TADC PRODUCTS LIABILITY NEWSLETTER

Selected Case Summaries
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Editor:

Joseph S. Pevsner
Thompson & Knight LLP

Contributing Editor:

Brian Marquise Andrews
Thompson & Knight LLP

I. Summary

1. A defendant is not a "seller" under Chapter 82 of the Texas Civil Practice & Remedies Code (and thus cannot seek indemnity against a manufacturer) when the defendant only uses the manufacturer's product incidentally to the production process and not as a component. Court of appeals held that a tree farmer is not a "seller" of herbicide when the farmer uses the herbicide to kill trees that are never placed into the stream of commerce. *F&F Ranch v. Occidental Chemical Corporation*, No. 14-09-00901-CV, 2011 Tex. App. LEXIS 2223 (Tex. App.—Houston [14th Dist.] March 29, 2011) (mem. op.).

2. Evidence of a change in product design after an accident may not be used to prove that an alternate design was available before the accident when there is no evidence to show that the changed design was feasible before the accident. Court of appeals held that a plaintiff could not prove that a tire was defectively designed by offering evidence of a design change that occurred after the accident when there is also no evidence that the changed design was feasible when the tire was manufactured. *Hathcock v. Hankook Tire America Corp.*, 330 S.W.3d 733 (Tex. App.—Texarkana [6th Dist.] Oct. 6, 2010).

3. A company that normally would be considered a "health care provider" under § 74.351 of the Texas Civil Practice & Remedies Code may not be if the company acts outside the scope of its contractual relationship with a health care provider. Court of appeals held that a defendant medical device manufacturing company may not be considered a health care provider because it may have acted outside the scope of its employment contract with a clinic when it gave instructions to a patient that conflicted with the doctor's instructions. *Orthopedic Resources, Inc. v. Swindell*, 329 S.W.3d 70 (Tex. App.—Dallas, Nov. 8, 2010, reh'ing overruled).

4. A manufacturer is not required to produce written copies of the federal regulation with which it complied in order to invoke the rebuttable presumption that its product was not defectively designed, manufactured, or marketed. Instead, testimony and letters from federal agencies that show that the manufacturer has complied with federal regulations are sufficient to invoke the rebuttable presumption in § 82.008 of the Civil Practice & Remedies Code. *Shaw v. Trinity Highway Products, LLC*, 329 S.W.3d 914 (Tex. App.—Dallas, Dec. 20, 2010).

5. A seller of an inherently dangerous product may be held liable for a manufacturing defect and thus outside the protection of Texas Civil Practice & Remedies Code § 82.004 if it modifies the product before selling it. Court of appeals held that a defendant restaurant was not entitled to the protections of § 82.004 for selling an oyster dish when it modified the oysters to such a degree that it in effect manufactured the dish that caused injury to one of its patrons. *Jones v. Landry's Seafood Inn & Oyster Bar—Galveston, Inc.*, 328 S.W.3d 909 (Tex. App.—Houston [14th Dist.] Dec. 16, 2010).

6. An engineer's seal may be an affirmative representation as to the quality of the work performed by the engineer. Court of appeals held that an engineering firm may have made an affirmative representation as to the quality of the plans it prepared when its engineer attached his seal to the plans. *CCE, Inc. v. PBS&J Construction Services, Inc.*, No. 01-09-00040-

CV, 2011 Tex. App. LEXIS 809 (Tex. App.—Houston [1st Dist.] Jan. 28, 2011).

II. Discussion

1. *F&F Ranch v. Occidental Chemical Corporation*, No. 14-09-00901-CV, 2011 Tex. App. LEXIS 2223 (Tex. App.—Houston [14th Dist.] March 29, 2011) (mem. op.)

In *F&F Ranch*, the court of appeals held that a defendant is not a "seller" entitled to indemnification by the manufacturer under Chapter 82 of the Texas Civil Practice & Remedies Code when the product at issue is only incidental to the defendant's manufacturing process and is not a component that is place into the stream of commerce.

In 1992, Shane Bowers sued F & F Ranch, Occidental Chemical Corporation, Dow Chemical Company, Elementis Chemicals, Monsanto Company, and Aventis Pharmaceuticals for exposure to certain chemicals which caused him to contract non-Hodgkins lymphoma. Bowers was an employee of F & F Ranch which used the chemicals in its tree-farming properties to kill unwanted trees.

In 1995, the court granted summary judgment to all of the defendants, except the Ranch and Aventis Pharmaceuticals. The case was dismissed for want of prosecution in 2001, but was reinstated in 2002 against the Ranch only.

After a short bench trial in 2006, the Ranch settled its claims with Mr. Bowers' estate for $3,250,000.00. The Ranch then filed a suit seeking indemnification ultimately from Occidental Chemical Corporation, Dow Chemical Company, Elementis Chemicals, Monsanto Company, Evergreen Helicopters, and Aventis Pharmaceuticals ("Chemical Manufacturers"); essentially the same defendants that were dismissed on summary judgment from Mr. Bowers' suit.

The Ranch sought statutory indemnity as a "seller" under Chapter 82 of the Texas Civil Practice & Remedies Code which governs a manufacturer's indemnity obligations to a seller arising from a products liability action. The Ranch also sought common law indemnity.

Texas Civil Practice & Remedies Code § 82.002 provides that a "manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action…" Chapter 82 defines a "seller" as: "A person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof."

The Chemical Manufacturers moved for summary judgment asserting that the Ranch was not a "seller" under Chapter 82 and that the Ranch was not entitled to common law indemnity because none of the Chemical Manufacturers have admitted or been adjudicated liable in the underlying action. The trial court granted the Chemical Manufacturers' motion. The Ranch appealed.

The Houston court of appeals held that the Ranch was not a "seller" according to Chapter 82, and thus was not entitled to indemnity. The Ranch stipulated that it had "never been a retailer of chemicals or chemical products of any kind, and, in particular [had] never sold [the chemicals that allegedly caused Bowers' injuries]." The Ranch alleged, however, that it placed the chemicals in the stream of commerce, and thus qualified as a "seller."

The Ranch relied on the opinion from the Texas Supreme Court in *Fresh Coat Inc. v. K-2, Inc.* to support its theory of statutory indemnification. In *Fresh Coat*, the indemnitee did not sell the defective product, but sold services in which it installed the defective product. The Supreme Court held that the indemnitee was both a seller of the defective product as well as a service provider because it was in the business of providing the defective product along with the service of installing it.

The court of appeals contrasted the Ranch's activities from those in *Fresh Coat*. Unlike the indemnitee in *Fresh Coat*, the Ranch did not use the chemicals as part of the services it sold nor did it place the chemicals in the stream of commerce at all. Instead, the Ranch only used the chemicals to kill unwanted types of trees that were never placed into the stream of commerce. At best, the Ranch was just a user of the defective products, not a seller.

The Ranch also sought common-law indemnity from the chemical manufacturers contending that it was only an "innocent conduit." The common-law doctrine of indemnity requires that the manufacturer either be adjudicated liable or admit to liability for the product defect. However, none of the manufacturers were ever held liable for the product defect nor did they admit to liability. Thus, the Court held that the Ranch was not entitled to common law indemnity.

2. *Hathcock v. Hankook Tire America Corp.*, 330 S.W.3d 733 (Tex. App.—Texarkana [6th Dist.] Oct. 6, 2010).

In *Hathcock*, a plaintiff was not allowed to present evidence of a current design to support a claim that a safer, alternative design was available in the past design that caused the injury.

In August of 2004, Emily Roddy was driving a pickup truck with her children, Alexa and Hunter riding with her. The tire experienced a blow out causing Emily to lose control of the truck and hit a tree. Emily died at the scene of the accident; Hunter died later at the hospital; and Alexa suffered debilitating injuries.

Keith Hathcock (the children's father) sued Hankook Tire America Corporation and Hankook Tire Company Limited for defective design and manufacture of the tire that blew out while Emily was driving. Hathcock asserted several design-defect theories, his primary theory being that a safer, alternative design, which would have included steel plys on the tire, was available. As evidence, Hathcock attempted to show that Hankook subsequently changed the design of the tire to include a steel ply. Further, Hathcock attempted to introduce a federal regulation enacted after the allegedly defective tire was manufactured to show that the previous design was flawed.

Hankook defended that the allegedly defective tire was seven years old, had been chronically underinflated, and sustained dramatic damage 2,000 to 3,000 miles before the accident. After a four week trial, Hankook won on jury verdict.

Hathcock appealed asserting that the evidence was factually insufficient to support the verdict and that the trial court erred when it: 1) excluded evidence offered to show a safer alternative design; 2) excluded evidence of a regulation that was promulgated after the tire at issue was manufactured; 3) excluded evidence regarding Firestone tires; and 4) admitted testimony from Hankook's timely designated witness.

The court of appeals affirmed on all grounds. The Court found sufficient evidence to support the verdict, and held that the trial court did not commit error by excluding testimony from Hathcock's expert regarding Firestone tires since no foundation had been laid for the expert to give his opinion. The Court also upheld the testimony of Hankook's expert witness because he had been timely designated.

Significantly, the Court also affirmed the trial court's exclusion of Hathcock's alternative design evidence. The Court cited Chapter 82 of the Texas Civil Practice & Remedies Code which limits safer alternative designs to those which are "economically and technologically feasible at the time the product left control of the manufacturer or seller." The Court rejected Hathcock's proffer of a design change by Hankook reasoning that because Hathcock only showed that Hankook modified its tire design after the allegedly defective tire was manufactured, but did not offer any reason as to why the modification was feasible at the time the allegedly defective tire was manufactured, the evidence was properly excluded.

The Court also upheld the exclusion of a federal regulation enacted after the accident calling for the addition of steel plys to the tires. The Court stated that the trial court was within its discretion to decide that the introduction of the recent regulation would have been more prejudicial and confusing to the jury than probative because the jury could be confused into thinking that Hankook was required to comply with the recently enacted regulation at the time the tire was manufactured.

3. *Orthopedic Resources, Inc. v. Swindell*, 329 S.W.3d 70 (Tex. App.—Dallas, Nov. 8, 2010, reh'ing overruled).

In *Orthopedic Resources, Inc.*, the court of appeals held that a company that would ordinarily be considered a health care provider may not be so if it acts outside the course and

scope of its contractual relationship with a health care provider.

Kara Swindell was a patient of Dr. John Crates and the Plano Orthopedic Sports Medicine clinic. Dr. Crates operated on Swindell's foot to remove a bunion. After the surgery, Dr. Crates prescribed a medical device called a VascuTherm for cold compression therapy. Crates prescribed the device with instructions that it be used for thirty minutes at a time then off for two hours.

JTW is a company that had a contract with the clinic to supply the VascuTherm as prescribed by doctors. JTW was also required to provide information on how to use the VascuTherm. Under the terms of the contract, JTW was an independent contractor.

After Dr. Crates prescribed the VascuTherm for Swindell, JTW delivered the device to Swindell. JTW's president, John Wall, showed the device to Swindell's husband and told him that the VascuTherm could be used 24/7 as long as there was no numbness, tingling, or pain. Swindell allegedly used the device according to the instructions of JTW's president and not according to Dr. Crates' instruction that it be used for thirty minutes at a time with two hour breaks. As a result, she suffered frostbite which required partial or total amputation of four of her toes.

The Swindells sued JTW and the device manufacturer for products liability and negligence. JTW moved to dismiss the action with prejudice under § 74.351(b) of the Texas Civil Practice & Remedies Code asserting that it was a health care provider as defined by that section, that the Swindells' claims were health care liability claims, and that they failed to file the required expert report for such claims within 120 days of filing the lawsuit. The Swindells contended that JTW was not a health care provider and that they were not bringing health care liability claims. The trial court, after a hearing, denied JTW's motion and JTW appealed.

The Dallas court of appeals affirmed the denial of JTW's motion. The Court framed the questions it confronted with the applicable statutes which provide that a claimant asserting a healthcare liability claim must serve on each party one or more expert reports for each physician or healthcare provider against whom a claim is asserted. Further, a "health care provider" is defined as any person or entity duly licensed by the State of Texas to provide health care, and includes an independent contractor acting in the course and scope of the employment or contractual relationship.

The Court recognized that the clinic was certainly a health care provider and that JTW was its independent contractor. The remaining question was whether JTW acted within the course and scope of its employment or contractual relationship when JTW's president told the Swindells that the VascuTherm could be used 24/7.

JTW argued that under its contract with the clinic, JTW was obliged to provide "professional and prompt delivery, set-up, patient/patient family member instructions for [VascuTherm's] use and function…" and that the advice of JTW's president was in accordance with JTW's contractual obligations.

The Swindells, on the other hand, argued that JTW exceeded the scope of its contract by overriding the doctor's prescription that the device be used only for thirty minutes at a time with two hour breaks. The Swindells also offered Dr. Crates' testimony that all JTW was required to do was "to deliver the machine…[and] show how it turns on and off, but not [give] specific instructions on how long I should use this."

The Court held that the Swindell's evidence raised a genuine issue as to whether JTW's instructions on how to use the device were outside the course and scope of its contract with the clinic. Therefore, the Court affirmed the trial court's denial of JTW's motion to dismiss.

4. *Shaw v. Trinity Highway Products, LLC*, 329 S.W.3d 914 (Tex. App.—Dallas, Dec. 20, 2010).

In *Shaw*, the court of appeals held that a manufacturer is not required to produce written copies of federal regulations with which it has complied to invoke the rebuttable presumption of § 82.008 that the product was not defectively designed or marketed. Deposition testimony as well as letters from federal agencies are sufficient proof.

Debra Shaw was driving her pickup truck on Interstate 20 when it drifted off the road onto the shoulder and struck the lower left corner of the end cap (a device designed to absorb and dissipate the energy of a vehicle crashing into the end of the guardrail). The impact pushed the end cap back along the guardrail, stopped, turned one hundred and eighty degrees, then the guardrail was pushed into and penetrated the truck's cabin. Shaw died from injuries she sustained in the crash.

Shaw's family filed suit against Trinity, the manufacturer and seller of the end cap alleging that the end cap was defectively designed and marketed. Trinity filed for no-evidence summary judgment on all of the Shaws' claims which the trial court granted on all counts.

On appeal, Trinity argued that the Shaws' claims were barred by § 82.008(a) and (c) of the Texas Civil Practice & Remedies Code. § 82.008 creates a rebuttable presumption for defendant manufacturers and sellers that their product was not defectively designed or marketed if the product's formula, label, or design complied with mandatory federal regulations applicable to the product.

The Shaws argued that Trinity did not show that it was entitled to the presumption because copies of written federal standards were not supplied with Trinity's summary judgment motion. However, Trinity produced deposition testimony from representatives of the Texas Department of Transportation as well as letters from the Federal Highway Administration which stated that the end cap satisfied federal regulations. The court of appeals concluded that this was enough evidence to warrant the presumption.

The Shaws also argued that Trinity's motion for summary judgment should have been denied as to the Shaws' marketing defect claim because there was expert testimony that asserted that had proper warnings, guidelines, and instructions been provided, the accident would not have happened. Nevertheless, the court of appeals concluded that because the Shaws failed to provide evidence of what the proper warnings, guidelines, and instructions should have been nor did they present evidence that a warning would have prevented the injury in this case, the Shaws' evidence did not rise to the level to defeat Trinity's motion for summary judgment.

5. *Jones v. Landry's Seafood Inn & Oyster Bar—Galveston, Inc.*, 328 S.W.3d 909 (Tex. App.—Houston [14th Dist.] Dec. 16, 2010).

In *Jones*, the court of appeals held that a restaurant may be outside the protections of § 82.004 as a manufacturer when the consumer products it sells are also prepared by the restaurant.

Juliane Jones and her mother ate lunch at Grotto, a restaurant owned by Landry's Seafood. Jones ordered "Oysters Mimmo" which is a breaded, cooked oyster dish made of chopped or ground oyster meat. While eating, Jones bit into a hard object, injuring her tooth. The restaurant manager told Jones that the object was a pearl, but Jones disagreed.

Nevertheless, the manager told Jones to immediately seek out a dentist and that Landry's would pay for treatment to repair her tooth. Jones followed the manager's suggestion and found a local dentist who installed a temporary crown. Jones also visited another dentist upon her return to Chicago for a follow up appointment.

When Jones sent her receipts from these dentist visits to Landry's and contacted Landry's customer service, Landry's refused to pay. Jones then brought suit against Landry's for strict products liability, negligence, breach of implied warranty, and promissory estoppel. Landry's moved for traditional and no evidence summary judgment against Jones' claims. The trial court granted Landry's motions and ordered that Jones take nothing. Jones appealed.

The Houston court of appeals reversed. Landry's asserted its traditional summary judgment motion based on § 82.004 of the Texas Civil Practice & Remedies Code which states: "(a) In a products liability action, a manufacturer or seller shall not be liable if…the product is a common consumer product intended for personal consumption, such as…an oyster." For purposes of § 82.004, the term "products liability action" does not include an action based on a manufacturing defect.

Landry's characterized Jones' injury as one stemming from an oyster because the object on which she broke her tooth, according to Landry's, was a pearl – which is an object in an

oyster. Therefore, Jones' claim would be barred by § 82.004.

However, Jones asserted that her claim was not barred by § 82.004, because it was based on a manufacturing defect, not § 82.004's definition of "products liability." Jones argued that because the dish she ordered was not a simple oyster, but instead was a cooked oyster dish consisting of processed, ground oyster meat prepared by Landry's, § 82.004 did not operate to preclude her claims.

The court of appeals agreed with Jones. The Court agreed that the manner in which the dish was prepared made Jones' claim a manufacturing defect claim not barred by § 82.004. Because Landry's prepared the oyster meat – whether or not the object was present when the restaurant received the meat – Landry's employees allowed an inedible object to be incorporated into the dish or failed to detect and remove the object. Therefore, the court of appeals reversed the trial court's grant of summary judgment on this claim.

The court of appeals also held that Jones had presented sufficient evidence to raise a fact issue regarding her promissory estoppel claim, and reversed.

6. *CCE, Inc. v. PBS&J Construction Services, Inc.*, No. 01-09-00040-CV, 2011 Tex. App. LEXIS 809 (Tex. App.—Houston [1st Dist.] Jan. 28, 2011).

In *CCE, Inc.* the court of appeals held that an engineer's seal may be considered an affirmative representation as to the quality of the work that has been performed.

PBS&J, an engineering firm, was hired by the Texas Department of Transportation ("TxDOT") to prepare plans for a new road in Nacogdoches County. The plans included a "Storm Water Pollution Prevention Plan."

CCE, Inc. was hired by TxDOT to construct the road according to the plans prepared by PBS&J. During construction, silt discharged from the road project onto nearby private property and TxDOT instructed CCE to suspend work on the road until the erosion control measures laid out in the road plans were in place. CCE maintained that it had complied with the Storm Water Pollution Prevention Plan as specified in the road plans.

Because of the erosion control problems, TxDOT later declared CCE in default of the construction contract, ordered CCE to cease work, and notified CCE's surety that it was obligated to arrange for completion of the road project. CCE hired another construction company to complete the project and incurred an additional $2,423,752.20 in expenses over and above what it would have had it been able to complete the project on its own.

CCE sued PBS&J for, among other things, negligent misrepresentation alleging that PBS&J had represented that the road construction plans conformed with permit guidelines and that the Storm Water Pollution Prevention Plan would work. In support of its allegations, CCE presented a copy of the road plans prepared by PBS&J which bore the engineering seal of one of PBS&J's engineers.

PBS&J moved for and was granted a no-evidence summary judgment by the trial court. The court of appeals reversed the portion of the trial court's order dismissing CCE's negligent misrepresentation claims. The Court reasoned that PBS&J's engineering seal that was on the construction plans incorporated the assurances contained in § 137.33(a) and (b) of the Texas Administrative Code. The part of the Code emphasized by the Court was that the purpose of the engineer's seal is "to assure the user of the engineering product" and that "[u]pon sealing, engineers take full professional responsibility for that work." The Court concluded that these assurances along with evidence that the Storm Water Pollution Prevention Plan prepared by PBS&J failed was enough to survive a no-evidence summary judgment motion.