SPRING 2015 NEWSLETTER

PRODUCTS LIABILITY UPDATE

By Rocky Little

1. *Abutahoun v. Dow Chem. Co.*, No. 13-0175 (Supreme Court of Texas) May 8, 2015.

Robert Henderson worked for Win-Way Industries installing insulation containing asbestos at a Dow Chemical Company facility. While working in the Dow facility, Henderson was exposed to asbestos dust by Dow employees who were installing, sawing, and removing asbestos insulation nearby on the same pipeline system. Many years later, Henderson contracted mesothelioma resulting in his death. The sole issue addressed by the Texas Supreme Court is whether Chapter 95 of the Texas Civil Practice & Remedies Code applies to an independent contractor's claims for negligence against a property owner when the injuries arise out of the property owner's negligent activities, and not the independent contractor's own work. The Henderson plaintiffs argued that Chapter 95 only applies to claims that arise out of the independent contractor's own work rather than the contemporaneous negligent acts of Dow, and that liability for these contemporaneous acts should be determined by a general negligence analysis.

The Court noted that Chapter 95 applies to a claim for damages caused by negligence against a property owner for injury to an employee (Henderson) of a subcontractor (Win-Way Industries) that arises from the condition or use of an improvement to real property where the subcontractor constructs, repairs, renovates, or modifies the improvement. In this case, Dow is the property owner, and the pipeline system is the improvement to real property. Under section 95.003, the property owner is not liable unless the plaintiff proves that: (1) the property owner exercises some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and (2) the property owner had actual knowledge of the danger or condition resulting in the injury and failed to adequately warn. Consequently, Chapter 95's limitations on a property owner's liability is much different than liability determined by the submission of a general negligence question (failure to use ordinary care) to a jury.

The Court pointed out that Chapter 95 does not deprive a subcontractor's employee of the right to recover damages from a negligent property owner. Rather, it specifically allows for such a recovery as long as the evidentiary burdens of the statute are met. The Court held that Chapter 95 of the Civil Practice & Remedies Code applies to all independent contractor claims for damages caused by a property owner's negligence when the requirements of §95.002(2) are satisfied. Therefore, Dow's liability for contemporaneous negligent acts in this case was not to be determined by a general negligence analysis, but rather the requirements of Chapter 95.

2. *Genie Indus., Inc. v Matak*, No. 13-0042 (Supreme Court of Texas) May 8, 2015.

This products liability suit was brought by the family of Walter Matak who was on a fully-extended mechanical lift that tipped over causing him to fall 40 feet to his death. At the time, Matak was working for Gulf Coast Electric to run fiber optic cable in the ceilings of the Cathedral in the Pines Church. The lift was manufactured by Genie Industries who was sued on a design defect theory of liability. The case was originally tried to a jury who found Genie 55% responsible for the damages. The court of appeals affirmed the jury's decision. The Supreme Court reversed the judgment of the court of appeals and rendered judgment for Genie.

The Supreme Court noted that a product manufacturer is not liable for a design defect unless a safer alternative design exists and the defect renders the product unreasonably dangerous--that is, its risks outweigh its utility. Although the issue of whether the product is unreasonably dangerous is usually one of fact for the jury to decide, it may nevertheless be an issue of law for the court to decide when the evidence is such that reasonable minds cannot differ on the risk-utility balancing considerations.

To impose liability on Genie, the plaintiffs had to present evidence of an alternative design that (1) would have been safer for Matak and prevented or significantly reduced his risk of injury, (2) would not have been less safe in other circumstances and increased the risks to other users, (3) would not have substantially impaired the lift's utility, and (4) was economically and technologically feasible at the time. Texas law does not require a manufacturer to destroy the utility of a product in order to make it safe. The Court held that Plaintiffs met their burden of proving by more than a scintilla of evidence the existence of a safer alternative design.

In order to recover from Genie, the plaintiffs also had to prove that the defective design rendered the lift unreasonably dangerous. The law of products liability does not require that a product be risk-free, only that it will not be unreasonably dangerous. Whether a defective design renders a product unreasonably dangerous depends on whether the product's risks outweigh its utility, considering:

> (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
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> (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
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> (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs;
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> (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of the general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and
>
> (5) the expectations of the ordinary consumers.

This risk-utility balancing analysis is for the jury unless the evidence allows but one reasonable conclusion. In this case, the Supreme Court decided that, based on the evidence presented at trial, and notwithstanding the jury's verdict, reasonable minds can only conclude that the Genie lift is not unreasonably dangerous.