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Does Product Design Liability Exist Outside the Chain Of Distribution?

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Black letter products liability law requires a party to be within the "chain of distribution" in order to be liable under theories of strict liability or breach of warranty for an injury caused by a defective product.[1] Since New York law essentially collapses the two distinct bodies of tort law—strict products liability and negligent product design/manufacture—into one standard,[2] a significant question is posed as to whether the party who is responsible for the design, if outside the chain of distribution, may be sued by a person injured by a defective product that was manufactured and distributed by others.

This situation often arises where a particular product line and its design are purchased by a wholly new company who becomes responsible for the product's subsequent manufacture and distribution. In New York, the question of whether the original designer bears any continuing liability in tort for injuries occurring after the product's design left its control is answered largely through consideration of two cases: *Emslie v. Borg-Warner Automotive*[3] issued by the U.S. Court of Appeals for the Second Circuit, and *Sage v. Fairchild-Swearington*[4] issued by the New York Court of Appeals.

Analysis

The answer to the question posed lies in the public policy behind tort liability, and particularly the policy behind the creation of strict products liability law.[5] The New York Court of Appeals adopted strict products liability in *Codling v. Paglia* in 1973.[6] There, the court discussed policy considerations inherent in the economic realities of mass production and distribution that led the court in the interest of "justice and common sense" to place the risk of harm for defective products and the associated financial burdens of those harmful consequences on the "manufacturers" who place those products in the stream of commerce.[7] The doctrine creates incentives for safety-motivated improvements to a product's design and manufacture by assigning liability for unreasonably designed and unsafe products to those parties that are best placed to "discover the defect[s] and correct [them] to avoid injury to the public."[8] In *Emslie v. Borg Warner Automotive*, the Second Circuit addressed the question of whether a predecessor product designer could be held liable along with the subsequent product manufacturer for an injury created by a product manufactured after the product design left the original designer's control.

Emslie v. Borg-Warner. In *Emslie*, the plaintiff was injured in 2005 while riding as a passenger on an ATV that overturned.[9] The accident was alleged to have been caused in part by a flaw in the transmission.[10] Borg-Warner Automotive was the original designer and manufacturer of the transmission, but sold the rights to manufacture the product to defendant Recreative Industries in the mid-1970s, along with "the design, manufacturing tools, and inventory in order to build the transmissions."[11] Plaintiffs premised their claim against Borg-Warner upon the theories of strict liability and negligence premised upon its role as the original designer of the alleged defectively designed transmission. The district court, however, awarded Borg-Warner summary judgment, holding that it was not an appropriate defendant because it had not placed the product at issue into the stream of commerce as required to establish a claim for defective design.[12]

The district court relied upon the fact that Borg-Warner had sold its rights, title, and interest in the transmission, had no control or involvement with the manufacture of the specific transmission or vehicle at issue in the suit, and had not been in a position to modify or improve upon the transmission design or correct defects in the design.[13] Because the district court held that Borg-Warner "played no role in placing the transmission at issue into the stream of commerce," it was not liable for the design of the transmission. Id.

The Second Circuit affirmed, holding that imposing strict liability on Borg-Warner would not reasonably serve the rationale for strict liability because it was not in the best position to have eliminated the danger.[14] The Second Circuit referenced the policy underlying the imposition of strict products liability, finding that Borg-Warner, having sold all rights to the design at issue, "had no ability to learn from experience whether its design was causing injuries, no ability to conduct safety tests, and no possibility of improving the design to diminish the risk of harm."[15] The court, however, noted that the transfer of the design from Borg-Warner to Recreative may not, in all circumstances, have insulated Borg-Warner from

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potential liability, indicating in dicta that it was passing on the question of whether the outcome would be the same if the transfer of the product line and the incident were relatively close in time.[16] The court likewise did not address "whether Borg-Warner would be liable if, prior to its sale to Recreative, it had already placed the transmissions into the stream of commerce with awareness of its unreasonable design defect." Id.

Sage v. Fairchild-Swearington. The unsuccessful plaintiffs in Borg-Warner relied heavily on *Sage v. Fairchild-Swearington*, a New York Court of Appeals case where a plaintiff was injured when she caught her hand on a hook attached to the doorway of a cargo compartment on an aircraft manufactured by defendant.[17] The hook itself was a replacement part that had not been made by the defendant, but rather had been fabricated and installed by plaintiff's coworkers according to the design of the original part.

The defendant challenged the claim on the basis that it was not the manufacturer of the actual part at issue, the hook that caused the injury. Significantly, defendant's employees "testified that they assumed the ladder would not be used at all times and that the hangers would break and be replaced."[18] Once a hanger broke, it was defendant's expectation that the purchaser would not buy a new part from defendant, because a replacement could be easily fabricated by the purchaser.[19]

The court held that the original manufacturer could be held liable for defective design because the airline "did no more than perpetuate defendant's bad design as defendant's representatives saw that they might."[20] It distinguished cases where purchasers altered or removed safety mechanisms to render an otherwise safe design dangerous, because the hanger design was not altered—it was merely replaced by the purchaser.[21] The court thus held that because the manufacturer was the logical party in a position to discover the defect, it made sense for it to shoulder the economic burden as an inducement to design quality equipment at the outset.[22] The court opined that "to insulate a manufacturer under such circumstances would allow it to escape liability for designing flimsy parts secure in the knowledge that once the part breaks and is replaced, it will no longer be liable."[23] Ultimately, the court's ruling seemed to be predicated on the fact that not only had the purchaser merely replicated defendant's defective design, but that it was defendant's intent that it do so.

More importantly, it was not the hook that was the defectively designed "product," but rather the doorway was the "product," of which the hook was merely a component. Viewed in this context, the replacement of the component hook with an identical version did nothing to alter the original allegedly negligent doorway design of the defendant.

In *Emslie v. Recreative Indus.*, the Western District of New York distinguished *Sage* on the basis that defendant Borg-Warner—because of the transfer of the product line—was no longer in the position to control the design of the product, or discover and correct defects in the design of the transmission.[24] The two cases are in harmony because in *Sage*, as set forth above, the defendant had not transferred the design or manufacturing control to another entity, leaving it in the best position to control and correct the product, as necessary.

'Codling' placed the risk of harm for defective products and the associated financial burdens of those harmful consequences on the "manufacturers" who place those products in the stream of commerce.

Treatment of the issue by other jurisdictions. Outside of New York, several courts have held that manufacturers are not liable when they sell a product design to another entity that ultimately manufactures the product that injures a consumer. See, e.g., *Potwora ex rel. Gray v. Grip*[25] (designer of motorcycle helmets who later sold the manufacturing assets of its helmet division could not be held liable for injuries caused by a helmet manufactured by the successor corporation); *Jones v. Borden*[26] (defendant manufacturer of a spray paint canister was not liable under Louisiana product liability law because it sold the division which created the product more than nine months prior to the manufacture date of the canister at issue); *Fricke v. Owens-Corning Fiberglass*[27] (previous manufacturer of vinegar was not liable for failure to warn because it sold vinegar business 10 months earlier); *Firestone Steel Products v. Barajas*[28] (Firestone granted royalty-free licenses of its single-piece wheel design, and then another manufacturer, Kelsey-Hayes, modified Firestone's design to develop the product that ultimately injured plaintiff. Because Kelsey-Hayes had modified the wheel's design, the court held that Firestone was not liable under a product liability theory because it did not introduce the wheel into the stream of commerce).

Similarly, in *Healy v. McGhan Medical* and *In re Minnesota Breast Implant Litig.*, individuals injured by breast implants manufactured and sold by McGhan III, a one-time subsidiary of 3M, have tried to sue 3M under a theory of negligent design based on the proposition that the implants were identical in design to those manufactured and sold by 3M prior to divesture of McGhan III.[29] More than one court has granted summary judgment for 3M on this claim on the basis that 3M did not place the product into the stream of commerce.[30]

Conclusion

Since the adoption of the strict products liability doctrine in New York was policy driven, it is perhaps fitting that courts answer questions regarding the boundaries of the doctrine by reference to that underlying policy. While the *Emslie* case answers, for the most part, the question of whether a remote designer of a product outside the chain of distribution can be sued for an injury caused by that product's design, the decision does leave open the possibility for some exception to the rule. More importantly, since New York law essentially merges the standards of strict products liability and negligent product design, the *Emslie* holding would be equally applicable under either theory.

1. See, e.g., *Quinones v. Federated Dept. Stores*, 92 A.D.3d 931, 931 (2d Dep't 2012) ("Liability may not be imposed for breach of warranty or strict products liability upon a party that is outside the manufacturing, selling, or distribution chain.") (internal citations omitted); *Phillips v. Orentreich*, 1995 WL 351532, at *5 (S.D.N.Y. June 9, 1995) (products liability claim can be brought only against parties in the direct distribution chain, i.e., manufacturers, retailers, distributors, processors, and makers of component parts); *Bickram v. Case*, 712 F. Supp. 18, 22 (E.D.N.Y. 1989); *Kane v. A.J. Cohen Distrib. of Gen. Merch.*, 172 A.D.2d 720, 720 (2d Dep't 1991) (products liability action cannot be maintained against a party who is outside the manufacturing, selling, or distribution chain).
2. In New York, the theories of negligence and strict liability for design defect are functionally equivalent. *Adams v. Genie Indus.*, 14 N.Y.3d 535, 543 (2010).
3. 655 F.3d 123 (2d Cir. 2011).
4. *Sage v. Fairchild-Swearingen*, 70 N.Y.2d 579, 587 (1987).
5. "'Imposition of this [strict product] liability rests largely on considerations of public policy.'" *Jaramillo v. Weyerhaeuser*, 12 N.Y.3d 181, 188 (2009) (quoting *Sukljian v. Ross & Son*, 69 N.Y.2d 89, 94-95 (1986)).
6. 32 N.Y.2d 330 (1973); *Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 390 (1991) (describing *Codling* as the seminal case adopting strict products liability in New York state).
7. Id. (citing *Codling*, 32 N.Y.2d at 340-42, and the Restatement [Second] of Torts § 402A, comment c).
8. *Sage*, 70 N.Y.2d at 587.
9. *Emslie v. Borg-Warner Auto.*, 655 F.3d 123, 124 (2d Cir. 2011).
10. Id.
11. *Emslie v. Recreative Indus.*, 2010 WL 1840311, at *3 (W.D.N.Y. 2010) (*Emslie I*).
12. Id. at *4.
13. Id. at *4.
14. *Emslie*, 655 F.3d at 126.
15. Id.
16. Id. at 126 n.3.
17. *Sage*, 70 N.Y.2d 579.
18. Id. at 584.
19. Id.
20. Id at 587.
21. Id. at 586-87.
22. Id.
23. Id. at 587.
24. *Emslie I*, at *4.
25. 725 A.2d 697, 702 (N.J. App. Div. 1999).
26. 1995 WL 517298, at *2 (E.D. La. Aug. 28, 1995).
27. 618 So.2d 473 (La. Ct. App., 4th 1993).
28. 927 S.W.2d 608, 616 (Tx. 1996).
29. *Healy v. McGhan Medical*, 2001 WL 717110, at *3 (Sup. Ct. Mass March 29, 2001); *In re Minnesota Breast Implant Litig.*, 36 F. Supp. 2d 863 (D. Minn. 1998). In *Healy*, plaintiffs brought a claim for negligent design instead of products liability because they could not show the implants were manufactured by 3M, an element required to establish a product liability claim. In *In re Minnesota Breast Implant Litig.*, plaintiffs' product liability claims were dismissed against 3M because they were not the entity which placed the product into the stream of commerce.
30. Id.