# 2015 YEAR IN REVIEW

# PRODUCTS LIABILITY

**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;
>
> (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
>
> (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs;
>
> (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.

***3. Tatsch v Chrysler Group, LLC*, No. 04-13-00757-CV, Court of Appeals of Texas, Fourth District, San Antonio, December 3, 2014.**

In 2008, Tatsch bought a 2008 Dodge Ram 5500 pickup truck that came with a (Chrysler) Cummins Diesel Engine Limited Warranty ("express engine warranty") spanning five years or 100,000 miles, whichever came first. In August 2011 after 37,000 miles, the engine ceased functioning, and the estimated cost of repairs was $31,000. Chrysler denied Tatsch's request to repair the truck under the express engine warranty. Thereafter, Tatsch filed a claim with his comprehensive automobile insurance carrier, Infinity Mutual, which was denied. Infinity contended that the mechanical failure was caused by contaminated fuel, and therefore was excluded from coverage.

Tatsch sued Chrysler under the Texas Deceptive Trade Practices Consumer Protection Act ("DTPA") for breach of express warranty and for breach of implied warranty as defined by the Texas Business and Commerce Code. Tatsch also sued Infinity Mutual for various violations of the Texas Insurance Code as tied into the DTPA.

<u>Express Warranty</u>

Although the trial court granted Chrysler's No-Evidence Motion for Summary Judgment as to the express warranty, the Court of Appeals held that the trial court erred because Chrysler declined to repair a part it concedes was covered under the express warranty during the warranty period. Therefore, there was more than a scintilla of evidence that Chrysler failed to uphold its obligations under the express warranty. The trial court’s no-evidence summary judgment on this issue was reversed and remanded.

<u>Implied Warranty</u>

To recover for breach of an implied warranty under the DTPA, a plaintiff must prove: (1) consumer status, (2) existence of the warranty, (3) breach of the warranty, and (4) damages resulting from the breach. Even though Chrysler was the manufacturer, and not the seller, the court noted that a manufacturer can be responsible, without regard to privity, for the economic loss which results from the breach of the implied warranty of merchantability. Under the DTPA, a seller impliedly warrants that his goods are fit for the ordinary purposes for which such goods are used. For goods to breach this warranty, they must be defective. However, the defect in an implied warranty of merchantability case is not the same as the defect in a strict products liability case. The plaintiff does not have to use direct or expert evidence to show that the goods are unfit. Rather, the burden to prove breach of implied warranty may be met with circumstantial evidence alone. Evidence of proper use of the good together with a malfunction may be sufficient circumstantial evidence. Because plaintiff’s affidavit was conclusory rather than factual, plaintiff failed to provide more than a scintilla of evidence in support of his claims for breach of implied warranty, and the trial court’s no-evidence summary judgment on this issue in favor of Chrysler was affirmed.

Unfair Settlement Practices Under the Insurance Code

Following the trial court's granting of Infinity Mutual's No-Evidence Motion for Summary Judgment, one of the issues facing the court of appeals was whether Tatsch presented a scintilla of evidence that Infinity Mutual failed to conduct a reasonable investigation before denying the claim. The court noted that the special relationship between the insured and insurer imposes on the insurer a duty to investigate claims thoroughly and in good faith, and to deny those claims only after an investigation reveals there is a reasonable basis to do so. Tatsch alleged that Infinity Mutual did not inspect the vehicle, request documentation, speak with any Chrysler or dealership personnel, or even request a fuel sample before denying the claim. Although Infinity Mutual contends the fuel was discarded before a sample could be taken, it admitted that it did not inspect the truck. The court held that failing to inspect the truck is more than a scintilla of evidence as to whether Infinity Mutual performed a reasonable investigation before denying Tatsch's claim, and reversed the trial court's granting of the no-evidence motion for summary judgment on this issue.

**4. *De Los Santos v. Ford Motor Company*, No.04-14-00562-CV, Court of Appeals of Texas, San Antonio, June 17, 2015.**

This death claim arose from a one-vehicle accident involving the rollover of a 2005 Ford F-150 Super Crew pickup truck. Plaintiff contended that the right rear wheel assembly broke and separated from the truck, causing the right rear wheel to detach from the truck, and that the axle broke before the truck rolled over because of a crack that developed during the manufacturing process. Consequently, this products liability claim is based on an alleged manufacturing defect.

A manufacturing defect exists when a product deviates, in its quality or construction, from the specifications or planned output in a manner that makes it unreasonably dangerous. A plaintiff must prove the product was defective when it left the hands of the manufacturer and that the defect was a producing cause of the plaintiff's injuries. The plaintiff need not identify exactly how the defect came into being, only that the defect can be traced to the manufacturer. Furthermore, neither direct evidence nor expert testimony is required to establish the existence of a manufacturing defect. Often, a manufacturing defect can be proven only by circumstantial evidence, which is evidence that allows one to infer a fact based on the circumstances shown by the proponent of the fact.

Plaintiff's expert noted that properly manufactured axles are capable of sustaining bending loads of more than 100,000 inch pounds, and that the axle snapped at 40,000-50,000 inch pounds, breaking at half the load a standard axle should be able to bear. Accordingly, the axle deviated from the expected standard—i.e., it contained a crack caused by "embrittled" steel—and failed to remain intact when sideways frictional forces were exerted upon it. The court, however, pointed out that Plaintiff's expert testimony merely shows how the axle may have deviated from Ford's performance standards. Performance standards describe the intended result of a product, but do not indicate anything about the product's technical specifications or design. Likewise, the court noted that case law is clear: evidence that a product deviated from a performance standard is not evidence that a product deviated from its specifications or planned output.

The court also noted that in the absence of evidence of a standard, evidence that a product was treated in an unintended manner or that the product was manufactured in an unintended

configuration can establish a manufacturing defect claim. However, in this case, Plaintiff failed to produce any evidence to establish that Ford treated the axle in an unintended manner or manufactured the axle in an unintended configuration.

Consequently, the court held that the trial court did not err in granting a directed verdict in favor of Ford Motor Company because plaintiff failed to produce any evidence to establish the axle deviated from Ford's specification or planned output or that Ford treated the axle in an unintended manner or manufactured the axle in an unintended configuration.

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