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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002569-MR

DIANE S. BROWN, INDIVIDUALLY
AND AS NEXT FRIEND OF
ASHLEY RENEE BROWN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 96-CI-006407

BRK ELECTRONICS, INC.;
LIBERTY LITE; PITTWAY
CORPORATION; AND DORIS KOPPEL — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: Sometime during the morning of October 31, 1995, a fire broke out in the home of Tammy Dever. In one of those events that is sad beyond the power of words to express, the fire took the life of Dever's three-year-old daughter, Carol Ann, and severely injured Dever's guest and friend, two-year-old Ashley Renee Brown. Dever's home had been equipped with a smoke detector apparently manufactured in 1994 by BRK Brands, Inc. In

October 1996, Ashley and her mother, Diane Brown, filed suit for damages against BRK and others involved in the smoke detector's manufacture and distribution, as well as against Dever's landlord. Their suit, which is on-going, is based on theories of strict liability, breach of warranty, and negligence. Having learned that BRK had acquired its smoke-detector business from the Pittway Corporation,[1] the Browns amended their complaint in March 2000 by adding claims against that company. They alleged that the BRK detector was based on, indeed duplicated, a Pittway design. This fact, they contend, creates a sufficient nexus between Pittway and their injuries to bring Pittway within the scope of some or all of their theories of liability.

The trial court disagreed. By summary judgment entered September 29, 2000, the court dismissed the claims against Pittway. The court reasoned that Pittway could not be characterized as either a seller or a manufacturer of Dever's smoke detector, but that under Kentucky's Product Liability Act[2] potential liability, regardless of the liability theory advanced, is limited to those who can be so characterized. It is from that judgment, duly made final in accord with CR 54, that the Browns have appealed. Although our reasoning differs somewhat from that of the trial court, we affirm.

As the parties have noted, this court reviews summary judgments *de novo*. We accept the non-movant's factual allegations, unless it is clearly unreasonable to do so, and give

[1]Pittway is a Delaware Corporation with its headquarters in Illinois.

[2]KRS 411.300 - 411.350.

them the benefit of all reasonable inferences. As did the trial court, we then ask whether the movant is nevertheless entitled to judgment as a matter of law. The ultimate burden, a heavy one in Kentucky, is on the movant. He or she is entitled to judgment only when the non-movant's pleadings and discovery have failed to establish at least a dispute about each element of his or her claim or defense.[3] Here, there is no dispute that Pittway had divested itself of its smoke-alarm business and was not involved in the manufacture of Dever's alarm. Nor is there any dispute that BRK had acquired Pittway's alarm-manufacturing assets and had made Dever's alarm according to a Pittway design. The question is the purely legal one of Pittway's potential liability to the Browns in this situation.

The Browns' warranty and strict liability theories require little discussion. The Browns do not seriously allege an express warranty. Under KRS 355.2-318, the implied warranty provision of Kentucky's Uniform Commercial Code, the

> beneficiaries of implied warranties are limited to the purchaser and to 'any natural person who is in the family or household of [the] buyer or who is a guest in his home.[4]

Because Dever did not purchase the alarm from Pittway, the Browns, Dever's guests, can not qualify as beneficiaries of an implied warranty.

As noted by the trial court, section 402A of the *Restatement (Second) of Torts* informs Kentucky's strict product-

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[3]City of Florence, Kentucky v. Chipman, Ky., 38 S.W.3d 387 (2001).

[4]Williams v. Fulmer, Ky., 695 S.W.2d 411, 414 (1985) (citations and internal quotation marks omitted).

liability law.[5] Under that provision and the cases applying it, product manufacturers and sellers are liable for the harm caused by a product to the user or consumer if:

> (1) the product was in a defective condition when it left the possession or control of the seller,
> (2) it was unreasonably dangerous to the user or consumer,
> (3) the defect was a cause of the plaintiff's injuries or damages,
> (4) the seller engaged in the business of selling such product (it was not an isolated transaction unrelated to the principal business of the seller), and
> (5) the product was one that the seller expected to, and that did, reach the user or consumer without substantial change in the condition it was in when he or she sold it.[6]

The fourth element in this statement of the strict-liability cause of action, the requirement that the seller have been engaged in the ordinary course of business, is based on comment f to section 402A concerning the scope of this sort of liability:

> The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. . . . The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. . . . This Section is also not

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[5] Jones v. Hutchinson Manufacturing, Inc., Ky., 502 S.W.2d 66 (1973) (citing Dealer's Transport Co. v. Battery Distributing Co., Ky., 402 S.W.2d 441 (1965)).

[6] Werner v. Pittway Corporation, 90 F. Supp. 2d 1018, 1027 (W.D.Wis. 2000) (citations and internal quotation marks omitted); Nichols v. Union Underwear Company, Inc., Ky., 602 S.W.2d 429 (1980); Jones v. Hutchinson Manufacturing, Inc., *supra.*

> intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

A principal reason for this limitation is that occasional sellers, unlike those engaged in an on-going business, are not in a position to spread the cost of insuring against defective products--the justification in other situations for imposing strict liability.[7] A good faith sale of assets, like that alleged here, is clearly such an occasional sale. It does not give rise, therefore, to a strict-liability cause of action.[8]

The fact that Pittway can not be characterized as a seller or manufacturer for strict-liability purposes, however, does not imply that its asset transaction with BRK could not have been negligent toward the Browns. Noting, correctly, that our Products Liability Act (PLA) applies to all product-based personal-injury and property-damage claims, whatever the alleged theory of liability, the trial court seems to have concluded that no one but sellers or manufacturers can ever be liable for injuries arising from defective products. That is not what the PLA says. Although strict liability is limited to sellers and manufacturers, nowhere does the PLA suggest that the class of potential defendants in other-than-strict product liability actions is similarly limited. As this case illustrates, such a

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[7] Gavula v. ARA Services, Inc., 756 A.2d 17 (Pa. Super. 2000).

[8] *Cf.* Monsanto Company v. Reed, Ky., 950 S.W.2d 811 (1997) (holding that this section did not apply to salvage sales of electrical equipment); *cf. also* Taylor v. General Motors, Inc., 537 F. Supp. 949 (E.D.Ky. 1982) (noting some exceptions to the rule limiting strict liability to sellers and manufacturers, none of which applies in this case).

limitation would be unavailing because products, defective and otherwise, move through our society in myriad ways other than the ordinary course of business. As is everyone else, those engaged in that moving are under a duty to exercise ordinary, reasonable care and are subject to liability for injuries that result from their neglect of that duty. The PLA, therefore, does not foreclose the Browns' negligence-based claim. As Pittway notes, however, and as it argued before the trial court,[9] ordinary negligence principles do.

The Browns allege that, prior to the asset transfer, Pittway knew that its smoke-detector did not sound a timely alarm in certain types of fire. It further knew, therefore, or should have known, that, without a warning to that effect, a consumer might choose Pittway's product--or a product based on its design--inappropriately, relying on the product to provide protection it was not in fact capable of providing. Given that awareness, the Browns contend, Pittway was under a duty to provide such a warning, certainly to its purchaser, BRK, and to consumers and users as well. Pittway breached that duty, perhaps willfully, the Browns allege, and the result was this terrible accident. Duty, breach, injury, causation; the Browns have thus alleged the formal elements of a cause of action for negligence. Why should not their claim be allowed to go forward?

[9] Memorandum in support of motion to dismiss Section IV (6/23/00).

Although several of the links in the Browns' negligence chain seem to us weak,[10] we shall stress the last one, causation, because the failure there is closely related to the trial court's notion that Pittway was too distantly involved to bear any responsibility for the Browns' injuries.

Assuming, that is, that Pittway had the duty to warn that the Browns allege and that it breached that duty, and assuming even further that Pittway's breach can be characterized as a substantial cause of the injuries,[11] we are nevertheless convinced that, as a matter of law, liability does not attach.

In Deutsch v. Shein,[12] our Supreme Court observed that a party's negligence is a proximate, or legal, cause of an injury if (1) it can be characterized as a substantial cause in fact of the injury; *i.e.*, if it was a substantial factor in bringing about the harm (a substantial factor usually being one foreseeably, in common experience, leading to the harm or to the type of harm involved) and if (2) there is no rule of law relieving the negligent party from responsibility. There is in this instance, we believe, a rule of law relieving Pittway from liability for the negligence alleged by the Browns. That rule is the so called superseding-cause rule, which, with an eye to these circumstances and borrowing from the *Restatement (Second) of Torts,* may be stated as follows:

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[10]*See* Felker v. McGhan Medical Corporation, 36 F. Supp. 2d 863 (D.Minn. 1998) (examining the duty element in a similar predecessor-manufacturer negligence claim).

[11]All of these assumptions, we reiterate, are subject to serious doubt.

[12]Ky., 597 S.W.2d 141 (1980).

> (1) Except as stated in Subsection (2), the failure of a third person [here BRK] to act to prevent harm to another threatened by the actor's [Pittway's] negligent conduct is not a superseding cause of such harm.
> (2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.[13]

BRK's failure to give the warning the Browns claim was due superseded, as a matter of law, Pittway's asserted liability. The Brown's do not allege that there was anything fraudulent about the Pittway-BRK transaction, that it was intended to have or had the effect of shielding assets from liability claims. Nor do they allege that, following the transaction, Pittway somehow remained in control of the way in which the smoke detectors were designed or manufactured, nor that Pittway prevented BRK from discovering the alleged defect. Absent some such allegation, however, we believe that the transaction must be accepted as what Pittway claims it was: BRK's assumption of full responsibility for whatever use it made of the assets it acquired from Pittway, including Pittway's smoke-detector design.[14] If the design's limitations necessitated warnings, it was BRK's duty to discover the limitations and to give the warnings. Its duty, as manufacturer, was so much greater than any duty Pittway retained

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[13] *Restatement (Second) of Torts* § 452 (1965).

[14] *Cf.* Taylor v. General Motors, Inc., 537 F. Supp. 949 (E.D.Ky. 1982) (discussing a non-manufacturer's control), *and* Felker v. McGhan Medical Corporation, 36 F. Supp. 2d 863 (D.Minn. 1998) (finding insufficient evidence to support allegations of a fraudulent transfer of assets).

as to supersede it.[15] Therefore, although we disagree to some extent with the trial court's reading of the Products Liability Act, we agree with its result.[16] Accordingly, we affirm the September 29, 2000, judgment of the Jefferson Circuit Court.

ALL CONCUR.

[15]*Cf.* Isaacs v. Smith, Ky., 5 S.W.3d 500 (1999) (patron's deliberate violence superseded liquor seller's negligence as cause of second patron's gun-shot injury); *and* Worldwide Equipment, Inc. v. Mullins, Ky. App., 11 S.W.3d 50 (1999) (manufacturer of major component had no duty to warn the ultimate manufacturer of safety regulations affecting that component). *Cf. also* MacPherson v. Buick Motor Company, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916) (observing several times that final manufacturer's responsibility was apt to supersede that of earlier contributors to the manufacturing process).

[16]This conclusion renders moot the question as to Pittway's statute-of-limitations defense, which, accordingly, we decline to address.

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