Supreme Court of Florida

ORIGINAL

No. 75,991

WILLIE J. HIGH, et al.,
Petitioners,

vs.

WESTINGHOUSE ELECTRIC CORP., et al.,
Respondents.

[June 11, 1992]

OVERTON, J.

We have for review High v. Westinghouse Electric Corp., 559 So. 2d 227 (Fla. 3d DCA 1989), in which the district court affirmed the trial court summary judgment, holding that Westinghouse, as the manufacturer of electrical transformers, is not liable to an employee of a scrap metal salvage business for injuries allegedly sustained from a hazardous fluid that was

released in dismantling transformers in the scrapping process. The district court then certified that "the within question passes upon one of great public importance within the meaning of article V, section 3(b)(4), Florida Constitution." Id. at 229 n.2.[1] While we approve the district court's decision on the question of strict liability, we find that there remains an issue of fact on the question of negligence. Consequently, we quash in part the decision of the district court of appeal and remand this case for further proceedings.

The relevant facts in the record are as follows. Westinghouse manufactured electrical transformers and sold them to Florida Power and Light Company (FPL). From 1967 to 1983, FPL sold its electrical transformers for junk to Pepper's Steel and Alloys (Pepper's), a scrap metal salvage business. In either 1970 or 1971, Monsanto, a manufacturer of polychlorinated bithenyls (PCBs), notified transformer manufacturers, including Westinghouse, of the toxic propensities of PCBs used in electrical transformers and their adverse effect on humans and the environment. Specific procedures concerning the disposal of transformers were recommended by Monsanto. Westinghouse did not disclose the potential existence of PCBs in their transformers until 1976, when it wrote a letter to its utility company customers, including FPL. In that letter, Westinghouse informed

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[1] We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

them that a substantial number of oil-filled transformers had been contaminated with PCBs in the manufacturing process. Westinghouse's letter suggested that when performing repairs, routine maintenance, or disposal, all oil-filled transformers should be checked for the presence of PCBs.[2]

Studies of humans exposed to PCBs have shown numerous adverse effects, including but not limited to chloracne and other epidermal disorders, digestive disturbances, jaundice, impotence, throat and respiratory irritations, and severe headaches. It is undisputed that none of the junk transformers that FPL sold to Pepper's contained any labels, markings, or warnings of any kind that the transformers contained PCBs or that the contents might be hazardous to human health.

Willie J. High was the main truck driver for Pepper's from 1965 to 1983. As part of his duties, he picked up aluminum wire, cable, and other scrap metal. He also picked up transformers from FPL in Miami and other cities around Florida. As part of his job, High loaded and unloaded the transformers onto Pepper's truck with a forklift. Specifically, he hooked and unhooked the

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[2] The pertinent portion of the letter read as follows: "In addition, when performing repair, routine maintenance or disposal, oil-filled transformers should be checked for the presence of PCB's. We also suggest that you check your own transformer oil storage and handling systems for possible presence of PCB's."

forklift cables. During this process, he came into contact with the PCB-contaminated transformer oil.

In 1975, the Dade County Department of Environmental Resource Management (DERM) cited Pepper's for a number of environmental ordinance violations. In 1983, DERM, the State of Florida Environmental Regulation Department, and the Environmental Protection Agency (EPA) determined that Pepper's property was sufficiently contaminated with oil containing PCBs to justify commencement of federal, state, and county legal actions against FPL, Pepper's, and the owners of adjacent properties for violating county, state, and federal ordinances and laws and to demand a cleanup of the site by FPL. As a result of the media coverage given the DERM and EPA actions, High became aware that he had been exposed to PCBs while employed at Pepper's and that some of his physical and mental problems might be attributed to this exposure. Consequently, on July 9, 1983, High brought this action under strict liability and negligence theories.

The trial court granted Westinghouse's motion for summary judgment, holding as a matter of law that the ultimate disposal of the transformer was not foreseeable to the manufacturer as a reasonably intended "use." On appeal, the district court of appeal, in a split decision, affirmed. In explaining why strict liability under section 402A of the Restatement (Second) of Torts (1965) is not applicable, the district court stated:

> The dismantling and recycling of products after they have been destroyed have been held to be product uses not reasonably foreseeable to manufacturers. . . .
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> . . . Westinghouse's transformers were destroyed prior to the alleged injuries. While the transformers were sealed and intact there was no harm. Rather, the alleged damage occurred after the contents of the devices were exposed through the dismantling process. Westinghouse's product as it had originally been sold to FP & L, for practical purposes, had ceased to exist at the time the alleged injuries occurred.
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> Here, the determination of no liability is based upon a substantial change in the product from the time it left the manufacturer's control to the time of the subject incident; this change negates the manufacturer's liability for any alleged defect under 402A. . . .
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> Where it is undisputed that a product defect has been created by subsequent alteration (i.e., destruction) and not by the actions of the manufacturer, the manufacturer is properly exonerated of liability as a matter of law.

559 So. 2d at 228. The district court concluded that

> the actual products supplied by Westinghouse were the electrical transformers, not the contaminated dielectric fluid. As a matter of law, the unsealing, stripping, and dumping of the contents of Westinghouse's product in order to salvage junk components were not reasonably foreseeable "uses" of the product nor was Willie High an intended "user" within the meaning of section 402A.

Id. at 229.

There are two questions we must address. The first is whether strict liability applies under section 402A of the Restatement (Second) of Torts for injuries that occur in dismantling an item. The second is whether the manufacturer,

Westinghouse, in this instance was negligent in failing to timely warn of dangerous contents in its product that could cause injuries in its alteration and dismantling.

While these are questions of first impression in this state, other courts have addressed similar issues. In Kalik v. Allis-Chalmers Corp., 658 F. Supp. 631 (W.D. Pa. 1987), the owners of a scrap metal business that had been contaminated by PCBs sued the manufacturers and suppliers of the products containing the PCBs to recover cleanup costs and damages incurred under the Comprehensive Environmental Response Compensation and Liability Act of 1980. In that case, the scrap metal business had purchased junk electrical components as scrap. The electrical components contained, as they did in this instance, PCBs. During the course of dismantling, handling, and storing the junk electrical components, PCB-contaminated oil leaked or spilled onto the site. A furnace used in dismantling and processing the components caused PCBs in the components to allegedly produce dioxins, which also polluted the site. Plaintiff's damage claims were based upon a negligent failure to warn and strict liability in tort. The United States District Court in Pennsylvania considered whether plaintiff's use of the product was reasonably foreseeable to the manufacturer. Although the court agreed that this was ordinarily a question of fact, it held as a matter of law that the recycling of a product after it had been destroyed and the destruction of a product were not reasonably foreseeable uses to the manufacturer.

In Wingett v. Teledyne Industries, Inc., 479 N.E.2d 51 (Ind. 1985), overruled on other grounds by Douglass v. Irvin, 549 N.E.2d 368 (Ind. 1990), an employee of an independent contractor hired to remove ductwork in a foundry was injured when a connection between two segments of ductwork failed and a portion of the ductwork fell to the floor as the employee cut the support hangers. The employee sued the foundry owners and the manufacturer and the installer of the ductwork. The employee claimed that the connection between the segments of ductwork that failed, consisting of a sheet metal band, screws, and clamps instead of an iron collar and bolts found on the other segments, caused his injury. The Indiana Supreme Court affirmed the summary judgement in favor of the manufacturer, holding as a matter of law that the dismantling and demolishing of the ductwork was not a reasonably foreseeable "use" of the product.

Finally, in Johnson v. Murph Metals, Inc., 562 F. Supp. 246 (N.D. Tex. 1983), a United States District Court in Texas granted a summary judgment and held that fumes and particulates from smelting lead from scrap batteries were not created from a "use" of the batteries. In that case, the employees of various lead-smelting companies who had sued certain automotive battery manufacturers stipulated that their injuries did not result from working with intact batteries or from the destruction of batteries to obtain the lead for smelting. The lead fumes and dust that allegedly injured them were created only after the lead was extracted from the destroyed batteries and used in the

smelting process. In determining that the plaintiffs were not "users" of defendants' products, the court held that "the defendants' product had ceased to exist." Id. at 249.

With regard to the first question and the applicability of strict liability under section 402A of the Restatement (Second) of Torts, we find that strict liability is not applicable. Florida adopted the principles of strict liability in tort under section 402A of the Restatement (Second) of Torts in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976). In order for strict liability to apply to the manufacturer, the transformers in this instance must have been used for the purpose intended. In the instant case, High's injury resulted from dismantling the transformers and coming into contact with the PCBs as a result of this process. We agree with the district court that section 402A does not apply because of the substantial alteration of the product when High came into contact with the contaminated oil. Secondly, section 402A applies to intended uses of products for which they were produced. When an injury occurs under those circumstances, the manufacturer is strictly liable. We find, under the circumstances in the instant case, that dismantling a product is not an intended use as prescribed by section 402A. Therefore, we find, under these facts, that strict liability does not apply.

The second question we must address concerns liability based on negligence. We find that a manufacturer has a duty to warn of dangerous contents in its product which could damage or

injure even when the product is not used for its intended purpose.[3] This issue, which is not directly addressed by the district court of appeal, is whether Westinghouse was negligent in warning FPL of the possible danger of PCB contamination.

We find that Westinghouse had a duty to timely notify the entity to whom it sold the electrical transformers, FPL in the instant case, once it was advised of the PCB contamination. The record reflects that Monsanto, the PCB manufacturer, notified Westinghouse sometime between 1970 and 1972, of the dangerous toxic propensities of PCBs used in electrical transformers and their adverse effect on humans and the environment. In that notification, specific procedures concerning the disposal of such transformers were recommended by Monsanto. We find that Westinghouse's November 22, 1976, letter to its utility customers, including FPL, relaying that information was adequate notice. However, whether or not the letter was timely is a question of fact that has not been resolved by this record. As stated earlier, Monsanto informed Westinghouse sometime between 1970 and 1972 of the possible PCB contamination, and Westinghouse, in turn, informed FPL of same in 1976. It is clear from the record that Westinghouse delayed in warning FPL of the contamination of these transformers. Although we hold that

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[3] Tampa Drug Co. v. Wait, 103 So. 2d 603 (Fla. 1958); Advance Chem. Co. v. Harter, 478 So. 2d 444 (Fla. 1st DCA 1985), review denied, 488 So. 2d 829 (Fla. 1986); Mathis v. National Lab., 355 So. 2d 117 (Fla. 3d DCA 1978).

Westinghouse's letter to FPL was adequate notice, we find that Westinghouse had a duty to timely notify FPL so that FPL could timely notify Pepper's of the possible danger that could occur in dismantling the transformers so that it could proceed in the prescribed manner. If this notice was not timely, then the next question is whether the lack of timely notice by Westinghouse was the proximate cause of High's injury. Given the circumstances, we find the timeliness of Westinghouse's notice to FPL is an issue of fact that must be resolved in this case and is not proper for summary judgment.

For the reasons expressed, we approve in part and quash in part the decision of the district court of appeal and remand for further proceedings consistent with this opinion.

It is so ordered.

SHAW, C.J. and McDONALD, GRIMES and HARDING, JJ., concur.
BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.
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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.