Affirmed and Memorandum Opinion filed March 2, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00844-CV

CHARLIE THOMAS FORD, LTD D/B/A AUTONATION FORD GULF FREEWAY, Appellant

V.

FORD MOTOR COMPANY, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2016-86410-A

M E M O R A N D U M O P I N I O N

Appellant Charlie Thomas Ford, LTD d/b/a AutoNation Ford Gulf Freeway ("AutoNation") appeals a summary judgment dismissing its contribution and indemnity claims against Ford Motor Company ("Ford"). AutoNation and Ford were defendants in an underlying suit filed by Sylvia and Alejandro Roman, who claimed that a new automobile they purchased from AutoNation was unfit. The Romans' claims against AutoNation went to arbitration, which resulted in an award

for the Romans. AutoNation then sought contribution and indemnity from Ford, and both parties filed cross-motions for summary judgment. The trial court granted Ford's motion, denied AutoNation's motion, and dismissed AutoNation's claims.

AutoNation contends that Ford owes contribution or indemnity under four independent theories, but we conclude that none of them has merit. We affirm the trial court's judgment in Ford's favor.

Background

Soon after the Romans purchased a new 2014 Ford Escape from AutoNation, they began experiencing problems with the vehicle. When driving the car, the Romans noticed that the corners of the dashboard lifted, became loose, and shook. The air conditioning began to fail, the doors rattled, and the windows would not seal. AutoNation attempted multiple repairs, to no avail. The Romans ultimately traded the car for one of another manufacturer.

The Romans sued AutoNation and Ford, asserting claims for breach of express and implied warranties and Texas Deceptive Trade Practices Act ("DTPA") violations. They sought recission of the sales contract and damages.

On AutoNation's motion, the trial court compelled the claims to arbitration. The record does not reveal why, but the Romans initiated arbitration against AutoNation only, unbeknownst to Ford. Ruling for the Romans, the arbitrator determined that AutoNation breached the implied warranty of fitness for a particular purpose under Business and Commerce Code section 2.315, and for that reason also violated the DTPA. The arbitrator awarded the Romans $2,000, representing the difference between the trade-in value of the vehicle had it been in good condition and the actual trade-in amount the Romans received. The arbitrator also awarded the Romans $10,260 in attorney's fees and $400 in costs. The trial court confirmed

the award and signed a final judgment in the Romans' favor for $2,000 in actual damages, $16,260 in attorney's fees, $400 in costs, and pre- and post-judgment interest. The judgment states that it "is a partial judgment against Defendant, Charlie Thomas Ford, Ltd. d/b/a AutoNation Ford Gulf Freeway only." The following month, the Romans settled their claims against Ford.

Following a severance, only AutoNation's claims against Ford remained to be resolved. In its live pleading in the severed action, AutoNation asserted that Ford owed it: (1) indemnity under Civil Practice and Remedies Code Chapter 82 (applicable in products-liability actions);[1] (2) contribution and indemnity under Texas Occupations Code section 2301.(also applicable in products-liability actions);[2] (3) contribution and indemnity under Civil Practice and Remedies Code sections 32.002 and 33.015;[3] and (4) indemnity under portions of a dealer sales and service agreement with Ford.

AutoNation moved for traditional summary judgment, seeking indemnity based on two of its pleaded claims: Civil Practice and Remedies Code Chapter 82 and Occupations Code section 2301.461. Ford filed a cross-motion for traditional summary judgment, contending that it owed no duty of contribution or indemnity on any grounds alleged by AutoNation in its live pleading. After a hearing, the trial court granted Ford's motion, denied AutoNation's motion, and signed a final judgment dismissing all of AutoNation's claims.

AutoNation appeals.

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[1] *See* Tex. Civ. Prac. & Rem. Code §§ 82.001-.008.

[2] *See* Tex. Occ. Code § 2301.461(b).

[3] *See* Tex. Civ. Prac. & Rem. Code §§ 32.001-.003; *id.* §§ 33.011-.017.

Issues Presented

AutoNation contends that the trial court erred by granting Ford's summary judgment motion on AutoNation's claims for contribution or indemnity.[4]

Standard of Review

We review a trial court's ruling on a motion for summary judgment de novo. *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274, 278 (Tex. 2018); *Texan Land & Cattle II, Ltd. v. ExxonMobil Pipeline Co.*, 579 S.W.3d 540, 542 (Tex. App.—Houston [14th Dist.] 2019, no pet.). To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). When both parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented, and, if we determine that the trial court erred, render the judgment the trial court should have rendered. *Tarr*, 556 S.W.3d at 278; *Texan Land & Cattle II*, 579 S.W.3d at 542.

Analysis

A. The trial court did not err in granting Ford's motion on AutoNation's Civil Practice and Remedies Chapter 82 claim.

In its first issue, AutoNation contends that the trial court erroneously concluded that Ford owed no contribution or indemnity under Civil Practice and Remedies Code section 82.002. Chapter 82 imposes a duty upon product manufacturers to "indemnify and hold harmless" product sellers "against loss arising

[4] On appeal, AutoNation does not challenge the summary judgment in Ford's favor on AutoNation's claim for contribution under Chapter 33.

out of a products liability action," except for "any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable." Tex. Civ. Prac. & Rem. Code § 82.002; *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 899 (Tex. 2010). The section's purpose is to require product manufacturers to indemnify innocent sellers for certain damages and litigation expenses arising out of products-liability actions and to require sellers to bear the damages and expenses for the losses they cause. *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 262 (Tex. 2006); *see Fresh Coat, Inc.*, 318 S.W.3d at 899. A "products liability action" is "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." Tex. Civ. Prac. & Rem. Code § 82.001(2). Whether a plaintiff has asserted a products liability action sufficient to trigger the duty to indemnify is determined from the allegations in the plaintiff's petition. *Petroleum Sols. v. Head*, 454 S.W.3d 482, 494 (Tex. 2014).

Ford says Chapter 82 does not apply because the Romans' lawsuit was not a "products liability action," but rather one merely for economic damages resulting from a defective car. Ford relies principally on our sister court's opinion in *Daniel v. Richardson*, No. 01-06-00242-CV, 2009 WL 1025765 (Tex. App.—Houston [1st Dist.] Apr. 16, 2009, no pet.) (mem. op.). There, Richardson bought a lawnmower from Daniel that was manufactured by Ferris. *Id.* at *1. When the lawnmower did not perform as Richardson expected, he sued Daniel and Ferris. *Id.* Richardson sought to recover damages and attorney's fees under the DTPA. *Id.* His claims against Daniel were severed from those against Ferris, and the case against Daniel

proceeded to trial. *Id.* After trial, Daniel—the seller—asserted that the trial court erred by failing to submit a question asking the jury to determine the manufacturer's liability under section 82.002. *Id.* at *3.

The First Court of Appeals disagreed, holding that Richardson's case was not a "products liability action," and therefore Chapter 82 did not apply. *Id.* The court reasoned:

> Richardson's lawsuit against Daniel [seller] was based on alleged violations of the Texas Deceptive Trade Practices Act, with Richardson asserting that both the characteristics of the lawn mower and Daniel's ability to service that mower had been misrepresented to him during the sale. At trial, Richardson sought only to recover the economic value of the contract he entered based upon the misrepresentations (the difference in the amount he paid for the mower and what the jury believed it to actually be worth) and the business he lost as a result of not being able to use the mower as he intended. He did not seek damages "arising out of personal injury, death, or property damage," and he therefore did not assert a "products liability" action under Chapter 82. Accordingly, Chapter 82 did not apply to the lawsuit at issue and the trial court properly denied Daniel's request for such a jury question.

Id.

We agree with Ford that *Daniel* presents a persuasive case of comparable circumstances. Although the term "products liability action" has been construed broadly, *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, 496 S.W.3d 33, 36 (Tex. 2016), it requires, at a minimum, allegations of personal injury, death, or property damage caused by an allegedly defective product. *See Head*, 454 S.W.3d at 491-92; *see also vRide, Inc. v. Ford Motor Co.*, No. 05-15-01377-CV, 2017 WL 462348, at *6-7 (Tex. App.—Dallas Feb. 2, 2017, no pet.) (mem. op.) (explaining that plaintiff's petition, which did not contain allegations that damages arose out of

personal injury, death, or property damage allegedly caused by a defective product, did not trigger indemnification pursuant to Chapter 82).

The Romans certainly alleged their car was defective, but their pleading includes no allegations of resulting personal injury, death, or property damage. They alleged:

- Less than 90 days after they purchased the new vehicle, they noticed that the corners of the dashboard were lifting, and the dashboard started rattling when the vehicle was driven;
- The air conditioning began to fail;
- AutoNation repaired the air conditioning and the dashboard, but the air conditioning "did not fulfill its intended purpose of cooling the vehicle";
- The vehicle's doors rattled, and the windows would not seal shut;
- The vehicle's environment was loud when driven at freeway speeds due to wind blowing through the unsealed windows;
- They received numerous recall notices, resulting in the vehicle being brought into AutoNation repeatedly for service;
- After one recall notice, AutoNation retained the vehicle for over a month to make repairs; and
- After several attempts, AutoNation failed to properly repair the vehicle.

Based on these factual allegations, the Romans sought: (1) damages for the difference in the car's value as accepted and the car's value if it had been provided as warranted; (2) mental anguish and treble damages under the DTPA; (3) recission of the sales contract and a refund of all sums paid; (4) damages for the loss of the vehicle's use; and (5) damages for their lost wages.

Because the Romans did not seek damages "arising out of personal injury, death, or property damage," they did not assert a "products liability action" under Chapter 82. *See vRide, Inc.*, 2017 WL 462348, at *6-7; *see also Daniel*, 2009 WL 1025765, at *3. Thus, the trial court did not err in concluding as a matter of law that the manufacturer indemnity requirement under section 82.002(a) does not apply to this case. The trial court properly granted Ford's summary judgment motion on AutoNation's chapter 82 indemnification claim. We overrule AutoNation's first issue.

B. The trial court did not err in granting Ford's motion on AutoNation's Occupations Code section 2301.461(b) claim.

AutoNation contends in its second issue that the trial court erroneously concluded that Ford owed no contribution or indemnity under Occupations Code section 2301.461. Section 2301.461(b) provides that "[n]otwithstanding the terms of any franchise or any other law, a manufacturer or distributor shall reimburse the dealer for any loss incurred by the dealer, including legal fees, court costs, and damages, as a result of the dealer having been named a party in a product liability action . . . ." Tex. Occ. Code § 2301.461(b).

Here again, any liability under section 2301.461(b) must be grounded on alleged loss incurred in a "product liability action." Although the Occupations Code does not define the term "product liability action," we may consider a variety of sources, including other statutory definitions, in determining the ordinary meaning of undefined statutory terms. *See, e.g.*, *Colorado County v. Staff*, 510 S.W.3d 435, 448 (Tex. 2017). Here, the term is used similarly in both Occupations Code Chapter 2301 and Civil Practice and Remedies Code Chapter 82. Notably, Civil Practice and Remedies Code section 82.003(b)—the section dealing with seller immunity in product liability actions—refers specifically to Occupations Code Chapter 2301.

See Tex. Civ. Prac. & Rem. Code § 82.003(b) ("This section [seller immunity] does not apply to a manufacturer or seller whose liability in a products liability action is governed by Chapter 2301, Occupations Code."). This reference suggests the Legislature intended the term "product[s] liability action" as used in both statutes to have similar meaning. Moreover, federal courts discussing both sections rely on the definition of "products liability action" provided in Chapter 82. *See Benavides v. Chrysler Grp. LLC*, No. 7:14-CV-518, 2014 WL 5507716 at * 8 (S.D. Tex. Oct. 9, 2014) (in discussing Occ. Code § 2301.461, court relied on definition of "products liability action" in Civ. Prac. & Rem. Code § 82.001(2)); *Garcia v. Nissan Motor Co.*, No. Civ. A. M-05-59, 2006 WL 8969944, at *2 (S.D. Tex. Mar. 30, 2006) (same). We agree that the term "product liability action" as used in section 2301.461(b) carries the same meaning as the term "products liability action" used in section 82.001(2); that is, it means an "action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." Tex. Civ. Prac. & Rem. Code § 82.001(2).

As we have stated, the Romans' lawsuit was not a products liability action. Thus, Occupations Code section 2301.461(b) does not apply. The trial court did not err in granting summary judgment in Ford's favor on AutoNation's claim for indemnity under Occupations Code section 2301.461. We overrule AutoNation's second issue.

C. The trial court did not err in granting Ford's motion on AutoNation's contract claim.

In its third issue, AutoNation urges that the trial court erroneously determined that Ford owed no indemnity under the parties' sales and services agreement. The Sales and Service Agreement indemnification clause provides that:

> The Company [Ford] shall defend, indemnify, hold harmless and protect the Dealer [AutoNation] from any losses, damages or expense, including costs and attorney's fees, resulting from or related to lawsuits, complaints or claims commenced against the Dealer by third parties concerning:
>
> (1) Property damage to a COMPANY PRODUCT or bodily injury or property damage arising out of an occurrence caused *solely* by a "production defect" in that product[.]
>
> (2) Property damages to a COMPANY PRODUCT or bodily injury or property damage arising out of an occurrence caused *solely* by a defect in the design of that product[.]

(Emphasis added).

The Romans' lawsuit did not allege or concern "bodily injury" or "property damage" "arising out of an occurrence caused solely by" a production or design defect in the Romans' vehicle. In the arbitration proceedings, the Romans sought damages of: (1) $2,000 for the loss in trade-in value of the Ford Escape because of its condition; (2) $3,045 for the cost of the Ford extended service plan; (3) $875 for the cost of the value care plan; and (4) rental costs for a replacement vehicle for 45 days. The arbitrator determined that AutoNation breached the implied warranty of fitness for a particular purpose, pursuant to Texas Business and Commerce Code section 2.315, and awarded the Romans $2,000 in damages for diminution in trade-in value. The Romans' pleadings and the arbitration award show conclusively that the indemnity duty described by the agreement is not triggered because the

underlying suit concerned no bodily injury or property damage caused solely by a production or design defect.

Accordingly, the trial court did not err in determining as a matter of law that the sales and services agreement did not entitle AutoNation to indemnification for the Romans' claim. Summary judgment was proper on this claim, and we overrule AutoNation's third issue.

D. The trial court did not err in granting Ford's motion on AutoNation's Civil Practice and Remedies Code Chapter 32 claim.

In its fourth and final issue, AutoNation urges that the trial court erroneously determined that Ford owed no contribution under Civil Practice and Remedies Code Chapter 32.

Applicable "only to tort actions,"[5] section 32.002, entitled "Right of Action," provides that "a person against whom a judgment is rendered has, on payment of the judgment, a right of action to recover payment from each codefendant against whom judgment is also rendered." Tex. Civ. Prac. & Rem. Code § 32.002. From this language, two reasons why Chapter 32 provides no right of contribution against Ford are readily apparent.

First, the right to contribution exists only against a codefendant against whom judgment is also rendered. *Id*. The trial court's judgment in the underlying case, which was based on the arbitrator's award, was against AutoNation only. The court did not render judgment against Ford, as clearly stated in the order: "this is a partial judgment *against Defendant, Charlie Thomas Ford, Ltd. d/b/a AutoNation Ford Gulf Freeway only*" (emphasis added). Ford did not participate in the arbitration on the merits, was not a party to the arbitration award, and was not adjudicated

[5] Tex. Civ. Prac. & Rem. Code § 32.001(a).

responsible for the Romans' damages in the subsequent judgment.[6] Thus, contribution under section 32.002 is not available to AutoNation.

Second, section 32.002 provides no relief to AutoNation because it applies only to tort actions, and this is not one. The Romans asserted breach of express and implied warranty claims, as well as DTPA violations based on the alleged warranty breaches. Breach of express or implied warranty claims, with no allegations of personal injury or death or damage to other property, sound in contract. *See JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 705 (Tex. 2008) (explaining that a breach of implied warranty can sound either in contract or tort, but "when the damages are purely economic, the claim sounds in contract"); *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 61 (Tex. 2008) ("An express warranty is the result of a negotiated exchange . . . and is a creature of contract." (internal citation and quotation omitted)). Similarly, the Romans' DTPA claims do not sound in tort here because they arise from their breach-of-warranty claims, which sound only in contract. *E.g.*, *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991). For these reasons, section 32.002 is inapplicable.

Under these circumstances, the trial court did not err in determining that AutoNation was not entitled to contribution from Ford. We overrule AutoNation's fourth and final issue.

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[6] For these same reasons, AutoNation's reliance on *Willingham Auto World v. Jones*, 833 S.W.2d 232, 234-35 (Tex. App.—Tyler 1992, writ denied), is misplaced. There, the Tyler Court of Appeals held that a product seller, Auto World, was not entitled to contribution from the product manufacturer, Winnebego, because nothing in the judgment found "Winnebago a joint tortfeasor with Auto World." *Id.* at 235; *see also Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 21 (Tex. 1987) ("The essential prerequisites for a contribution claim are a judgment finding the party seeking contribution to be a joint tortfeasor and the payment by such party of a disproportionate share of the common liability."). Likewise, our record is devoid of any judgment finding Ford a joint tortfeasor with AutoNation. *See* Tex. Civ. Prac. & Rem. Code § 32.002 (recovery only available against "codefendant against whom judgment is also rendered").

Conclusion

Having overruled each of AutoNation's issues, we affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Poissant, and Wilson.