Palmer v. 999 Quebec, Inc. - Reply Brief
No. 20150031

In the Supreme Court

State of North Dakota

Deborah J. Palmer, surviving spouse of
Gary J. Palmer, deceased,
Plaintiff and Appellant
v.
999 Quebec, Inc.(f/k/a International
Boiler Works Company), a Delaware
corporation; . . . ,
Defendants Supreme Court No. 20150031
[District Court No. 2013-CV-00113]
A.W. Kuettel & Sons, Inc.,
a Minnesota corporation;
Appellee

Appeal from the Final Judgment entered in the District

Court, Northeast Central Judicial District, Grand Forks

County, the Honorable Debbie G. Kleven presiding

REPLY BRIEF OF APPELLANT DEBORAH J. PALMER

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ARGUMENT

A. Appellee A.W. Kuettel & Sons, Inc. disregards North Dakota decisional precedent as it incorrectly claims that Kuettel "did not owe Palmer a duty of care as a matter of law" and that no genuine issues of material fact precluded entry of summary judgment by the district court in this case.

[¶1] Conspicuously not cited by A.W. Kuettel in its briefing in this appeal is the line of case law emanating from the decision of the North Dakota Supreme Court in Barsness v. General Diesel & Equipment, Co., 383 N.W.2d 840, 843-844 (N.D. 1986)(1)

, wherein this court explained as follows, relative to the determination of the existence of a duty on the part of a defendant in a negligence case:

It is important to note, however, that in Peterson we specifically distinguished "cases like Kirton v. Williams Elec. Co-op, Inc., 265 N.W.2d 702 (N.D. 1978), where factual determinations are prerequisite to establishing duty." Peterson, supra, 308 N.W.2d at 553. If the existence of a duty depends upon factual determinations, resolution of such factual disputes is for the trier of fact. See Layman, supra, 343 N.W.2d at 341; Schleicher v. Western State Bank, 314 N.W.2d 293, 298 (N.D. 1982); Kirton v. Williams Electric Cooperative, Inc., supra, 265 N.W.2d at 705. In Kirton, we held that whether the defendant could have reasonably foreseen the injury to the plaintiff was a factual determination prerequisite to the finding of a duty. See also Schleicher, supra, 314 N.W.2d at 298. The same situation is presented in the instant case--the existence of a duty is contingent upon a jury's determination of foreseeability of the injury to the plaintiff. Thus, Schlenk and Peterson are distinguishable and summary judgment on this issue was inappropriate. The appropriate procedure under these circumstances is outlined in Comment e to Section 328B of the Restatement (Second) of Torts (1965): "Where the existence of a duty will depend upon the existence or nonexistence of a fact as to which the jury may reasonably come to either one of two conclusions . . . then it becomes the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to such fact is drawn."

The trial court, however, determined that, as a matter of law, Land's misuse of the crane was not foreseeable. We have previously held that foreseeability of the plaintiff's injury is a question of fact for the jury, unless the facts are such that reasonable minds could not differ. Layman, supra, 343 N.W.2d at 341; Kirton, supra, 265 N.W.2d at 705. (emphasis added).

383 N.W.2d at 843(2)

[¶2] In contrast, the factually-inapposite North Dakota Supreme Court decisions which are cited by Kuettel do not superintend over the precedent of Barsness and its progeny, or the many

subsequent decisions of this court which do not cite Barsness, but consistently hold, as Barsness did in this regard.

[¶3] The facts, relevant to the determination of the existence of a duty in the instant case are set forth in¶¶5 through 14, and in ¶¶18-19 of the Appellant's Main Brief in this appeal and will not be restated here. Reduced to the essentials, however, it is respectfully submitted that the matter of "whether the defendant could have reasonably foreseen the injury to the plaintiff was a factual determination prerequisite to the finding of a duty"(3)

in this case, making erroneous the entry of summary judgment by the district court, a result which requires remand of this case for a trial upon its merits.

[¶4] Indeed, in the specific factual setting of household asbestos exposures, the appellate decisions from other jurisdictions which place the degree of importance upon the factor of "foreseeability of injury" -- as has the North Dakota Supreme Court in determining the existence of a duty of care -- have held that such a duty does exist - particularly in the instance of a member of the directly-asbestos-exposed person's immediate household. See, e.g., Simkins v. CSX Corp., 929 N.E.2d 1257, 1261-1265 (Ill. App. 2010), affirmed, 965 N.E.2d 1092 (Ill. 2012); Kesner v. Superior Court, 171 Cal. Rptr.3d 811, 818-819 (Cal. App. 2014); Bobo v. TVA, 2014 U.S. Dist. LEXIS 117917, **8-15 (N.D. Ala. August 25, 2014); Arnold v. Saberhagen Holdings, Inc., 240 P.3d 162, 169-174 (Wash. App. 2010), review denied, 249 P.3d 1029 (Wash. 2011); Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006); Olivo v. Exxon Mobil Corp., 872 A.2d 814, 819-821 (N.J. Super. App. Div. 2005); Chaisson v. Avondale Industries, Inc., 947 So.2d 171 (La. App. 2006), rehearing denied, 947 So.2d 171, writ denied, 954 So.2d 145 (La. 2007); Zimko v. American Cyanamid, 905 So.2d 465, 481-484 (La. App. 2005), writ denied, 925 So.2d 538 (La. 2006); Satterfield v. Breeding Insulation Company, 266 S.W.3d 347, 351-368 (Tenn. 2008); Satterfield v. Breeding Insulation Company, Inc., 2007 Tenn. App. LEXIS 230, **21-22 (Tenn. App. April 19, 2007); Anderson. v. A.J. Friedman Supply Co., Inc., 3 A.3d 545, 555-557 (N.J. Super. App. Div. 2010), certification denied, 16 A.3d 383, (N.J. 2011); Catania, et. al., v. Anco Insulations, Inc., et. al., 2009 WL 3855468, 2009 U.S. Dist. LEXIS 107375 (M.D. La. November 17, 2009); and Condon v. Union Oil Company of California, 2004 WL 1932847, 2004 Cal. Unpub. LEXIS 7975 (Cal. App. 1st Dist. August 31, 2004).

B. The district court's erroneous adoption of A.W. Kuettel's contrived

"misfeasance" vs. "nonfeasance" argument was unsupported by North Dakota precedent and thus Kuettel's assertion of it in the instant appeal should be rejected by the Supreme Court.

[¶5] Supported by nary a precedential decision of the North Dakota Supreme Court, the district court flatly adopted defendant/appellee A.W. Kuettel's argument based upon a Delaware Supreme court decision(4)

that, "Palmer's complaint appears to allege nonfeasance based upon the Defendants' failure to act, which indicates the Defendants did not owe Palmer a duty of care . . . . . Palmer's complaint does not appear to allege misfeasance, which would involve the Defendants working positively

to injury others." See, the district court's "Order Granting Defendants' Motion for Summary Judgment Based on No Legal Duty Owed", at slip opinion page 5 [Appx. at 132].

[¶6] Stated directly - there is no North Dakota jurisprudence in decisional precedent which bifurcates the determination of whether a duty is impressed upon defendant based upon the defendant's "nonfeasance", as opposed to that defendant's "misfeasance" -- within the context of a civil action sounding in negligence. To the extent that the subject of "misfeasance" has been addressed by the North Dakota Supreme Court in a negligence claim setting, it has been found - more than a century ago -- to functionally incorporate that to which the Delaware Supreme Court attached determinative significance in Price v. E.I. DuPont de Nemours & Co., supra, as "nonfeasance".(5)

[¶7] Furthermore, even in jurisdictions were a distinction between a negligence action defendant's "misfeasance" as opposed to his or her "nonfeasance" is significant -- in the type of factual setting which exits in the instant case, such courts have held that, as the district court correctly observed, "the inaction of the defendants rose to the level of misfeasance, which created a duty of care for those persons who came into contact with the clothing of the defendant's employees." See, the district court's "Order Granting Defendants' Motion for Summary Judgment Based on No Legal Duty Owed", at slip opinion page 3 [Appx. at 130], citing the decision of the Tennessee Supreme Court in Satterfield v. Breeding Insulation Company, 266 S.W.3d 347, 351-368 (Tenn. 2007).(6)

C. The appellant made (and preserved) the alternative argument that Minnesota corporation defendant/appellee A.W. Kuettel & Sons, Inc. should be subject to Minn. Stat. § 544.41 - Minnesota's non-manufacturer-seller/distributor statute.

[¶8] In addition to her argument based upon N.D.C.C.§28-01.3-04, appellant Deborah Palmer appellant has alternatively and consecutively argued that Minnesota corporation defendant A.W. Kuettel & Sons' liability for decedent Gary J. Palmer's exposures to asbestos-containing products manufactured by now-bankrupt manufacturers should be governed by Minnesota's non-manufacturer seller statute, Minn. Stat. §544.41 - particularly where the exposures occurred within the State of Minnesota, where Gary lived with his father and mother when these household asbestos exposures occurred. See, the Main Brief of Appellant Deborah Palmer, at ¶¶ 28-35, and at ¶¶ 47-48. See, also, the documentation of decedent Gary J. Palmer's household exposures to asbestos from his father's clothing during the years 1961-1965, and 1974-1979, narrated at Main Brief ¶¶ 5-14.

[¶9] Under Minn. Stat. §544.41, if a manufacturer of the products involved is bankrupt and not subject to the jurisdiction of the court, the non-manufacturer-seller/manufacturer may not be dismissed from the action. See, e.g., Tousignant v. Kanan Enters., 2011 U.S. Dist. LEXIS 52309 (D.Minn. May 16, 2011)["In a products liability case, application of Minn. Stat. §544.41 was not appropriate because the supplier declared bankruptcy, and therefore, the federal district court did not have jurisdiction over the supplier."].

Dated this 17 th day of September, 2015,

____/s/__
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1. Barsness has remained viable precedent since it was decided. The decision of the North Dakota Supreme Court in Barsness v. General Diesel & Equipment, Co., 383 N.W.2d 840, 843-844 (N.D. 1986) has been cited with approval by the Supreme Court no fewer than twenty-four (24) times since it was decided, being most recently followed in Wotzka v. Minndakota Ltd. Partnership, 2013 ND 99,¶5, 831 N.W.2d 722, 725 (N.D. 2013).

2. As the New Jersey appellate court noted succinctly as it found a duty of care on the part of the defendant in an asbestos "take home" exposure case, Olivo v. Exxon Mobil Corp., 872 A.2d 814, 819 (N.J. Super. App. Div. 2005), affirmed at 895 A.2d 1143 (N.J. 2006): "Foreseeability is a foundational element in determining whether a duty exists." (emphasis added). The California Court of Appeals held similarly in a "take home" asbestos exposure case that, "(w)hile foreseeability of harm is not in California the exclusive consideration, it is among the most significant, if not the single most significant, factor. And there is a high degree of foreseeability of harm from secondary, or take-home, exposure to those whose contact with an employer's workers is not merely incidental, such as members of their household or long-term occupants of the residence." (emphasis added). Kesner v. Superior Court, 171 Cal. Rptr.3d 811, 818 (Cal. App. 2014).

3. Barsness v. General Diesel & Equipment, Co., supra, 383 N.W.2d at 843-844. See, also, Saltsman v. Sharp,2011 ND 172, ¶5, 803 N.W.2d 553, 557 (N.D. 2011).

4. Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162 (Del. 2011)

5. See, e.g., Schlosser v. Great Northern Railway, 20 N.D. 406, 411, 127 N.W. 502, 504 (N.D. 1910)[Where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong, as where he fails or neglects to use reasonable [9] care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of his misfeasance. An agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and as such, is responsible for any injury he may cause. (emphasis added)]. See, also, Olsness v., State, 58 N.D. 20, 26, 224 N.W. 913, 915 (N.D.1929) and Sanders v. Reister, 1 Dakota 151, 157, 46 N.W. 680, 680 (Dak. 1875).

6. See, also, e.g., Millsaps v. ALCOA, 2013 WL 5544053, 2013 U.S. Dist. LEXIS 147677, **11-14 (E.D. Pa. August 8, 2013) -- a decision by the federal district court which presided in the Multidistrict Litigation (MDL) 875 consolidation over thousands of consolidated federal asbestos-related actions (including those which were transferred from the District of North Dakota), finding Satterfield to be a "foreseeability of injury"-based decision.