IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No: 20110087

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

BRIEF OF APPELLANTS

RONALD H. SCHNEIDER, PRO HAC VICE
MN BAR #97299
SCHNEIDER LAW FIRM
706 South First Street - PO Box 776
Willmar, MN 56201
(320) 235-1902 FAX (320)235-3611
Attorney for Appellants

NICHOLAS B. HALL
ND ID#03223
HALL CURRIE LAWYERS, LTD.
710 Hill Avenue - PO Box 610
Grafton, ND 58237
(701)352-2810 FAX (701)352-1550
Attorney for Appellants

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STATEMENT OF THE CASE

[¶1] This proceeding commenced in June 2010, as a product liability action for personal injuries and damages suffered by Ruth Bornsen and Nathan Bornsen on November 21, 2007. The Complaint alleged that Ruth Bornsen was assisting her husband Nathan in a recently opened deer processing business in Larimore, North Dakota. At the time, Ruth was operating a Cabela's meat grinder, Model #32, which Nathan had recently purchased from the Cabela's retail store in East Grand Forks, Minnesota. The latex gloves worn by Ruth in the procedure of forcing venison chunks into the feed chute of the grinder had become loose and stretched. As she sought to nudge a venison chunk sticking to the side of the feed chute, the auger caught one of the finger tips of the glove and pulled her hand into the auger mechanism. All four fingers of her left hand were severed before the machine could be stopped.

[¶2] The initial investigation indicated the grinder was manufactured by Pragotrade, an Ohio entity. It is believed that at some point between the injury and the commencement of the action, Pragotrade, Inc., or its assets, was assumed by Pragotrade, LLC. Therefore, both have been made defendants. (See Complaint p. 5, A-11). The unit was prepared for distribution and sale by Cabela's which prominently placed its logo and trade mark on the unit, its package, and owner's manual (See A-71 to 78, A-80 to 86).

[¶3] Prior to answering the Complaint, Cabela's served a Notice of Filing of Notice of Removal on July 20, 2010, thereby removing the case to Federal Court for the Eastern District of North Dakota (A-32 to 35). Cabela's then moved for dismissal of the Complaint on July 27, 2010, with a Motion, Notice of Motion, Affidavit of Seller, and Memorandum of Law, relying upon North Dakota Century Code §28-01.3-04 (A-37 to 54). However, the Answer submitted by Pragotrade, while admitting it participated in the design and distribution of the grinder, denied that it was the manufacturer (A-59, 62).

[¶4] Bornsens filed a brief opposing the motion and Cabela's filed a reply brief (A-65 to 95, A-98 to 104). Oral argument was conducted before Honorable Ralph R. Erickson, Chief Judge of the US District Court, on February 2, 2011. At the hearing, Bornsens relied heavily on the recent case of *Reiss v. Komatsu America Corp.*, 735 F.Supp.2d 1125 (D.N.D. 2010) decided by Judge Hovland on August 17, 2010, after the briefing upon Cabela's Motion. In *Reiss*, a product liability action, Judge Hovland, finding that North Dakota Courts having not had the opportunity to consider whether the apparent manufacturer doctrine would be adopted in this State, predicted that it would be adopted by the North Dakota Supreme Court and issued his opinion accordingly. *Reiss, supra* ¶1. At the conclusion of the hearing, Judge Erickson directed that additional briefs be filed by the parties specifically addressing the ramifications of the *Reiss* decision. Supplemental briefs were thereafter filed by the

Bornsens and Cabela's.[1] On March 31, 2011, Judge Erickson filed an Order for Certification determining that pursuant to N.D.R.App.P. 47, the North Dakota Supreme Court should determine whether North Dakota would adopt the "apparent manufacturer" doctrine set forth in the Restatement (Second) of Torts §400 and the Restatement (Third) of Torts: Product Liability §14 (A-107, 108).

[¶5] Product liability law in North Dakota was most recently codified in 1993 as N.D.C.C. Chapter 28-01.3. A manufacturer is defined thusly:

[¶6] > "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or a consumer. The term includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. N.D.C.C. 28-01.3-01(1).

§28-01.3-01(3) defines a seller:

> "Seller" means any individual or entity, including a manufacturer, wholesaler, distributor, or a retailer, who is engaged in the business of selling or leasing any product for a resale, use, or consumption.

[¶7] The law provides a method by which a non-manufacturing seller may be released or dismissed from an action under Sec. 4 of the Act:

> 1. In any products liability action maintained against a seller of a product who did not manufacture the product, the seller shall upon answering or otherwise pleading file

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[1] Briefs filed prior to the motion hearing are included in the Appendix on the basis that the exhibits thereto have independent relevance. The supplemental briefs filed after the hearing are not included in the Appendix.

an affidavit certifying the correct identity of the manufacturer of the product allegedly causing the person injury, death, or damage to property.

2. After the plaintiff has filed a complaint against the manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of the claim against the certifying seller, unless the plaintiff can show any of the following:

   (a) That the certifying seller exercised some significant control over the design or manufacture of the product, or provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the personal injury, death, or damage to property.

   (b) That the certifying seller had actual knowledge of the defect in the product which caused the personal injury, death or damage to property.

   (c) That the certifying seller created the defect in the product which caused the personal injury, death, or damage to property. N.D.C.C. 28-1.03-04.

[¶8] Cabela's seeks dismissal on the basis that it is a non-manufacturing seller who has by affidavit correctly identified the manufacturer (Pragotrade) and thus should be dismissed from the case. Bornsens argued that Cabela's should not be dismissed because Pragotrade's answer disputes that it was the manufacturer, that Cabela's had actual knowledge of the defect at the time of sale (obstructed warning), and that in accord with *Reiss*, the Court should determine that Cabela's was the "apparent

manufacturer" of the meat grinder. As a result of the Order for Certification, the only question before the Court at this time is whether or not North Dakota will adopt the doctrine of "apparent manufacturer" as predicted by Judge Hovland in *Reiss, supra.*

[¶9] By affidavits and exhibits submitted with the pleadings and briefs, Bornsens have demonstrated that the Cabela's meat grinder contained Cabela's trade name prominently engraved upon the grinder and upon all sides of the shipping carton. Cabela's name or trademark also appeared on virtually every page of the owner's manual (A-71 to 78, A-80 to 86).

ARGUMENT

I. NORTH DAKOTA SHOULD ADOPT THE APPARENT MANUFACTURER DOCTRINE AS SET FORTH IN THE RESTATEMENT (SECOND) OF TORTS §400 AND RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY §14.

A. The apparent manufacturer doctrine is not in conflict with or incompatible with N.D.C.C. 28-03.1.

[¶10] Codification of product liability law in North Dakota has undergone various revisions since its conception in 1979. N.D.C.C. Chapter 28-01.1 was adopted following a 1977 interim committee study (See *Winkler v. Gilmore & Tatge Mfg., Inc.*, 334 NW2d 837, 840 (ND 1983). In *Winkler*, the Court cited legislative history background indicating that the purpose of the statute was to "relieve" North Dakota retailers of products liability suits that they are subjected to merely because the retailer sold the product. Id. at 334 NW2d 841. A similar theme has run through the

revisions of the Product Liability Act over time, i.e., to protect North Dakota businesses who are "mere retailers."

[¶11] The definition of a manufacturer in the 1979 Act was similar in most respects to the definition under the current Act (N.D.C.C. 28-01.3-01(1)) with one important exception. In 1979, N.D.C.C. 28-01.1-06(1) included the provision:

> "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:
>
> (a) Does not otherwise specify how the product shall be produced; or
> (b) Does not control, in some significant manner, the manufacturing process of the product,
>
> And the seller discloses the actual manufacturer." (Emphasis supplied).

[¶12] The 1979 Act was adopted after the Restatement (Second) of Torts §400 which was published in 1965. As such, §28-01.1-06(1) protecting private labelers may have been a legislative act nullifying the apparent manufacturer doctrine.

[¶13] "Private labeling" is an accepted manufacturing and sales term in which goods are produced by one company for the benefit of another company and which bear the label of the latter company." (See *Armor All Products v. Amoco Oil Co.*, 533 NW2d 720 (WI 1995). In the instant case, it is undisputed that Cabela's is not a manufacturer and did not manufacture the Cabela's meat grinder, Model #32. Cabela's arranged with Pragotrade, or another manufacturer, to provide a product to which Cabela's attached its "private label" and sold as its own product.

[¶14] The legislature revised the Act in 1987 by incorporating the section which is now §28-01.3-04 providing that a non-manufacturing seller may be dismissed from any action upon certifying the correct identity of the manufacturer and the manufacturer has been made a party in the action. (1987 Session Laws Chapter 384, Judicial Procedure, Civil). [¶16] In 1993, Chapter 28-01.1 was repealed and the current Act was adopted as Chapter 28-01.3. The current §28-01.3-01(1) defining a manufacturer has been considerably shortened as set out above. Most importantly, the definition of a manufacturer no longer excludes a party or entity deemed to be a manufacturer merely because it has placed a private label on a product. While the cryptic legislative history notes and comments provided this writer by the Legislative Council of the State of North Dakota provide no specific discussion or reasoning relating to the removal of this provision, its removal is significant. The unassailable rule in this jurisdiction is that 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 (ND 1985); *City of Minot v. Knudson*, 184 NW2d 58, ¶5 (ND 1971); *State v. Beilke*, 489 NW2d 589, ¶6 (ND 1992)).

[¶15] It is therefore clear that in 1979, the legislature acted to preempt the inclusion of private labelers or apparent manufacturers, and in 1987, it repealed and withdrew any such restriction. In other words, the special protection given apparent

manufacturers in 1979 was taken away in 1987. While the apparent manufacturer doctrine, a creation of common law, had never been formally embraced or adopted in this jurisdiction, the 1987 Act cleared the way for its reception:

> "When a statute abrogating a rule or principle of the common law is repealed, the common law principle or rule is, ipso facto, revived, unless there is something to show a contrary intent on the part of the legislature." *Burleigh County v. Rhud*, 136 NW 1082 (ND 1912); *Reeves & Co. v. Russell*, 148 NW 654 (ND 1915).

[¶16] With the exception of the statement that a private labeler will not be found to be a manufacturer, the previous §28-01.1-06(1) in its definition of a manufacturer is indistinguishable by its terms from the current definition of a manufacturer at 28-01.3-01 when combined with the exceptions to releasing the seller under 28-01.3-04(2). Since the 1979 legislature determined specific language was necessary to prevent private labelers or apparent manufacturers from coming within the definition of a manufacturer, the striking or repeal of such a provision clearly suggests that apparent manufacturers may now be considered manufacturers under Chapter 28-01.3.

[¶17] In *Reiss v. Komatsu America Corp.*, 735 F.Supp.2d 1125 (D.N.D. 2010), the Court issued a 30-page opinion in a complex products liability case in which Judge Hovland determined that a distributor of heavy equipment, Komatsu, would not be dismissed as a seller under §28-01.3-04 as it met the requisites of an apparent manufacturer. Id. ¶2. The Court was persuaded that Komatsu qualified as an apparent manufacturer by placing two branding decals on the construction implement

(even though one label correctly identified that the unit was made in Brazil), and that the operator's manual and promotional material identified the product as being a Dresser/Komatsu implement. Id. ¶1. After citing and reviewing §28-01.3-04, and the manufacturer definition in §28-01.3-01(1), the Court stated:

> "Diesel Machinery's argument is premised on the principles set forth in the Restatement (Second) of Torts §400 (1965) and Restatement (Third) of Torts: Products Liability §14 (1998). The Restatement (Second) of Torts §400 provides: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." North Dakota Courts have not had an opportunity to consider whether the North Dakota Supreme Court would adopt the apparent manufacturer doctrine as set forth in the Restatement (Second) of Torts §400 or, the Restatement (Third) of Torts: Products Liability §14. Id., 1132.

[¶18] After citing an army of jurisdictions that have adopted the apparent manufacturer doctrine, the opinion continued:

> "The Court is persuaded that the North Dakota Supreme Court would likewise adopt the Restatement (Second) of Torts §400. The North Dakota Supreme Court has previously adopted the provisions of the Restatement concerning strict liability in products liability actions and negligent failure to warn (Citations omitted). Id. ¶1.

[¶19] Clearly, Judge Hovland had no doubt that (a)the apparent manufacturer doctrine was compatible with the definition in §28-01.3-01(1), and (b)the North Dakota Supreme Court, having adopted other product liability restatement doctrines would, likewise adopt Restatement (Second) of Torts §400.

[¶20] Chief Judge Babcock of the U.S. District Court for the District of Colorado would agree with Judge Hovland. In *Claire Long & Allstate Insurance Co. v. U.S. Brass Corporation*, 33 F.Supp.2d 999 (U.S.D.Co. 2004), Judge Babcock cited numerous cases when concluding that: "nearly every jurisdiction confronted with the issue has adopted the apparent manufacturer doctrine." He then concluded:

> "Reference to the legislative actions of other States confirms that Colorado 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 1003, 1004.

B. <u>The apparent manufacturer doctrine is consistent with North Dakota legislative intent and does no harm to North Dakota retailers.</u>

[¶21] Legislative history material regarding codification and the various revisions of North Dakota product liability law after 1979 have not been included in the appendix. None of the procedures, comments, or testimony furnished this writer by the Legislative Council speak to or discuss in any manner either the practice of private labeling or the apparent manufacturer doctrine. What is clear throughout such material, however, as referenced in *Winkler supra*, is the objective of protecting North Dakota retailers from being pulled into litigation when they are mere retailers of a product. Cabela's, on the other hand, is not a North Dakota retailer. Cabela's is a large, regional corporate entity distributing and selling a multitude of hunting and outdoor products, many bearing its corporate name or trademark logo.

[¶22] Cabela's chose to contract with another entity to fabricate or manufacture a product upon which it affixed its brand name and aggressively marketed the product as its own. This situation is markedly different from that in which a hardware store in Rugby sells Toro lawn and yard equipment or Stihl chain saws. A company which chooses to market a product it did not make under its own brand, does so for a purpose. That purpose is that the public will have more faith in the product and it would be more appealing to potential customers. When one seeks to market a product fabricated by others as its own, it does so for economic reasons, i.e., profit. There is, therefore, a corresponding responsibility. In *Claire Long, supra*, Judge Babcock discussed the apparent manufacturer doctrine thusly:

> "The restatement explains the rationale for the rule.
>
> > The actor puts out a chattel as his own product in two types of cases. The first is where the actor appears to be the manufacturer of the chattel. The second is where the chattel appears to have been made particularly for the actor. In the first type of case, the actor frequently causes the chattel to be used in reliance upon his care in making it; in the second, he frequently causes the chattel to be used in reliance upon a belief that he has required it to be made properly for him and that the actor's reputation is an assurance to the user of the quality of the product.
>
> Restatement (Second) of Torts §400 Cmt. d(1965). In either case, the actor expects its own name to carry some weight with the customer in hopes to capitalize upon, and

preserve, its good will. This representation, which the seller makes for its own benefit, leaves the customer ignorant of who actually manufactured the product. As the Supreme Court of Illinois explained,

> "The primary rationale for imposing liability on the apparent manufacturer of a defective product is that it has induced the *purchasing public* to belief that it is the actual manufacturer, and to act on this belief--that is, *to purchase the product in reliance* on the apparent manufacturer's reputation and skill in making it." *Hebbel v. Schurman Equipment*, 92 Ill.2d 368, 442 NE2d 199, 203, 65 Ill. Dec.888 (Ill. 1982) (Emphasis original).

This case illustrates the restatement reasoning. James Thomas Brown (Brown), a deponent-representative of US Brass, testified that US Brass required Dormont to stamp US Brass' name on the pipes in order that US Brass could represent to its customers that it manufactured the pipes. (Deposition citation). US Brass "wanted to maintain and protect its customer base." (Deposition citation). The end game was to keep those customers who had come to rely upon US Brass' past performance as a manufacturer. This is the situation that the apparent manufacturer rule addresses. 333 F.Supp.2d 999, 1002, 1003.

[¶23] In 1995, the legislative assembly provided a "declaration of legislative findings and intent" which is codified at N.D.C.C. 28-01.3-07 as follows:

> 1. "The legislative assembly finds that products liability reforms enacted in 1979, 1987, and 1993, have provided a needed degree of certainty in the laws governing civil actions against product manufacturers and sellers.

2. In recent years, it has become increasingly evident that there are still serious problems with the current civil justice system. As a result, there is an urgent need for additional legislation to establish clear and predictable rules with respect to certain matters relating to products liability actions.

3. The purpose of Sections 28-01.3-08 and 28-01.3-09 is to clarify and improve the method of determining responsibility for the payment of damages in products liability litigation; to restore balance and predictability between the consumer and the manufacturer or seller in product liability litigation; to bring about a more fair and equitable resolution of controversies in products liability litigation; to reenact a statute of repose to provide a reasonable period of time for the commencement of products liability litigation after a manufacturer or seller has parted with possession of its product; to address problems that have been created by judicial interpretation of our previous enactments; ***to enact, with minor changes, several provisions of former Chapter 28-01.1***; and to simplify and provide an increased degree of certainty and predictability to our products liability laws. (Emphases supplied).

[¶24] It is thus clear that the "minor changes" which occurred with the reenacting of Chapter 28-01.1(now repealed) had purpose. It cannot be argued that repeal of the original provision protecting private labelers, or apparent manufacturers, was without intention or effect.

CONCLUSION

[¶25] By repealing that portion of the manufacturer definition which protected "private labelers," the legislature in 1987 removed any impediment to this Court adopting the apparent manufacturer doctrine. Further, adoption of the apparent manufacturer doctrine does no harm to the class the legislature has sought to protect all these years consisting of North Dakota retailers who are merely the sellers or resellers of manufactured products. Absent legislative edict, there is no compelling public policy argument to support special protection for companies who choose to mislead consumers by marketing as their own a product manufactured by another. This Court should adopt the apparent manufacturer doctrine.

RESPECTFULLY submitted this 2nd day of May, 2011.

SCHNEIDER LAW FIRM
Ronald H. Schneider, Pro hac Vice
MN Bar #97299
Attorneys for Plaintiffs
706 south First Street - P.O. Box 776
Willmar, MN 56201
Telephone: (320) 235-1902

HALL CURRIE LAWYERS, LTD.
Attorneys for Plaintiff
710 Hill Avenue - P.O. Box 610
Grafton, ND 58237
Telephone: (701) 352-2810
FAX: (701) 352-1550

BY: _____
Nicholas B. Hall (ND #03223)