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Products Liability in Texas — Fifth Circuit Imposes Higher Duty of Care on Manufacturers of Automobiles

Plaintiff was injured when the dimmer switch on his new car malfunctioned and the headlights went out which resulted in his driving off the road and into a tree. The jury found that the independent supplier of the dimmer switch had been negligent in its manufacture, but that the assembler-manufacturer, by reasonable inspection, could *not* have discovered the defect. Nevertheless, the assembler-manufacturer was found negligent for placing the car on the market in its defective condition. *Held, affirmed*: The assembler-manufacturer of an automobile is liable for the negligence of an independent supplier of a component part.¹ *Ford Motor Co. v. Matbis*, 322 F.2d 267 (5th Cir. 1963).

In imposing liability upon manufacturers, the courts have seized principally upon two theories, negligence and strict liability. Under the general negligence rule, the duty placed upon manufacturers of all products, other than those inherently dangerous, is one of "reasonable care."² If the product is inherently dangerous, a standard of extreme caution normally is required.³ The rule holding the assembler-manufacturer liable for injuries resulting from negligently made component parts of his product was first set forth in the landmark case of *MacPherson v. Buick Motor Co.*⁴ The New York court held that a manufacturer breached a duty of care owed the pur-

¹ 322 F.2d 267, 276 (5th Cir. 1963). The case was appealed from a verdict for the plaintiff. The jury found that the automobile was in an inherently dangerous condition, due to the defect in the dimmer switch, that the supplier of the switch had been negligent in its manufacture, and that Ford, by means of reasonable inspection, could not have discovered the defect. *Id.* at 272 nn. 3-5. The jury also found that Ford was negligent in marketing the car in its defective condition. *Id.* at 272 n.6. Appellant contended that it could not be held guilty of negligence because it had not breached a reasonable duty of care. *Id.* at 272. Additionally, appellant contended that lack of privity of contract precluded plaintiff from recovery. *Id.* at 275. The court of appeals rejected both arguments and affirmed the judgment of the trial court. *Id.* at 276.

² *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

³ *Talley v. Beever & Hindes*, 78 S.W. 23 (Tex. Civ. App. 1903). As distinguished from an imminently dangerous product, a product is said to be inherently dangerous when it is dangerous per se. Privity of contract is not necessary to recover in cases concerning inherently dangerous products. *Liggett & Myers Tobacco Co. v. Wallace*, 69 S.W.2d 857 (Tex. Civ. App. 1934) *error disp.*; *Brown Cracker & Candy Co. v. Jensen*, 32 S.W.2d 227 (Tex. Civ. App. 1930); *Texas Drug Co. v. Cadwell*, 237 S.W. 968 (Tex. Civ. App. 1922) *error ref.*; *Cohn v. Saenz*, 211 S.W. 492 (Tex. Civ. App. 1919) *error ref.*; *Armstrong Packing Co. v. Clem*, 151 S.W. 576 (Tex. Civ. App. 1912) *error ref.*

Imminently dangerous products are those which are not dangerous by nature, but which are dangerous because of some defect in their manufacture. *Dunn v. Texas Coca-Cola Bottling Co.*, 84 S.W.2d 545 (Tex. Civ. App. 1935) *error disp.* Privity of contract is not necessary to recovery when the product is imminently dangerous. *International Derrick & Equip. Co. v. Croix*, 241 F.2d 216 (5th Cir. 1957); *Johnson v. Murray Co.*, 90 S.W.2d 920 (Tex. Civ. App. 1936) *error disp.*

⁴ 217 N.Y. 382, 111 N.E. 1050 (1916).

chaser by marketing a product without first subjecting it to tests commensurate with the amount of danger involved if the product proved defective.⁵ This rule was adopted by the Texas court of civil appeals in *Blickman v. Cbilton*.⁶ It should be noted that in *MacPherson* and *Blickman*, although the defective component was negligently manufactured by an independent supplier, there was no finding, as in the principal case, that the manufacturer could not have discovered the defect by a reasonable inspection of the finished product.⁷

The alternative theories by which liability may be imposed upon a manufacturer for defects in his product are varying forms of strict liability. One of the most common of these theories is the action of implied warranty of merchantability, which is a contractual action.⁸ A more recent theory is that of strict liability in tort, which does not depend upon a basis of warranty.⁹ Another is of an in-between sort; in it liability is predicated upon "the broad principle of the public policy to protect health and life."¹⁰ Although there is a trend among other jurisdictions toward applying some form of strict liability to an increasing number of products,¹¹ Texas has thus far limited recovery on its "public policy" theory to food cases.¹²

In the principal case, the Fifth Circuit was faced with the liability of an assembler-manufacturer for his supplier's negligence even though the assembler-manufacturer could not have discovered the defect by reasonable inspection.¹³ The court relied upon section 400 of the Restatement of Torts as the principal basis of recovery.¹⁴ "One

⁵ *Id.* at 1051.

⁶ 114 S.W.2d 646 (Tex. Civ. App. 1938). In this case, a negligently manufactured lunch counter stool was supplied to the contractor-defendant. Whether the defendant could have found the defect by means of a reasonable inspection was not submitted to the jury. *Id.* at 648. However, the stool was defectively made and the plaintiff was injured while using it. *Id.* at 648.

⁷ See notes 5, 6 *supra*. Also see *Hooper v. General Motors Corp.*, 123 Utah 515, 260 P.2d 549 (1953): "Thus, to impose liability on an assembler of an automobile certain necessary elements must be made out. Plaintiff is required to show: (1) A defective wheel at the time of the automobile assembly; (2) Such defect being discoverable by reasonable inspection; (3) Injury caused by failure of the wheel due to its defective condition." *Id.* at 551.

⁸ *Chapman v. Brown*, 198 F. Supp. 78, 98 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962); *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413, 418 (1954); *Esborg v. Bailey Drug Co.*, 61 Wash. 2d 347, 378 P.2d 298, 304-305 (1963).

⁹ *Greenman v. Yuba Power Prods., Inc.*, 27 Cal. 697, 377 P.2d 897, 900 (1962), noted in 17 Sw. L.J. 669 (1963).

¹⁰ *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 829 (1942).

¹¹ See *Chapman v. Brown*, 198 F. Supp. 78, 119 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962), for a list of jurisdictions which have accepted some form of strict liability.

¹² *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). In *Brown v. Howard*, 285 S.W.2d 752 (Tex. Civ. App. 1955) *error ref. n.r.e.*, the court refused to extend the implied warranty rule of *Decker* to a cattle spray because the injury was not to human health or life.

¹³ 322 F.2d at 276.

¹⁴ *Id.* at 272, 274.

who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."¹⁵ The effect is to impute the negligence of a supplier to the assembler-manufacturer.¹⁶ Apparently, the basis for the application of section 400 is one of public policy. The courts following section 400 have reasoned that since manufacturers induce customers to rely upon the quality of their finished products, it is reasonable to impose liability upon a manufacturer when an injury results from a defective part supplied by another.¹⁷ The court, in the principal case, noted that section 400 incorporates section 395¹⁸ by which liability is imposed upon a manufacturer (supplier) who fails to use reasonable care in the manufacture of a chattel which will, unless carefully made, cause an *unreasonable* risk of injury to those who use it.¹⁹ In holding that the fact situation before the court fell within the rule of section 395, the court was able to employ section 400 in imputing the supplier's negligence to the assembler-manufacturer.²⁰ Finally, the opinion resorted to an unnecessary extension of implied warranty to reject Ford's argument that lack of privity of contract barred recovery by the plaintiff.²¹

As precedent for applying section 400, the court cited²² *Blickman v. Chilton*.²³ Although *Blickman*²⁴ did cite section 400 as an applicable principle of Texas law, that case can be distinguished from *Ford Motor Co. v. Mathis*.²⁵ In *Blickman*,²⁶ the controlling issue was not the imputing of negligence from the supplier to the contractor (assembler-manufacturer in the principal case), but was the intervening act of a third party and the lack of privity of contract.²⁷ The question whether the defendant could have discovered the defect by reasonable inspection was not submitted to the jury.²⁸ Therefore, in relying on section 400, the court of civil appeals did not face the problem of imputing negligence to a defendant who had met his reasonable duty of care.

¹⁵ Restatement, Torts § 400 (1934).

¹⁶ 322 F.2d at 276 n.18.

¹⁷ *Id.* at 274. *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 443 (1944); *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413, 417 (1954); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 81 (1960).

¹⁸ *Ibid.*

¹⁹ Restatement, Torts § 395 (1934); see Restatement, Torts § 395 (Supp. 1949).

²⁰ 322 F.2d at 274-75.

²¹ *Id.* at 275.

²² *Id.* at 272.

²³ 114 S.W.2d 646 (Tex. Civ. App. 1938).

²⁴ *Id.* at 649.

²⁵ 322 F.2d 267 (5th Cir. 1963).

²⁶ 114 S.W.2d 646 (Tex. Civ. App. 1938).

²⁷ *Id.* at 648-50.

²⁸ *Id.* at 648.

Regardless of the application of *Blickman*,²⁹ a more serious objection exists to the adoption of section 400 as a general rule of Texas negligence law. Before proximate cause can be charged to a defendant, the plaintiff must prove the defendant breached a duty of reasonable care owed to the plaintiff.³⁰ Imputing the negligence of a supplier to an assembler-manufacturer, even though the latter could not have discovered the defect by reasonable inspection, seemingly violates this accepted concept of proximate cause. Apparently, the only means by which the defect can be attributed to the assembler-manufacturer without violating the meaning of proximate cause is by substituting a higher standard of care for the normal duty of reasonable inspection. But in affirming the trial court's finding that an automobile equipped with a defective dimmer switch is inherently dangerous,³¹ the court did exactly this. An inherently dangerous product, the court reasoned, necessarily involves an unreasonable risk and therefore the commensurate duty of care is increased substantially,³² even to a level which cannot be met easily or practically.³³ It should be recognized that the above argument is merely a nominal attempt at preserving the doctrine of proximate cause when the assembler-manufacturer could not have discovered, by reasonable inspection, the defect in the component part. The very fact that the court was not concerned with such a justification of proximate cause, coupled with the emphasis placed on the public policy rationale,³⁴ may be an indication that the court was more concerned with implementing a limited form of strict liability than it was with following rules of negligence law.

In addition to the adoption of section 400, the court strongly suggested that public policy may be asserted as an independent theory of imputing negligence to the manufacturer.³⁵ In today's world of merchandising, purchasers rarely distinguish between the assembler-manufacturer and the supplier, nor does the manufacturer wish them

²⁹ 114 S.W.2d 646 (Tex. Civ. App. 1938).

³⁰ *Guthrie v. Sinclair Ref. Co.*, 320 S.W.2d 396, 398 (Tex. Civ. App. 1959) *error ref. n.r.e.*; *Green, Proximate Cause in Texas Negligence Law*, 28 Texas L. Rev. 471, 761-64 (1950).

³¹ 322 F.2d at 274-75.

³² *Ibid.*

³³ That the court was not concerned particularly with whether the defendant possibly could meet the duty of care imposed is shown by the heavy emphasis placed upon the public policy argument and the implied warranty theory. See notes 35-47 *infra* and accompanying text.

³⁴ See notes 33-36 *infra*. "To hold the assembler liable for the negligence of its component-part manufacturer appears to be a sound and realistic doctrine . . . this principle surely reflects the outlook of this modern world of big business advertising in a big way." 322 F.2d at 273.

³⁵ *Id.* at 273-74.

to do so.³⁶ When advertising leads a purchaser to rely upon the quality of a finished product, the manufacturer should be required to stand behind the quality of the product, including its component parts.³⁷ Even though this public policy argument is being adopted by an increasing number of jurisdictions,³⁸ it encounters the same criticism as all other public policy arguments, *viz.*, the substitution of results for causes and economic balancing for legal analysis.³⁹

In its treatment of the privity issue, the Fifth Circuit indicated a favorable inclination toward the application of implied warranty to automobile cases. Ford contended that the plaintiff was barred from recovery because he was not in privity.⁴⁰ In cases of both inherently and imminently dangerous products, the need for privity has long been abolished in negligence law.⁴¹ The court easily could have applied this rule and dismissed the issue, but instead it chose to reject the privity argument by reference to implied warranty cases.⁴² In pointing out that the category of products included in the implied warranty area is continually expanding,⁴³ the court cited as precedent the now famous case of *Henningsen v. Bloomfield Motors, Inc.*⁴⁴ That case held an automobile manufacturer liable on an implied warranty of merchantability for injuries caused by a defect in one of its products.⁴⁵ Judge Brown even leaned heavily upon the *Henningsen*⁴⁶ language in expressing his belief that the Supreme Court of Texas will not "differentiate between a Texan killed by a microbe and one killed by a negligently defective machine hurtling through space at great, but expected speed."⁴⁷ It may readily be observed that such a treatment of implied warranty adds nothing to negligence law, upon which the present case supposedly is decided.

In *Ford Motor Co.*,⁴⁸ the assembler-manufacturer actually was

³⁶ *Id.* at 274. Whether public policy alone may be a sufficient ground on which to impute the supplier's negligence to the assembler-manufacturer is not clear. Although § 400 has its roots in public policy, the emphasis and the space devoted to the merchandising factor in the opinion arguably may serve as a separate ground for imputing negligence from the supplier to the assembler-manufacturer.

³⁷ *Ibid.*

³⁸ See note 11 *supra*.

³⁹ Plant, *Strict Liability of Manufacturers For Injuries Caused By Defects In Products—An Opposing View*, 24 *Tenn. L. Rev.* 938, 945-46 (1957).

⁴⁰ 322 F.2d at 275.

⁴¹ See note 3 *supra*.

⁴² 322 F.2d at 275.

⁴³ *Id.* at 275 nn.14, 15.

⁴⁴ 32 N.J. 358, 161 A.2d 69 (1960).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ 322 F.2d at 276. The exact language of *Henningsen* is, "We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile."

32 N.J. 358, 161 A.2d 69, 83 (1960).

⁴⁸ 322 F.2d 267 (5th Cir. 1963).