No. 23-126005-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HERITAGE TRACTOR, INC.,
Plaintiff-Appellant,

vs.

EVERGY KANSAS CENTRAL, INC.,
Defendant-Appellee,

REPLY BRIEF OF APPELLANT HERITAGE TRACTOR, INC.

Appeal from the District Court of Douglas County, Kansas
Honorable James R. McCabria, Judge
District Court Case No. 2020-CV-000136

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Oral Argument 30 minutes

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REPLY BRIEF

Plaintiff Heritage Tractor, Inc., ("Heritage Tractor") hereby reasserts all arguments and authorities in its prior briefs and submits this reply to address new matters raised by Defendant Evergy Kansas Central, Inc. f/k/a Westar Energy, Inc.'s ("Westar"):

I. The Kansas Corporation Commission's Interpretation of the Tariff is Not Precedential in the Court's Interpretation of the Tariff.

Westar apparently continues to take the position that three sections, namely Sections 7.02(A)-(C), of the Tariff apply to the facts of this case yet offers no explanation as to why the Tariff has three provisions all applicable to the same fact pattern. (Westar Brief, p. 9) As noted in Heritage Tractor's Brief, the District Court disagreed and indicated that Section 7.02(B) applied. (Heritage Tractor Brief, p. 11) Westar is now citing to provisions outside the Record of Appeal in its attempt to convince the Court that the limitation of liability provisions is clear, unambiguous, and applicable. (Westar Brief, p. 8)

Heritage Tractor agrees with Westar that *E.g. State v. Paul*, 285 Kan. 658, 662, 175 P3rd 840 (2008) is instructive on interpretation, but Westar fails to include the most important provision in its citation to that case. The *entire* quote states: "Where the statutory provision or language is ambiguous, that is, where the statute contains provisions or language of doubtful or conflicting meaning, *as gleaned from a natural and reasonable interpretation*

of its language, and leaves us generally uncertain ****662*** *which one of two or more meanings is the proper meaning, we must resort to maxims of construction.*"(emphasis added) Westar claims the three Sections "are actually different and not in conflict with each other" but offers no explanation as to why three provisions were written to apply to the same fact pattern. (Westar Brief, p. 9)

Westar wants this Court to focus on the trees as opposed to seeing the entire forest. Each of the limitation of liability Sections in the Tariff must be read as a whole and in context with one another. The first sentences of Sections 7.02(A) and(C) establish the parameters/boundaries for the applicable of the balance of each Subsection. Westar asserts the three sections are complementary (Westar Brief, p. 12), and Heritage Tractor agrees, but only if one accepts Heritage Tractor's natural and reasonable interpretation of the three sections. Westar offers no explanation as to how the three section are complementary.

Westar attempts to bolster its overbroad view of the three limitation of liability sections by citing to recent administrative proceedings from the Kansas Corporation Commission ("KCC"). Westar cites to *In re: Complaint Against Westar by John Feldkamp*, Docket No 19 WESS-361-Com, 2020 WL 3962239 (Kan Corp. Comm'n July 9, 2020) for the proposition that Westar's vegetation management does not display a showing of willful or wanton

conduct. (Westar Brief, p. 12) In that case, the Complainant, an individual seeking reimbursement for his insurance deductible, did not challenge the application of the limitation of liability clause and the purported willful or wanton conduct standard. In *In re: Complaint Against Westar by Jerry Jackson*, Docket No. 17-WSEE-326-COM, 2017, WL 3386378 (Kan. Corp. Comm'n Aug 3, 2017), the Complainant again did not challenge the application of the limitation of liability clause and the purported willful or wanton conduct standard. In both cases, the KCC assumed the willful and wanton standard applied. The KCC undertook no analyses as to how or why the limitation of liability provisions applied to the facts in those cases.

II. Heritage Tractor is Not Asking this Court to Overrule *Danisco*.

Westar asserts that Heritage Tractor has argued that the KCC did not have sufficient authority to limit liability for ordinary negligence in the Westar Tariff. (Westar Brief, p. 14) In making such an argument, Westar argues that Heritage Tractor is asking the Court to disregard the controlling law of *Danisco*. (Id) This is simply not true. Heritage Tractor does not challenge the KCC's authority to make tariffs outlined in *Danisco*. (Heritage Tractor Brief, p. 19) Heritage Tractor does not challenge the KCC's authority to limit liability for ordinary negligence, *as it pertains to service interruptions*, which is the only tariff provision the *Danisco* Court addressed. (Id)

Westar attempts to broaden the holding in *Danisco* to encompass more than just the answer to the certified questions before it. Westar claimed "[t]he Supreme Court expressly held that it was reasonable for a tariff to relieve an electric utility 'of liability for damages of any nature resulting from the utility's own simple negligence.'" (Westar Brief, p. 23, citing *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 267 Kan. 760, 761, 986 P.2d 377, 379 (1999)) But that is a mere selection of the actual holding language. The Supreme Court actually held that "[i]t was reasonable for the KCC to allow KCP & L's Rules 7.06 and 7.12 to become effective insofar as these rules relieve KCP & L of liability for damages of any nature resulting from the utility's own simple negligence." *Id.* The Court cannot ignore that the *Danisco* holding was limited to the reasonableness of those provisions of the Tariff which were exclusively about damages arising from service interruptions. The reasonableness of one provision does not equate to the reasonableness of all.

Westar further attempts to argue that the cases the *Danisco* Court relied upon went beyond service interruptions, which is evidence of a broader holding intended by the Supreme Court. (Westar Brief, p. 24) The *Danisco* Court explicitly identified that set of cases as those involving "…rules promulgated by public utilities which absolve them from liability for simple negligence in the delivery of their services…" *Danisco* at 769. They were

examples involving the same type of negligence analyzed in the tariff provision before the *Danisco* Court. In short, they did not involve the type of negligence being addressed in the Westar Tariff provisions at issue in this case. As thoroughly spelled out in Heritage Tractor's brief, *Danisco* dealt with negligence that involved a duty that does not arise from common law, but through contract. As such, it is not the damages that are the issue but the duty that controls whether a tariff provision would fall under *Danisco's* authority or not. In this case, the duty being breached flowed from common law and not contract, and therefore *Danisco* does not control it.

III. Whether the Court Deems the Westar Tariff Unconstitutional or Unlawful, the KCC Did Not have the Authority to Abrogate Common Law.

Westar would like to quibble over the use of the word "unconstitutional." (Westar Brief, p. 27) Heritage Tractor was clear in its response to Westar's Motion for Summary Judgment, as well as its appeal of the District Court's order on said motion, that the KCC does not have the authority to abrogate common law. The Kansas Constitution, Article II, gives the Kansas Legislature the power to enact law. There is nothing within the Constitution giving the Legislature the ability to delegate that duty, much less abrogate common law. The closest it comes is in providing "[d]elegation of powers of local legislation and administration. The legislature may confer powers of local legislation and administration upon political subdivisions."

Article II, §21. That would certainly confer the ability to provide the right to the KCC to enter into tariffs, but not the abrogation of common law. To read the Tariff as abrogating common law would be to say that the Legislature has unconstitutionally delegated the right to abrogate common law to the KCC.

Indeed, on its face, the delegation of authority to the KCC by the Legislature said nothing of the KCC being able to abrogate common law. Even assuming that it had the ability to do it under the powers granted to it in the Constitution, it would have needed to have been an explicit delegation. There was no such explicit delegation, and if there had been, the KCC would not have a greater right than the Legislature in how such an abrogation may be made, i.e., in an explicit manner and with an adequate substitute remedy. See, *Am. Gen. Fin. Servs., Inc. v. Carter*, 39 Kan. App. 2d 683, 687, 184 P.3d 273, 277 (2008) (*citing, In re Estate of Mettee*, 10 Kan.App.2d 184, 187, 694 P.2d 1325, aff'd 237 Kan. 652, 702 P.2d 1381 (1985) and *In re Estate of Roloff*, 36 Kan.App.2d 684, 689, 143 P.3d 406 (2006)); *See also*, *Bair v. Peck*, 248 Kan. 824, 839, 811 P.2d 1176, 1188 (1991)

Westar does not attempt to argue that the Westar Tariff is explicit in its abrogation of common law. There is nothing within the Westar Tariff that acknowledges its intended effect. Instead, Westar ignores the first requirement and moves to the second. (Westar Brief, p. 30-35) In referencing the *Bair* case, Westar argues that rate-making is a sufficient remedy to the

common law right being abolished. (Westar Brief, p. 34-35) In *Bair*, "the theory behind the common-law doctrine of vicarious liability was that the employer should be liable for the employee's negligence in order to assure that an innocent injured third party would not have to suffer the loss due to the inability of the tortfeasor employee to respond in damages." *Bair* at 1179. The alternate remedy that the Legislature provided was for compulsory malpractice insurance with which to ensure victims would be compensated. *Id.* at 1188.

Rate-making is incongruous. First, the benefit of rate-making has only ever been tied to interruptions of service and the impact those interruptions have on the ability to set reasonable rates. Heritage Tractor is unaware of any study that contemplates the impact for claims for damages wholly unrelated to the supply of electrical service. Second, while rate-making might be a rationale as to why common law should be abrogated, it is not a remedy to the common law rights being abrogated. A remedy would be to offer another avenue of recovery for the damages that would otherwise be recoverable through the common law cause of action. The Westar Tariff makes no such provision. Therefore, it is unconstitutional for the KCC to have abrogated common law with the Westar Tariff.

It is immaterial if the Court chooses to treat the issue as KCC's unlawful abrogation of common law versus an unconstitutional abrogation of

common law. It all sounds in the same law, which was briefed by Heritage Tractor in the underlying motion for summary judgment (R. Vol. III, p. 11-14) as well as its Appellate Brief. (Heritage Tractor Brief, p. 17-22) The issue is properly before this Court.

IV. There Is No Additional Burden under the Willful and Wanton Standard that Requires the Court to Find Affirmative Acts by Westar for Heritage Tractor to Prove Wanton Conduct on the Part of Westar in Viewing the Facts in Light Most Favorable to Heritage Tractor.

Westar continually cites to various cases and administrative proceedings for the proposition that the applicable standard is willful or wanton conduct, but inexplicably also claims the willful or wanton conduct must affirmatively appear. (Westar Brief, p. 41) This is yet more bait and switch by Westar which cites a variety of cases to imply that Heritage Tractor has a heightened factual burden. Yet, none of the cited cases used the term "affirmatively appear" in relation to anything close to the facts or circumstances of this matter. For example, *Wagner v. Am. Family Mut. Ins. Co.*, 65 Wis 2d 243, 249 222 N.W.2d 652 (1974) concerns the request for a new trial. Westar only provided a partial quote from that case. (Westar Brief, p. 42) The entire quote is "(t)he words 'affirmatively appear' mean that the court must be convinced that the verdict reflects a result which in all probability would have been more favorable to the complaining party but for the improper argument." Said citation is hardly applicable to this case.

Additionally, to the extent that the inclusion of the term "affirmatively appear" means something more than that the complaining party has the burden to prove the conduct was wanton, then the terms of the Tariff are outside the bounds of what was approved in *Danisco* and should be considered unreasonable.

Finally, it is well accepted that in deciding a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244 (10th Cir. 2009) Westar's own expert, Nelson Bingel, testified the Westar inspection program did not comply with industry recommendations. Westar was aware of the broad risk of dangerous conditions that aging utility poles can create and that the Westar inspection program did not comply with industries recommendations. Viewed in light most to Heritage Tractor, it seems clear that a jury could conclude that Westar's conduct was wanton.

CONCLUSION

As outlined in Heritage Tractor's Brief and as supplemented by this Reply, Heritage Tractor requests that the District Court's Order Granting Summary Judgment be reversed and the matter remanded back to the District Court for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Brief of Appellant Heritage Tractor, Inc. was e-filed with the Clerk of Appellate Court by using the electronic filing system, which will send notice of electronic filing to the following:

J. Eric Weslander
John T. Bullock
ATTORNEYS FOR DEFENDANT-APPELLEE

The undersigned, does hereby further certify that on July 19, 2023, a copy of the Reply Brief of Appellant was sent via electronic address to the following:

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