BENCHMEMO: Otero v. Ingersoll-Rand Co., CA 87-0130-A

ATTORNEYS: Plaintiff -- Roy Baldwin

Defendant -- Edward Nicholas (Wright, Robinson)

Judge, this matter is before you on defendant's motion for summary judgment.

FACTS

Plaintiff worked as a steel fabricator for Southern Iron Works, a steel fabrication company in Springfield, Virginia. Part of plaintiff's job involved the use of hand-held reamers to ream out holes in structural steel. Defendant is a manufacturer of reamers. (Ingersoll is a New Jersey corporation doing business in Virginia.)

On 16 December 1983, plaintiff was operating a hand-held multivane reamer by himself. When he tried to turn it off, the turn off valve allegedly malfunctioned and the machine kept on running, causing it to kick back and throw the plaintiff through the air. (Presumably when he landed he suffered injuries.) He sues the manufacturer of the machine for (1) negligent design and manufacture and (2) failure to warn.

Southern Iron Works has been in the structural steel fabrication business for about 50 years. (See affidavit of Mr. Barger, Chief of Operations.) It is common knowledge in that business that reamers such as the one plaintiff was using should not be operated in a hand-held manner by a single operator. Barger knew this. Throughout 1983, Southern Iron Works gave every new employee a copy of the "Steel Fabricating Safety Manual" published by the American Institute of Steel Construction. Mr Barger knew that the manual states that: "two people are required for the operation of the standard hand reamer. Never attempt to operate with only one person."

The defendant manufactured and sold the reamer in question to Southern Iron Works before May 1961.

The defendant moves for summary judgment on the entire claim on the grounds of lack of privity. It moves for summary judgment on count two -- failure to warn -- on the grounds that it had no duty to warn the employee where the employer knew of the danger.

Lack of Privity

Defendant says that the law in Virginia before 1962 limited products liability claims to those in contractual privity with the manufacturer or seller. Farish for Farish v. Courion Industries, Inc., 754 F.2d 1111 (4th Cir. 1985). This rule, defendant says, applies to post-1962 injuries allegedly caused by products manufactures and sold before 1962. Id., at 1117-18. Since the reamer in question was manufactured and sold to Southern Iron Works before 1962, the lack of privity between the plaintiff and Ingersoll-Rand bars the plaintiff's claim, defendant argues.

Judge, an exception, under common law, to the privity doctrine exists for inherently dangerous products. Farish does not disturb this exception. Id., at 1118. The product in this case is a three horsepower pneumatic drill which accepts a two-foot long bit and is used for enlarging holes in steel beams. I think that there is no question that this machine is "inherently dangerous." The Virginia Supreme Court defined an "inherently dangerous product" as one where "the danger of injury stems from the product itself, and not from any defect in it." General Bronze Corporation v. Kostopulos, 122 S.E.2d 548, 551, 203 Va. 66, ___ (1961).

This exception may be enough to defeat the defendant's summary judgment motion based on lack of privity. However, the inherently dangerous product exception will not be available to the plaintiff if he is found to have been contributorily negligent. See Farish. In Farish, the trial judge found the plaintiff contributorily negligent as a matter of law. Here, it seems to me that operating this machine by himself would render the plaintiff contributorily negligent, although he swears that no one ever told him of the danger. If the question of contrib is a factual one for the jury, you should deny defendant's motion for summary judgment on the entire claim.

Duty to Warn

Defendant moves for summary judgment on Count Two (Failure to Warn), contending that because plaintiff's employer was aware of the danger associated with one-person operation of the reamer, Ingersoll-Rand had no duty to warn the plaintiff.

In Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985), the Fourth Circuit upheld the district court's grant of summary judgment to the defendant manufacturers where the employer knew of the dangers associated with a product, silica sand. (Affirming Goodbar v. Whitehead Brothers, 591 F. Supp. 552 (W.D. Va. 1984). In his opinion, Judge Kiser stated the general principle of Virginia law as follows: "In Virginia there is no duty on product suppliers to warn employees of knowledgeable industrial purchasers as to product-related hazards." Here, it is clear that Southern Iron Works knew about the dangers associated with one-person operation of the reamer. They have been in the business for about 50 years, and Mr, Barger swears that he himself has known about such dangers for about 30 years. Plaintiff counters that the employer never warned him or handed out the safety manual to him. (He argues that his signature on a form indicating his receipt of the safety manual is a forgery or has been put there by the magic of photocopying.) But this is besides the point. Ingersoll-Rand has the right to rely on the employer's fulfilling its legal obligation to warn its employees.

Plaintiff tries to distinguish Goodbar by saying that in that case the product was silica sand and that the supplier could not put a warning label on every grain of sand, whereas a warning label could have been placed on the reamer. Judge Kiser discusses, as an additional point, ("touching briefly on another point raised by Defendants"), the difficulties that sand suppliers face in attempting to warn the Foundry's employees of the hazards inherent in the use of sand, and agrees that the sand supplier has no duty to warn "when only the Foundry is in a position to communicate effective warning." However, plaintiff is wrong to argue that the case holds that this is the only time when a supplier has no duty to warn. The holding was much broader than this.

Judge, the other case plaintiff cites, Barnes v. Litton Industrial Products, Inc., is distinguishable from this case in that Barnes involved a consumer product not industrial equipment. (In Barnes, two inmates at a state penal farm who were employed in the hospital facility as dental assistants drank "burning alcohol" used to fuel bunsen burners, and were rendered totally blind. That stuff must have had a pretty high proof!) Judge Kiser, in Goodbar, completely distinguishes Barnes and other consumer products cases.

In sum,

You should DENY defendant's motion for summary judgment as to the entire claim on the grounds of lack of privity because of the inherently dangerous product exception to the privity doctrine -- unless you are prepared to rule that the plaintiff was contributorily negligent as a matter of law.

You should GRANT defendant's motion for summary judgment on Count Two, the Failure to Warn Count. Defendant had no duty to warn the plaintiff because it supplied the machine to a knowledgeable industrial employer and was entitled to rely on the employer to pass the warning along to its employees.

DISCOVERY

Judge, plaintiff also wants you to overrule objections to interrogatories. I suggested to Mr. Baldwin that he and Mr. Nochols try to work this out, but he says that they are not able to.