IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20110087

Supreme Court No: 20110087

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STATE OF NORTH DAKOTA

Ruth Bornsen and Nathan Bornsen

Plaintiffs/Appellants,

vs.

Pragotrade, LLC, Pragotrade, Inc., and Cabela's Retail, Inc,

Defendants/Appellees.

UPON ORDER FOR CERTIFICATION

U.S. DISTRICT COURT (D.N.D.)
MARCH 31, 2011

CIVIL NO. 2:10-CV-65

HONORABLE RALPH R. ERICKSON, CHIEF JUDGE

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

[¶1] In briefs filed by the North Dakota Defense Lawyers Association (Amicus) and Cabela's, various arguments are made that the apparent manufacturer doctrine is outdated in the context of modern strict product liability theories, that it is either not consistent with, or is contrary to statutory language and legislative intent of the North Dakota Legislature, and that adoption or recognition of the doctrine would establish an unauthorized expansion of the scope of product liability actions.

[¶2] In this reply brief Bornsens will seek to meet and address the positions advanced by the opposition.

ARGUMENT

I. THE APPARENT MANUFACTURER DOCTRINE IS NOT OUTDATED.

[¶3] Cabela's cites various commentaries suggesting that the apparent manufacturer doctrine has run its course and should be considered outdated. It further points out that many of the cases relied upon in *Reiss v. Komatsu America Corp.*, 735 F.Supp.2d 1125 (D.N.D. 2010), were decided decades ago and should not carry the influence they once did. Cabela's cites additional more modern cases which it states have rejected the doctrine.

[¶4] The authors of the Restatement of Torts would not agree. Restatement (Third) of Torts: Prod. Liab. §14, adopted in 1998, continues to include the apparent manufacturer doctrine.

[¶5] Indeed, the cases representing many of the 15 jurisdictions cited by *Reiss* in adopting the apparent manufacturer doctrine were decided some time ago. This does not, in itself, make them bad or outdated law. Four of the cases were decided since 1990.

[¶6] Of particular note is *Warzynski v. Empire Comfort Systems, Inc.*, 401 SE2d 801 (NC.App. 1991) in which a "retailer exception" statute was involved. The statute provided that an action could not be commenced against a seller of a product if it were sold in a sealed container and the seller was not afforded a reasonable opportunity to inspect the product in order to reveal any defective condition. The plaintiff argued the doctrine of apparent manufacturer should apply since the seller marketed the product as its own, including providing the warranty and the placement of its name on the product and accompanying written materials.

[¶7] The Court concluded:

> "Therefore, we hold that a genuine issue of material fact exists as to whether *Empire* was the apparent manufacturer of the heaters. Accordingly, we reverse the trial court entry of summary judgment for *Empire*. 401 SE2d, 805.

[¶8] Cabela's has cited several modern or recent cases in which it is contended the apparent manufacturer doctrine was considered and rejected. Upon careful review, one finds various distinctions in those cases.

[¶9] In *Rushing v. Flerlage Marine Co.*, 2010 WL 3419443 (W.D.Ky. 2010), the US District Court for the Western District Court of Kentucky predicted the Kentucky Supreme Court would reject the apparent manufacturer doctrine. The decision, authored by a U.S. Magistrate, determined that the apparent manufacturer doctrine cannot "exist entirely

peacefully" with Kentucky's "middleman" statute. Id., p 2. The decision also recognized and noted comments in a decision from the Eastern District of Kentucky, *Beverly v. MEVA Farmwork Sys., Inc.*, 2010 WL 2305746 (E.D.Ky. 2010) in which District Judge Reeves commented that the Kentucky middleman statute and the restatement rule are not necessarily incompatible and do not apply to exactly the same conditions, stating:

> "KRS §411.340 is meant to protect innocent middlemen who are selling someone else's products, whereas the Restatement rule applies where the product was put out under the defendant's name-which, given that *Beverly* originally sued only *MEVA Farmwork* (identifying it as the manufacturer of the allegedly defective product), is likely the case here. Furthermore, KRS §411.340 has been interpreted as merely providing a defense for retailers under certain circumstances; the general rule holding manufacturers *and* distributors strictly liable for defective products remains in effect in Kentucky. Id at FN.2.

[¶10] Magistrate Moyer then noted that "Kentucky's courts do not appear to have adopted any of the Restatement (Third) of Torts: Product Liability. (Emphasis supplied)(Citation omitted)(Id at 2). Thus, authority in the state of Kentucky is unsettled.

[¶11] *Stones v. Sears, Reebok & Co.*, 558 NW2d 540 (Neb. 1997) is cited as rejecting the apparent manufacturer doctrine. In *Stones*, however, the court merely determined the facts were insufficient. The Court concluded:

> "Because the record in the instant case simply does not support a cause of action against Sears under the apparent manufacturer doctrine, we leave for another day whether the doctrine is in conflict with the plain language of §25-21.181." 558 NW2d at 565, 566.

[¶12] *Seasword v. Hilti, Inc.*, 537 NW2d 221 (Mich. 1995) is again cited as rejecting the apparent manufacturer doctrine. In *Seasword*, the doctrine was not rejected as being

inappropriate, outdated, or contrary to Michigan law. The Court determined it was simply unnecessary:

> "Because nonmanufacturing sellers in Michigan continue to be answerable for design defects under existing tort theories, we find it unnecessary to adopt an *additional* theory under which nonmanufacturing sellers could be accountable for injuries caused by an allegedly defective product." 537 NW2d at 547.

[¶13] In *Alltrade, Inc. v. McDonald*, 445 SE2d 856 (Ga.App. 1994), the Georgia Court of Appeals determined that a retailer, which had placed its label on stepladders sold to various outlets would not be held liable as an apparent manufacturer. The decision was necessitated by Georgia's unique statute identifying, and protecting, a product seller which was defined, in addition to the usual activities of selling and distributing, also as one who "prepares; blends; packages; labels; markets; or assembles" a product (445 SE2d at 858). Thus, the expansive definition of a "product seller" in Georgia precludes application of the apparent manufacturer doctrine.

[¶14] In *Duncan v. M & M Auto Service, Inc.*, 898 NE2d 338 (In.App. 2008), the Indiana Court of Appeals refused to apply the apparent manufacturer doctrine in a case where the plaintiff contended simply that a company which installed a component in an automobile and placed its own name on the invoice should be held liable. Under this scenario, there would seem to be no factual basis for applying the apparent manufacturer doctrine.

[¶15] In *Goesel v. Boley International, Ltd.*, 664 F.Supp.2d 923 (N.D.Ill. 2009), the District Court predicted that the Illinois Supreme Court would not adopt an apparent manufacturer doctrine. The plaintiff claimed that Target Corporation (Target) held itself out as the

apparent manufacturer of a toy which it marketed and sold and which allegedly caused injury to plaintiff's son. While the facts suggest that Target may not have been found to be the apparent manufacturer (the packaging indicated only that the product was "distributed" by Target and that it was sold under copyright), in one sense, Cabela's has reason to rely heavily on *Goesel* since the Illinois seller protective statute, with its three exceptions, is a close match to that adopted in North Dakota. On the other hand, the journey of both case law and the statutory provision in Illinois does not make a clear road map for this Court to follow.

[¶16] *Hebel v. Sherman Equipment*, 442 NE2d 199 (Ill. 1982) was decided by the Illinois Supreme Court one year prior to the enactment of the Illinois seller protective statute. In *Hebel*, the court undertook a detailed analysis of the "holding out" or apparent manufacturer doctrine, ultimately determining the facts before it did not justify its application. 442 NE2d at 203. The fact that the statute in question was adopted one year after *Hebel* was not lost on the *Goesel* court (664 F.Supp.2d at 924 (FN. 5)). Nevertheless, in its prediction that the Illinois Supreme Court would not adopt the doctrine, the *Goesel* court could not ignore two cases decided by the Appellate Court of Illinois, *Root v. J.H. Industries, Inc.*, 660 NE2d 195 (Ill.App. 1995), and *Luu v. Kim*, 752 NE2d 547 (Ill.App. 2001). Each of these cases was decided post-statute as well, and in each, the doctrine of apparent manufacturer was asserted and discussed thoroughly with a conclusion each time that the facts were inadequate.

[¶17] Cabela's dismisses Bornsen's reliance upon *Long v. United States Brass Corporation*, 333 F.Supp.2d 999 (D.C.Col. 2004) because the statute is worded differently, and the case was decided on a "negative implication." First, a review of all of the cited cases makes it clear that the definitions, terms, phrasing, and exceptions, in seller protective

statutes are never identical from one state to another. There was, however, one paragraph in the Colorado statute which is virtually identical to the 1979 North Dakota definition regarding private labelers. Section 13-21-401(1) provides:

> "A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or control, in some manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is."

[¶18] The Court concluded, as it must, that there would be no reason to include this section unless placement of a private label was otherwise sufficient to impose liability. 333 F.Supp.2d at 1002. In other words, the Colorado legislature anticipated that a seller, by placing a private label on a product it did not manufacture, may be found to be an apparent manufacturer, and it could therefore protect itself and assure immunity by disclosing the actual manufacturer. The Court concluded:

> "Reference to the legislative actions of others states confirms that the Colorado legislature has endorsed the Restatement view. Had the legislature intended to exclude apparent manufacturers from liability, it could have done so explicitly, as other states have considered or done." (Citations omitted). 333 F.Supp.2d at 1003.

II. TRADITIONAL STRICT LIABILITY IN PRODUCT LIABILITY CASES DOES NOT PROVIDE PROTECTION TO NORTH DAKOTA CONSUMERS.

[¶19] The briefs by the North Dakota Defense Lawyers Association and Cabela's rely upon commentators who opine the doctrine is now superfluous, quaint, or outdated in product liability law. The authors of *Madden & Owen* on products liability indicate that this has resulted from " . . . effective discovery techniques for uncovering both the identity and

production methods of manufacturers, and, most importantly, with the adoption of a general doctrine of strict products liability in tort . . . ". (2 Madden & Owen on Prod. Liab. §19:5 (3d ed.)). It also asserted that " . . . in a jurisdiction imposing strict liability on sellers in the chain of distribution, the apparent manufacturer doctrine seems inapplicable to strict liability cases." (*Am. L. Prod. Liab.* 3d ed. §6:2). The doctrine is criticized in Sachs *Product Liability Reform and Sale Liability: A proposal for a change,* 55 Baylor L.Rev. 1031(2003):

> "When a seller did not actually create the defect in question, however, a fundamental question is whether there is any benefit to having both the seller and manufacturer as defendants rather than just having as a defendant a manufacturer who is identified, is subject to jurisdiction, can be served with process, and is able (either individually or through an insurer) fully to satisfy a judgment. If these conditions are satisfied, having only the manufacturer as a defendant clearly should be sufficient since the plaintiff is just entitled to one recovery for the damages sustained." Id. at 1048

[¶20] The only problem with the logical positions posed by such authors is that the facts and law they rely upon have no relation to North Dakota product liability law. Chapter 28-01.3 does not allow for any discovery prior to the seller filing its certifying affidavit, nor any reinstatement if its affidavit is found to be untruthful. It does not provide any exceptions if the manufacturer is not subject to jurisdiction in North Dakota, or cannot be served with process, or is not able to fully satisfy a judgment. Finally, the rule that strict liability in tort should be applied against all manufacturers and sellers in the stream of commerce adopted in *Johnson v. American Motors Corporation*, 225 NW2d 57 (N.D. 1974) was abrogated in full, under Cabela's theory, by the legislature in 1979.

[¶21] Therefore, under the defense position, even where there is a private labeler or apparent manufacturer in the chain, if the original manufacturer is not subject to jurisdiction in North Dakota (as is becoming more and more common in the global economy), an injured plaintiff has no remedy.

III. CHAPTER 28-01.3 IS NOT INCOMPATIBLE WITH THE APPARENT MANUFACTURER DOCTRINE.

[¶22] The piecemeal evolution of products liability statutes in North Dakota from 1979 through 1995 has resulted in a product with its own conflicts and inconsistencies. While the 1979 act emphasized indemnity on the part of nonmanufacturing sellers, and the 1987 act provided immunity to nonmanufacturing sellers, the 1993 act, all of which is still in effect, seems to attempt to provide both. While a nonmanufacturing seller is dismissed at the outset under N.D.C.C. 28-01.3-04 by filing the certifying affidavit, N.D.C.C. 28-01.3-05 asserts that an innocent seller who is required to defend in the action shall be indemnified by the manufacturer. It is difficult to reconcile these two sections if subsection 04 is interpreted to prohibit the involvement of all nonmanufacturing sellers who have no part in creating or knowing of the alleged defect. The 1987 session also adopted Chapter 32-03.2 establishing comparative fault in all actions including "strict liability for product defect." N.D.C.C. 32-03.2-01. As a result, where there are multiple defendants, each defendant, even in a products liability case, is liable only for that fault attributed directly to him. (*Butz v. Warner*, 438 NW2d 509 (N.D. 1989)

[¶23] It is not uncommon that evidence will develop in discovery and during trial resulting in a party who cannot be made a defendant being placed upon a verdict form as a potential

source of fault. Allowing an apparent manufacturer to be held in a case as a defendant does not defeat the interests of justice or the stated legislative intent to protect North Dakota retailers. The apparent manufacturer is ordinarily a larger, regional or multi-state entity which will not be held liable unless the facts so warrant, and its inclusion as a defendant allows an injured plaintiff a better measure of justice if the original manufacturer is not subject to jurisdiction, or an absent party is assessed a portion of fault.

[¶24] In 1979, the legislature was clearly aware of the apparent manufacturer doctrine when its definition of a manufacturer made explicitly clear that one who "places or has placed a private label on a product" is not a manufacturer if the seller had no involvement in the production of the product. The definition included knowledge on the part of the seller which might make it a manufacturer very similar to the provisions in the 1987 and 1993 amendments. The 1979 qualifier regarding private labeling, however, has been removed.

[¶25] As stated in *Long v. United Brass Corporation*, 333 F.Supp.2d 999: "had the legislature intended to exclude apparent manufacturers from liability it could have done so explicitly, as other states have considered or done." (Citing *Alltrade, Inc., supra*). 333 F.Supp.3d at 1003.

[¶26] Once the legislature amends or revises an existing statute in any manner, it is clearly the legislature's intent to change the original statute. (*Bostow v. Lundell Manufacturing Co.*, 376 NW2d 20, §1 (N.D. 1985). As a result, when the 1987 act removed the language protecting private labelers, the common law doctrine of apparent manufacturer became available in North Dakota.

RESPECTFULLY submitted this 13th day of June, 2011.

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