 F.2d 1290, 1292 (10th Cir. 1987).

The substantive law under which we evaluate Cooper's arguments is K.S.A. 84-2-714. That section, which prescribes the damages a buyer may recover for breach of express or implied warranties, provides:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of section 84-2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

In this appeal, Cooper reasserts most of the eleven arguments it made to the trial court in its motions for a directed verdict and for judgment notwithstanding the verdict. We will address Cooper's arguments in the order in which they are presented.

1. **Loss of Bargain**

Holland claimed damages for the difference between the value of the drill at the time of delivery and the value it would have had if it had conformed to the warranty. K.S.A. 84-2-714(2) (1983). This element of damages was presented to the jury in the first paragraph of Jury Instruction 14. Cooper asserts this claim for loss of bargain is overstated as a matter of law.

First, Cooper asserts "[t]here is no evidence that the Jumbo had no value, salvage or otherwise, when the pump failed in April or May 1981 or at any time thereafter." Brief of Appellant at 23. Cooper did not present this argument to the trial court. We will not consider it.

Second, Cooper argues Holland's loss of bargain damages are legally limited in any event by the amount Contractors paid Cooper for the Jumbo: $137,676. Cooper's attempt to limit Holland's recovery to any transaction price is inconsistent with the express language of K.S.A. 84-2-714(2). Although the transaction price is evidence of the value of the goods as warranted, recovery is not legally tied to any transaction price. It is tied to the value of the goods as warranted. Evidence of two transaction prices was introduced: the price Contractors paid Cooper, and the price Holland paid Contractors. From these two prices, the jury could have reasonably concluded that the value of the Jumbo, if it had been as warranted, would have been approximately $176,000. Further, based on the evidence of the Jumbo's performance the jury could have reasonably concluded the value of the Jumbo as delivered was approximately $18,000. Consequently, the jury had a reasonable basis for assessing Holland's loss of bargain damages.

Holland's claim under K.S.A. 84-2-714(2) was not overstated as a matter of law.

2. Consequential Damages

In addition to damages under K.S.A. 84-2-714(2), Holland claimed consequential damages under K.S.A. 84-2-715(2).

K.S.A. 84-2-715 provides:

> (2) Consequential damages resulting from the seller's breach include
> (a) any loss resulting from general or peculiar requirements and needs of which the seller at the time of contracting had reason to know and

which could not reasonably be prevented by cover or otherwise.

This element of damages was presented to the jury in the second and third paragraphs of Jury Instruction 14. Holland requested consequential damages for the cost of operating a second drill and for the net cost of rock purchased from another mine. Holland's theory supporting its claim for consequential damages ran like this. Based upon Cooper's demonstration of the Jumbo at Holland's mine, Holland reasonably expected the Jumbo to drill approximately twice as fast as one of its pneumatic drills. Since they expected the Jumbo to drill twice as fast, they expected to retire both pneumatic drills, use only the Jumbo, and still produce the same amount of rock. Holland thus expected to make more profit while maintaining the same level of production because the Jumbo would be cheaper to operate than the two pneumatic drills. But the Jumbo failed to perform as expected. So in order to maintain its production levels, Holland continued operating one of the pneumatic drills and purchased rock from another mine. Consequently, Holland made less profit than it would have made had the Jumbo performed as it reasonably expected. Holland's expenses were increased and profits reduced in the amount of the cost of operating the second drill and the price of the rock purchased from another mine in excess of Holland's production costs.

Cooper argues these consequential damages are not recoverable as a matter of law.

a. The cost of operating a second drill

First, Cooper asserts that awarding the costs of operating the second drill theoretically gives Holland a double recovery. We disagree.

The basic objective of damages under the Kansas Uniform Commercial Code is to put Holland in as good a position as if Cooper has fully performed. K.S.A. 84-1-106(1); Cricket Alley v. Data Terminal Systems, 732 P.2d 719, 725 (Kan. 1987).

According to Holland's theory of consequential damages, if the Jumbo had performed as warranted Holland would have received a Jumbo worth approximately $176,000 and it would have incurred the normal costs of operating it. This is the position Holland would have been in if the Jumbo had operated as warranted. But the Jumbo did not perform as warranted. So Holland received a Jumbo worth approximately $18,000, it incurred the normal costs of operating the Jumbo, plus $47,128 in above-normal operating costs for the Jumbo, plus $312,498 to operate a second pneumatic drill, plus $92,160 to purchase rock from another mine. This is Holland's position because of the breach. The difference in the two positions is approximately what Holland requested in Plaintiff's Exhibit 77. Holland's damage claim was not, as a matter of law, theoretically duplicative.

Second, Cooper asserts that some of the costs of operating the second pneumatic drill are not recoverable as a matter of law because Holland did not satisfy its burden of producing evidence to prove these damages could not have been prevented by cover or otherwise.

To recover consequential damages in Kansas, an aggrieved buyer has the burden of producing evidence to show they could not have been prevented. International Petroleum Services, Inc. v. S & N Well Service, Inc., 639 P.2d 29, 38 (Kan. 1982). There is evidence to support an inference by the jury that Holland was not required to acquire an alternative drill until sometime after October 13, 1981. Until then, Cooper and Contractors were attempting to repair the Jumbo. But Cooper argues Holland's consequential damages should have been cut off on October 13, 1981. Holland, on the other hand, argues they could not reasonably have prevented such damages until February 1983. These are arguments both parties should have, and did, make to the jury. The exact point in time at which Holland's consequential damages could have been prevented is a question of reasonableness. The trial judge correctly instructed the jury not to award Holland damages it could have prevented. Cooper's argument goes to the weight of the evidence. Such questions should be decided by the jury, as they were in this case.

Third, Cooper asserts there was insufficient proof that the Jumbo's defects actually caused Holland to incur the costs of operating a second drill. More specifically, it says there was insufficient evidence from which the jury could reasonably conclude that the Jumbo, even if it had been as warranted, would have replaced both pneumatic drills. We disagree. Cooper demonstrated the Jumbo at Holland's mine. IX R. 160-164. During the demonstration the Jumbo drilled approximately twice as fast as one of Holland's pneumatic drills. IX R. 348. Further, the hydraulic drill that Holland eventually purchased from Tamrock performed as Holland had hoped the Jumbo would. It replaced both pneumatic drills. XI R. 445-446, 612.

Viewed in the light most favorable to Holland, and drawing all reasonable inferences in its favor, we think there was sufficient evidence from which a reasonable jury could conclude by a preponderance of the evidence that the Jumbo, if it had been as warranted, would have replaced both pneumatic drills; there was sufficient evidence of a causal connection between the Jumbo's defect and the costs of operating the second drill.

Finally, Cooper contends there was insufficient evidence from which a jury could determine the amount of damages associated with operating the second drill. A buyer seeking consequential damages has the burden of producing evidence that demonstrates the amount of these damages with reasonable certainty. "Such evidence must provide the trier of fact with a reasonable basis upon which to arrive at an award." LaVilla Fair v. Lewis Carpet Mills, Inc., 548 P.2d 825, 834 (Kan. 1976); International Petroleum, 639 P.2d at 38.

Holland's calculation of the costs of operating the second drill are summarized in Plaintiff's Exhibit 69. Rue Holland, president of Holland Corporation, testified that the amounts in this exhibit were derived from the actual costs of operating the pneumatic drills during 1977 and 1978, as recorded in Holland's accounting records. XI R. 556-559, 566-572, 583-588. Donald Voth, Holland's certified public accountant, provided further testimony explaining Holland's claim for depreciation. XII R. 765-777.

Viewed in the light most favorable to Holland, and drawing all reasonable inferences in its favor, we think this was sufficient evidence to provide the jury with a reasonable basis on which to arrive at an award of damages for the costs of operating the second drill and supports the verdict.

b. The net cost of purchasing rock

Holland claimed the Jumbo produced so little rock they needed to buy rock from another mine. Holland's claim for consequential damages included $92,160, which Holland said was the net cost of this rock. Cooper asserts that as a matter of law Holland may not recover these costs.

First, Cooper asserts that Holland may not recover these costs because only Holland Quarries has a claim against Cooper; that Holland Quarries bought the Jumbo, but Holland Construction bought the rock from Union Quarries. Further, Holland's theory underlying its claim for the net costs of purchasing rock from another mine was inartfully presented. We disagree. We think the record supports this claim as one that could validly be asserted by the parent, Holland Corporation, which brought this suit.

While Holland Quarries bought the Jumbo, in the working relationship of the affiliated Holland companies, it did so to serve the needs of Holland Construction, which was the market for Holland Quarries' rock. When the Jumbo's failings then caused Holland Construction to go out and make the purchases from Union Quarries, the damages to Holland Construction could be recovered from Cooper. These were damages which were within the affiliated companies and which Cooper should have foreseen. All these rights were merged into the parent, Holland Corporation, and its claims, when it brought this suit, properly included the damages suffered by Holland Construction when it had to purchase rock from the outside company, Union Quarries.

Second, Cooper claims there was insufficient evidence to support a finding that Holland's need for the purchased rock was caused by the Jumbo's defects. Cooper's argument supporting its contention that the Jumbo's defects did not cause Holland to buy rock from another mine simply reargues the conflicting evidence in the record. Resolution of the conflicts in the evidence was properly left to the jury.

As discussed above, Holland had the burden of producing evidence which demonstrated the amount of these damages with reasonable certainty and which would provide the jury with a reasonable basis upon which to arrive at an award. Holland's calculation of the damages it suffered from purchasing this rock are detailed in Defendant's Exhibit S-1. Rue Holland and Donald Voth testified extensively about the method used to calculate these damages. XII R. 586-592, 720-731, 759-762.

Viewed in the light most favorable to Holland, and drawing all reasonable inferences in its favor, we think there was sufficient evidence to provide the jury with a reasonable basis for an award for the damages to Holland Construction, whose rights were merged into the parent, Holland Corporation, which brought suit.

In addition to the motions for a directed verdict or judgment notwithstanding the verdict, discussed above, Cooper also requested a new trial. The standard for a trial judge to grant a new trial is somewhat less stringent than for a directed verdict or judgment notwithstanding the verdict: "The court has the power and the duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice." See generally C. Wright & A. Miller, 11 Federal Practice and Procedure §§ 2805, at 38; 2806 at 42-43 (1973) (distinguishing motions for judgment notwithstanding the verdict and for new trial and standards applicable to each). Our standard of review is for "manifest abuse of discretion." Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984).

As we held above, the trial judge did not err when he denied Cooper's motions for a directed verdict or for judgment notwithstanding the verdict. Further, we do not think the jury's verdict was unjust; the jury awarded Holland considerably less damages than was indicated in its proof. The trial judge did not abuse his discretion when he denied Cooper's motion for a new trial.

A F F I R M E D.

Entered for the court
William J. Holloway, Jr.
Chief Judge