

**STATE OF LOUISIANA  
COURT OF APPEAL, THIRD CIRCUIT**

**05-1018**

**PATSY ANN COLLINS DOMINGUE, ET AL.**

**VERSUS**

**EXCALIBAR MINERALS OF LOUISIANA, LLC, ET AL.**

**PICKETT, J., dissenting.**

I respectfully dissent. A thorough review of the record leads to the conclusion that the trial court erred in granting the Motion for JNOV.

The majority correctly cites jurisprudence which sets forth the standard to be applied when determining whether a JNOV is appropriate. In the matter before us, however, the evidence does not point so strongly in favor of the moving party that reasonable men could not reach different conclusions. In fact, there was ample evidence before the jury to support its verdict.

The jury in this case attributed 60% of the fault in causing Mr. Domingue's death to his employer, MMD, 5% to Charles Judice, the driver of the ADT which ran over Mr. Domingue, and 35% to Mr. Domingue. The jury found Cameco to be free from fault, finding no design defect in the ADT involved in the accident. Since the trial judge's JNOV reversed the jury's finding on the issue of Cameco's fault, and Cameco is the lone appellant, our sole inquiry should be whether the evidence points so strongly in favor of finding Cameco at fault that reasonable men could not reach a different conclusion. Our jurisprudence tells us that a mere preponderance of evidence in favor of the mover is insufficient. In order for the JNOV to be properly

granted, the facts and inferences must be so strongly and overwhelmingly in favor of finding Cameco at fault that reasonable men could not have found otherwise. If, however, reasonable persons, in the exercise of impartial judgment, could have found Cameco free from fault, then it was error for the trial court to grant the motion and this court further errs by affirming the trial court's judgment.

My review of the record convinces me that the trial judge erred in granting the plaintiffs' motion for JNOV. While the testimony and evidence presented by plaintiffs' witnesses O. Peter Smith, H. John Head and Michael Sutton do in fact support a finding that Cameco shared the fault for Mr. Domingue's death, unlike the majority, I find the testimony and evidence presented by Cameco's witnesses, Ronald Adams, Ken Rodrigue, and Ronald Brass, exonerated Cameco. The fact that the jury obviously chose to accept the testimony of the Cameco witnesses does not, as the majority seems to believe, make them unreasonable.

Mr. Ronald Adams, who owned his own contracting business, testified that in the mid-1980s he was using DJB articulated dump trucks, touted by the plaintiffs' O. Peter Smith for their superior visibility. Mr. Adams stated that he was dissatisfied with the DJBs because of their short, narrow wheel base which caused oscillation, road rutting and instability. He testified that, when attempting to turn corners with a fully loaded DJB, the vehicle had a tendency to turn over. He further explained that the short wheel base would cause the rear tires to fall into the same ruts the front tires had just vacated, thus tearing up the roadway and causing the vehicle to oscillate. Because of his dissatisfaction with the DJB and his positive experience with Cameco 405-B tractors, he approached Cameco and asked if they could modify their 405-B tractor to accept a dump truck bed. He explained that he was interested in a stable

vehicle with a large “foot print” and a longer wheel base than the DJB. Cameco agreed to take on the project and converted three 405-B tractors to 405-B articulated dump trucks (hereafter ADTs or 405-Bs). The Cameco ADTs had dual tires on each side of its axles, both front and rear, giving it a large foot print. This large foot print increased its stability and decreased the amount of load placed on each tire. This not only allowed the vehicle to carry heavy loads but also increased the life of the tires. Mr. Adams was so impressed with the performance of the 405-Bs that the next year he ordered three more of the vehicles. He testified that he used those six machines from the mid-80s until he went out of business and auctioned them off in 1999. He stated that during that time none of the vehicles turned over or became involved in any accident because of poor operator visibility. When the ADTs were auctioned in 1999, they were equipped with large rear-view mirrors mounted on the roof on each side of the cab where the operator sat.

Ken Rodrigue, who started at Cameco, retired from John Deere (who acquired Cameco) as President of Cameco Industries. Mr. Rodrigue was one of the founders of Cameco and was serving as Executive Vice President of Production and Engineering at the time John Deere acquired the company. Mr. Rodrigue was Vice President of Production and Engineering at Cameco when the 405-B ADT was conceived and manufactured and was responsible for modification of the 405-B tractor into the 405-B ADT. He stated that Mr. Adams had purchased some 405-B tractors to use with some Cameco 12-C scrapers, was impressed with the tractors and inquired about the possibility of Cameco producing a 405-B ADT. Mr. Adams took Mr. Rodrigue to a building site, showed him the DJBs they were using and explained the problems he was having with the DJBs—tearing up the haul roads, getting stuck,

and the biggest problem, turning over. Cameco then designed and built the 405-B ADT to overcome the problems Mr. Adams was having with the DJBs. Hence, the longer and wider wheel base and the dual tires front and rear. Mr Rodrigue testified that Cameco equipped the ADTs with dual outside mirrors to permit the operator to see as much as possible and used hydrostatic power steering to make the ADT as easy to handle as possible.

The plaintiffs' experts were of the opinion that the dual front tires were unnecessary and were a design defect and a safety hazard as they decreased visibility and increased the turning radius of the 405-B. When queried about the necessity of dual front tires, Mr. Rodrigue explained that the ADT had to be designed to operate over different types of terrain. He stated that on soft ground, the dual front tires were necessary to provide sufficient "flotation" or ground pressure which he defined as "the force imposed . . . by the weight of the vehicle through the tire to the ground . . . usually measured in pounds per square inch." Insufficient flotation would cause the ADT to sink into soft ground, increasing rolling resistance thus making the machine inefficient. He also testified that on hilly terrain, the combined weight of the vehicle and its load would be principally on the rear axle and tires while going uphill, but would then shift to the front axle and tires when going downhill, i.e., weight distribution was not static, but a function of the grade which the ADT was traversing. Finally, he stated that, the dual tires front and rear, increased the ADTs footprint, greatly adding to its stability, thereby making it almost impossible to turn over.

The plaintiffs' claim that the vehicle was defective in design because of poor visibility due to the dual tires and a long hood. Mr. Rodrigue testified that the vehicle came equipped with large rear view mirrors mounted on the outside-top of the cab.

He explained that Cameco was aware of some limited visibility to the direct front of the ADT and included a warning in the manual which came with the vehicle that before proceeding, “make sure you have sufficient room to maneuver and the area is clear of personnel.” “[A] product is not unreasonably dangerous or defectively designed where the evidence shows that the product can be safely used if the instructions in the operations manual are followed.” *Delphen v. Dep’t of Transp. and Dev.*, 94-1261, p. 8 (La.App. 4 Cir. 5/24/95), 657 So.2d 328, 334, *writs denied*, 95-2116, 95-2124 (La. 11/17/95), 663 So.2d 716, 717. He went on to say that, to increase visibility, a driver could stand up and/or look around the side or simply articulate the ADT to either side to see any area in which his visibility was restricted.

The defense’s final witness was Mr. Ronald Brass, a retired John Deere engineering specialist who now owns his own consulting firm. He also addressed the plaintiffs’ allegations of design defects. As to the dual tires, he explained that not only do they greatly increase stability, but they provide the vehicle with superior flotation characteristics. Mr. Brass stated that on a hard surface it takes approximately forty pounds of force per ton of a vehicle to over-come rolling resistance. Accordingly, if you wanted to push an automobile which weighed 4,000 pounds or two tons, you would have to apply eighty pounds of effort to move the car across a hard surface. He explained that on a soft surface, like mud or sand, the force required increases quickly and may reach 400-500 pounds per ton. He testified another advantage of dual tires is the increased useful life of the tires. He noted that industrial tires are quite expensive and that most tire failure is due to sidewall failure cause by flexing of the sidewall. Dual tires decrease sidewall flexing, thereby increasing tire life. He went on to say that dual tires also provide greater traction by

placing more tire surface in contact with the ground. As an example, he noted that in some parts of the country one finds some farm tractors with four-wheel-drive and triple tires.

In addressing the question of restricted visibility, Mr. Brass agreed “that when the machine is pointed in a particular direction and you look only across the very top of the hood that there is an area of restricted visibility ahead of the machine.” Mr. Brass went on to say that he agreed with Mr. Rodrigue “that all you need to do is, is turn the steering wheel a bit and then you can see the area that would formerly have been hidden and you can turn the wheel the other way and you can see that area without difficulty.” In addition, Mr. Brass explained, the seat on the ADT is fully adjustable, up and down, fore and aft, and even has “a weight adjustment which allows you to basically crank up the spring force to increase the height of the operator as he sits in the cab.”

One of the plaintiffs’ experts had opined that visibility was restricted because of inferior material in the windshield which permitted scratching and pitting. when questioned about this allegation, Mr. Brass replied:

[T]he windows that were provided by Cameco, the windshield and the two quarter windows were made of a material identified as lexan. Lexan is one of the acrylic families. That’s the clear kind of plastic that you see and it’s very break resistance [sic]. That’s the reason it was used here. It was not only lexan, but it was a special version of lexan called marguard, which has a scratch resistance [sic] surface, so it, it is the kind of material that you might use in the dirty, dusty kind of environment which this machine would be found in [sic].

In sum, Mr. Rodrigue stated, “I do not believe that the [design of the] 405B dump truck was a cause of the accident that involved Russell Domingue.”

These witnesses’ testimony as to the visibility is bolstered by a review of the video tape presented to the jury that clearly shows, when sitting in the driver’s seat,

an unimpeded view of the area in front of the tires that ultimately ran over Mr. Domingue.

The majority relies, in affirming the JNOV, on the trial court's finding that "the expert testimony presented by Mike Sutton and Peter Smith demonstrated that the blind spot on the 405B truck was caused by a [design defect] and was a proximate cause of Domingue's death." The majority, however, ignores the evidence presented to the jury to the contrary.

The majority further notes that "[t]he trial court found the blind spot was exceptionally large, causing a driver to be unable to see, *at all*, a person of Domingue's height in the location of the accident. The court also found the design defect which causes the blind spot was not necessary to the functioning of the truck and could have been easily modified at minimal cost." A review of the record shows that these conclusions by the trial court are reached not by relying on uncontroverted evidence but on evidence that was highly controverted. For example, Mike Sutton, upon whose testimony the trial court relied in reaching its conclusion, testified on direct that Mr. Domingue was entirely in a blind spot from the time the ADT operator began moving the machine forward until Mr. Domingue was struck and killed. On cross-examination, however, it was established that Sutton did not necessarily have the correct information as to Mr. Domingue's location before the ADT pulled forward, and Sutton admitted that when Mr. Domingue was struck and killed by the left, outside tire he was not in a blind spot.

It is the jury's function to determine what testimony to accept and what to reject. It is error on the part of the trial court to substitute its judgment for that of the jury when the jury verdict is clearly supported by the evidence. It is clear that

reasonable persons, in the exercise of impartial judgment, could have found Cameco free from fault and it was error for the trial court to grant the plaintiffs' motion for JNOV.

Accordingly, I would reverse the trial court's JNOV and reinstate the jury verdict.