

1988

Hanover Limited, Western Maintenance and
Management Inc., and Brooke Grant v. Cessna
Aircraft Company, Cessna Finance Corporation,
Teledyne Industries Inc., and AAR Northwest Inc.:
Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

880042-CA
HANOVER LIMITED, a partnership; :
WESTERN MAINTENANCE AND :
MANAGEMENT, INC., a Utah cor- :
poration; and BROOKE GRANT, an :
individual, :
Plaintiffs, :
-vs.- :
CESSNA AIRCRAFT COMPANY, a :
Kansas corporation; CESSNA :
FINANCE CORPORATION, a Kansas :
corporation; TELEDYNE INDUSTRIES, :
INC., a California corporation; :
AAR NORTHWEST, INC., a Delaware :
corporation; and TRANS WEST :
AIRCRAFT SALES, INC., a Utah :
corporation, :
Defendants. :

TRANS-WEST AIRCRAFT SALES, INC., :
Cross-claimant and Appellant, : No. 880042-CA
-vs.- :
THE CESSNA AIRCRAFT COMPANY, a :
Kansas corporation, :
Cross-defendant and :
Respondent. :

PETITION FOR REHEARING OF RESPONDENT
THE CESSNA AIRCRAFT COMPANY

Appeal from the Third Judicial District Court of Salt
Lake County, The Honorable David B. Dee, District Judge.

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ISSUES FOR REVIEW

Respondent The Cessna Aircraft Company (CESSNA) respectfully submits that the Court of Appeals erred in its OPINION remanding this case to the district court in that it:

1. Reversed the district court's grant of summary judgment in favor of CESSNA when the material facts upon which CESSNA's motion was based were admittedly uncontroverted and fully supported CESSNA's motion; and

2. Allowed appellants Trans-West Aircraft Sales, Inc. (TRANS-WEST) to raise a contention of error for the first time on appeal.

STATEMENT OF FACTS

The facts material to a review of the above issues are:

1. On March 1, 1985 CESSNA filed a Motion for Summary Judgment based on TRANS-WEST's answers to certain discovery requests (R. 001253-71).

2. On March 21, 1985 CESSNA filed a Pre-hearing Submittal in support of its motion citing the district court to certain facts in the record (R. 001276-80).

3. On September 16, 1985, TRANS-WEST filed a Motion for Summary Judgment (001366-7) and a memorandum in support thereof (001328-57), which although not styled as also being in opposi-

tion to CESSNA's motion for summary judgment, countered positions CESSNA had been urging in defense of TRANS-WEST's cross-claim. POINT SIX of TRANS-WEST's memorandum was "THE LAW OF INDEMNIFICATION DOES NOT REQUIRE THAT THE CLAIMS OF THE PARTIES BE FULLY ADJUDICATED BEFORE THE PASSIVE DEFENDANT MAY MAINTAIN HIS ACTION FOR INDEMNIFICATION." (R. 001353).

4. On October 3, 1985, CESSNA renewed its Motion for Summary Judgment (R. 001380-2) and filed a memorandum in support thereof and in opposition to TRANS-WEST's motion for summary judgment (R. 001383-98). Uncontroverted Fact No. 9 thereof stated:

On February 14, 1985, plaintiffs executed a Release of All Claims, forever discharging defendants, including CESSNA, CESSNA FINANCE and TRANS WEST, from all claims arising from plaintiffs' purchase or use of the subject aircraft. The Release of All Claims specifically states:

'IT IS FURTHER UNDERSTOOD AND AGREED that this settlement is a compromise of a contingent and unliquidated claim and that payment thereof is not to be construed as an admission of liability on the part of those released, by whom liability is expressly denied.'

and POINT TWO of the memorandum raised the issue that TRANS-WEST had not shown that it is entitled to indemnification, stating:

Even under the authorities advanced by TRANS-WEST, a retailer must show that the manufacturer supplied a defective product which

caused injury to the plaintiff, before the issue of the retailer's right to indemnification can be addressed. (R. 001395).

5. TRANS-WEST filed no memorandum in opposition to CESSNA's memorandum in support of its motion for summary judgment, nor did it request additional time to file affidavits or to conduct additional discovery to oppose CESSNA's motion, as it could have done under Rule 56(f), U.R.C.P.

6. On December 5, 1985, Judge Dee of the district court heard the reciprocal motions for summary judgment and took them under advisement (R. 001400), and on January 9, 1986 entered a Judgment of Dismissal of Cross-claim which granted CESSNA's and Cessna Finance Corporation's motions for summary judgment and denied TRANS-WEST's motion for summary judgment (R. 001401-3).

7. At no time prior to the hearing or thereafter, or after the judgment of dismissal had been entered, did TRANS-WEST contend it would be error to grant CESSNA's motion for summary judgment, if TRANS-WEST's motion for summary judgment was denied -- and at no time while before the district court did TRANS-WEST request a trial on the issue of whether or not the aircraft was defective, or claim that the district court committed error in not sua sponte setting the case for trial when denying TRANS-WEST's motion for summary judgment.

8. The first time TRANS-WEST referred to its present contention that it was error for the district court not to require a trial of the issue of the aircraft's alleged defectiveness was in its STATEMENT OF ISSUES TO BE PRESENTED TO THE SUPREME COURT (R. 001408-10) wherein it stated:

Appellant shall present to the Supreme Court the issue of whether or not, . . . and, alternatively, whether or not the Trial Court erred in not permitting appellant a trial on the issue of the negligent manufacture of the product in question or the breach of warranties if that determination was required before appellant would be entitled to indemnification.

9. At POINT THREE of Respondent's Brief, CESSNA called to the Court's attention the fact that TRANS-WEST was raising for the first time on appeal the claim that it had been denied its right to a trial on the issue of defectiveness of the aircraft in question by the following language:

TRANS-WEST now takes the position of demanding a trial on the question of whether the aircraft was defective. . . . TRANS-WEST is not now entitled to a trial on the issue since it not only failed to request it in the court below, but affirmatively asserted that such a trial was unnecessary due to the absence of any material questions of fact necessary to decide the issue raised by its motion for summary judgment. It is fundamental that a party may not claim as error a position raised for the first time on appeal. (authorities cited). (Respondent's Brief pp. 16-17).

10. This Court at page 8 of its OPINION correctly states:

Settlement of the underlying product liability action does not preclude indemnification (authorities cited). If, however, in reaching the settlement agreement, the manufacturer does not admit it furnished a defective product, the trial court must resolve this issue before determining liability for attorney's fees, costs and expenses.

but then states in its ANALYSIS at page 13 that "[t]he trial court's granting of Cessna and Cessna Finance's motions for summary judgment was premature," which has the effect of requiring Cessna to show that the aircraft was not defective as an element of its entitlement for summary judgment.

ARGUMENT

POINT I.

THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S SUMMARY JUDGMENT FOR CESSNA SINCE TRANS-WEST DID NOT PROVE ITS ENTITLEMENT TO INDEMNIFICATION.

Prior to appeal, TRANS-WEST, apparently hoping to avoid the substantial expense of attempting to prove "defectiveness" of the aircraft, always took the position that it did not need to show that the aircraft in question was defective as an element of its right to indemnification against CESSNA for its attorney's fees and expenses in defending against plaintiffs' claims. In POINT SIX of its memorandum in support of its motion for summary judgment (R. 001353), TRANS-WEST misapplies Rule 13(f), U.R.C.P.,

regarding the maintenance of a cross-claim prior to judgment in the principal action as support for the proposition that showing the liability of CESSNA (that the aircraft was defective) is not necessary to its case. CESSNA raised the lack of a defectiveness finding as a defense to TRANS-WEST's motion for summary judgment in CESSNA's memorandum in support of its motion for summary judgment and in opposition to TRANS-WEST's motion for summary judgment by specifically pointing out at R. 001395 that

[e]ven under the authorities advanced by TRANS WEST, a retailer must show that the manufacturer supplied a defective product which caused injury to the plaintiff, before the issue of a retailer's right to indemnification can be addressed.

TRANS-WEST made no response to said defense, did not file an opposition or reply memorandum to CESSNA's memorandum in support of CESSNA's motion and in opposition to TRANS-WEST's motion for summary judgment (R. 001383-98), did not request addition time or discovery under Rule 56(f), U.C.R.P., and did not request a trial on the issue of defectiveness, but steadfastly pursued its motion for summary judgment to hearing based upon twenty-six alleged "Uncontroverted Facts" (R. 001328-35), none of which referred to any admission or finding that the aircraft in question was defective.

The Court's Opinion seems to ignore the fact that CESSNA had a reciprocal motion for summary judgment pending before the district court which was granted. Since TRANS-WEST had not proved that the aircraft was defective, and had not requested additional time or discovery to attempt to prove defectiveness, CESSNA's motion for summary judgment was timely and mature, and the same was properly granted by the district court. As stated at Rule 56(e), U.R.C.P.,

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is clear from the record that TRANS-WEST never considered a showing of defectiveness to be necessary to its motion for summary judgment and it never attempted to prove such. It based its motion upon twenty-six alleged "Uncontroverted Facts," some of which improperly cited only the testimony of TRANS-WEST's owner in support thereof, but it did not even attempt to show that the aircraft was defective, only that the plaintiffs had alleged that it was in their complaint.

For this Court to now, in effect, say -- TRANS-WEST you should have attempted to prove defectiveness and we are going to let you try again to make your case, while totally ignoring the fact that CESSNA had made a reciprocal motion for summary judgment and that both parties were satisfied with the state of the record at the time their respective motions were heard, was totally unwarranted and unprecedented.

The Court should modify its Opinion to acknowledge the procedural state of the record at the time the reciprocal motions for summary judgment were heard to the effect that (1) TRANS-WEST had never attempted to prove defectiveness of the aircraft, (2) such a finding is necessary to a cause of action for implied indemnity for costs of defense, (3) CESSNA had a defensive motion for summary judgment pending, (4) TRANS-WEST had not requested additional time or discovery to oppose CESSNA's motion, and (5) since TRANS-WEST had failed to prove that the aircraft was defective, the district court properly granted CESSNA's motion for summary judgment.

POINT II.

THE COURT OF APPEALS ERRED IN PERMITTING TRANS-WEST TO RAISE FOR THE FIRST TIME ON APPEAL THE CONTENTION OF ERROR THAT THE TRIAL COURT DID NOT REQUIRE A TRIAL ON THE ISSUE OF DEFECTIVENESS.

TRANS-WEST acknowledges in its brief (pp. 34-35) that

[t]hese issues (defectiveness and whether TRANS-WEST was only a passive party) were set down for trial by the trial court, but then both parties filed motions for summary judgment and the court struck the trial date and upon ruling in favor of CESSNA dismissed TRANS-WEST's cause of action,

Emphasis added. TRANS-WEST failed to show, and cannot show, that it opposed CESSNA's motion for summary judgment by filing a memorandum in opposition thereto or requesting further time or discovery under Rule 56(f), U.R.C.P. in which to respond to CESSNA's motion. Likewise, TRANS-WEST failed to show, and cannot show, any request to the district court for trial on the issue of defectiveness either before or after the district court granted CESSNA's motion for summary judgment.

Since TRANS-WEST filed a motion for summary judgment and did not object to CESSNA's motion for summary judgment being heard at the same time, it cannot claim as error the fact that the district court heard the reciprocal motions for summary judgment on December 5, 1985 (R. 001400); and not having filed any supplemental memorandum or request for trial before the district court entered judgment in CESSNA's favor of January 9, 1986, TRANS-WEST cannot cite as error the procedural fact that the district court ruled on CESSNA's motion on January 9, 1986 (R. 001401-3). And since TRANS-WEST did not even attempt to show defectiveness, a critical issue under any theory of implied indemnity, it cannot

cite as substantive error the fact that the district court granted CESSNA's motion for summary judgment which was properly before it. TRANS-WEST, in effect, merely says at page 35 of its brief -- if the Court disagrees with me and finds that a showing of defectiveness is necessary, then please send the case back to the district court and let me take another shot at it. TRANS-WEST does not in its brief, nor does this Court in its Opinion, explain why it was error for the district court to grant CESSNA's motion for summary judgment, or why it was error for the district court to not require a trial which was never requested after the reciprocal motions for summary judgment were filed. Even after the district court had entered its judgment in CESSNA's favor, TRANS-WEST made no attempt to seek relief therefrom under Rule 60(b), U.R.C.P. It could have at least claimed "excusable neglect" in not advising the court that it wanted a trial on the merits in the event its motion was not granted.

In sum, TRANS-WEST at no time and in no way advised the district court that it wanted a trial on the issue of defectiveness, or of its contention that it would be error if the court did not give it one. CESSNA at page 17 of its brief cited Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983) and Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983) for the proposition that a party cannot claim as error a

position raised for the first time on appeal. This proposition was recently reaffirmed by the Utah Supreme Court in Zions First National Bank v. National American Title Insurance Co., 749 P.2d 651, 654 (Utah 1988) wherein the Court observed and held:

National American's third claim on appeal is that an agency relationship existed between Jeffrey Olson and Zions and that as a result, Jeffrey's knowledge of the forgery should be imputed to Zions. This claim has been raised on appeal for the first time. Generally, we do not consider issues that were not presented to the trial court. (authorities cited). National American urges that there is no sound policy reason for our not considering this issue. National American acknowledges that agency is generally a question of fact for the trial court, but contends that when the facts on which an issue may be determined are undisputed and those facts do not permit the drawing of conflicting inferences, all that remains is a legal question. Because we do not defer to trial court's determinations of legal questions, National American contends that we are as well situated as the trial court to deal with the issue.

National American's position ignores one of the reasons for refusing to consider any matter for the first time on appeal, even a matter of law. Although we may not defer to a trial court's conclusion on a legal question, we certainly may derive great benefit from the trial judge's views on the issues and may be persuaded by those views. This provides ample justification for refusing to consider National American's claim.

CESSNA submits that there is no just reason why this Court should permit TRANS-WEST to raise for the first time on appeal

the contention that it was not afforded a trial on the issue of defectiveness, which it affirmatively negated by filing a motion for summary judgment and never thereafter requested.

CONCLUSION

This Court's OPINION reversing the district court's granting of summary judgment in favor of CESSNA shows only why the district court could not have granted TRANS-WEST's motion for summary judgment, which it did not. It does not show why CESSNA was not entitled to the granting of its motion for summary judgment. CESSNA's motion was not procedurally opposed and was substantively sound since TRANS-WEST had not shown that the aircraft in question was defective. Both parties were satisfied with the state of the record at the time they filed their respective motions. TRANS-WEST never requested additional time or discovery to oppose CESSNA's motion, and did not object to the district court hearing both motions at the same time, nor did TRANS-WEST seek any post-trial relief from the judgment granting CESSNA's motion for summary judgment, including a request for trial on the issue of defectiveness of the aircraft in question.

TRANS-WEST's request for trial of the issue of defectiveness was raised for the first time on appeal and there is no legal justification for this Court to reverse the district court's grant of summary judgment in favor of CESSNA to provide TRANS-

WEST a second chance to prove its case. The district court committed no legal error in granting CESSNA's motion for summary judgment and that judgment should be affirmed.

CESSNA respectfully requests this Court to modify its Opinion to correctly reflect the fact that both motions for summary judgment were properly before the district court for hearing and since TRANS-WEST failed to prove the critical issue of defectiveness, the district court properly granted CESSNA's motion for summary judgment and TRANS-WEST cannot now complain for the first time on appeal that it was not afforded a trial on the defectiveness issue.

CERTIFICATION OF COUNSEL

Counsel for CESSNA certifies that this Petition for Re-hearing has not been filed for the purpose of delay, but to correct what counsel perceives to be a procedural error in the Court's Opinion.

RESPECTFULLY SUBMITTED this 11th day of July, 1988.

H. WAYNE WADSWORTH
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four (4) true and correct copies of the foregoing PETITION FOR REHEARING OF RESPONDENT THE CESSNA AIRCRAFT COMPANY was mailed, postage prepaid, to the following counsel of record this 11th day of July, 1988:

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Of Respondent's Counsel