New Mexico Law Review

19 N.M. L. Rev. 743 (Summer 1989 1989)

Summer 1989

Products Liability

Joan Marie Hart

F. Michael Hart

PRODUCTS LIABILITY

JOAN MARIE HART* and F. MICHAEL HART**

I. INTRODUCTION

Fifteen years ago, in *Stang v. Hertz*,[1] the New Mexico Supreme Court embraced the doctrine of strict products liability. The decision adopted Section 402A of the *Restatement (Second) of Torts* which holds vendors and lessors responsible for defective goods which cause injuries to users or consumers of the goods.[2] This article will discuss the New Mexico products liability cases reported in 1987, chiefly in the context of causes of action brought under the strict liability doctrine. Other actions, which are often appropriate in products liability cases, such as breach of contract, breach of warranty or negligence, are also discussed as those actions relate to Section 402A causes of action. Further, the article briefly describes and comments on the 1987 Several Liability Act.[3]

The New Mexico Court of Appeals addressed a variety of products liability issues in the three cases the court decided in 1987. The first case set out the elements sufficient to state a strict liability claim.[4] The second attempted to resolve the relationship between strict liability and comparative negligence in the indemnity context.[5] The third case discussed fore-

---

*B.A. Harvard University, 1978; J.D. University of New Mexico, 1982.
**B.A. Harvard University, 1983; J.D. University of New Mexico, 1988.

1. 83 N.M. 730, 497 P.2d 732 (1972).

2. Section 402A of the RESTATEMENT (SECOND) OF TORTS reads:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

3. N.M. STAT. ANN. §§ 41-3A-1 to -2 (Supp. 1987). The 1987 Several Liability Act is discussed in detail in Schultz and Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M.L. REV. 483 (1988).

4. Armijo v. Ed Black's Chevrolet Center, Inc., 105 N.M. 422, 733 P.2d 870 (Ct. App. 1987).

5. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App.), *cert. denied*, 106 N.M. 24, 738 P.2d 518 (1987).

seeability as a matter of law in a strict products case.[6] In the final case discussed here, the New Mexico Federal District Court considered whether a hand gun is *per se* defective under the New Mexico doctrine of strict products liability.[7]

II. LIMITATIONS TO WARRANTY ACTIONS IN PRODUCTS CASES

In *Armijo v. Ed Black's Chevrolet Center, Inc.*,[8] defendant, Ed Black's, sold a dump truck to plaintiff Armijo's employer. The dump truck was defective; third-party defendant, Stuart Truck Equipment, had negligently performed the welds that attached the dump bed to the truck.[9] As Armijo was operating the truck, the bed broke off and the cab jerked violently, injuring Armijo.[10]

Armijo sued Ed Black's in negligence and breach of warranty but not in strict products liability.[11] Armijo's complaint stated: (1) Ed Black's sold a truck that Armijo used, (2) the truck had defective welds, and (3) Armijo was injured because the welds failed.[12] When discovery revealed that Stuart's negligence caused the defective welds, the parties filed various motions.[13] The district court granted Ed Black's motions for summary judgment on the negligence claim and for judgment on the pleadings regarding the warranty claim.[14] The court denied Armijo's motion to amend the complaint to include a strict liability claim.[15]

The New Mexico Court of Appeals upheld the summary judgment on the negligence claim on the grounds that Stuart, the third-party, admitted performing the welds and because Armijo presented no evidence of independent negligence on the part of Ed Black's.[16] The court also upheld the lower court's ruling on the warranty claim, finding that New Mexico's version of Section 55-2-318 of the Uniform Commercial Code (U.C.C.), "Third Party Beneficiaries of Warranties Expressed and Implied,"[17] did not protect employees of purchasers.[18] Explaining earlier case law and

6. Van de Valde v. Volvo of Am. Corp., 106 N.M. 457, 744 P.2d 930 (Ct. App. 1987).

7. Armijo v. Ex Cam, Inc., 656 F.Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988).

8. 105 N.M. 422, 733 P.2d 870 (Ct. App. 1987).

9. *Id.* at 423, 733 P.2d at 871.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. N.M. STAT. ANN. § 55-2-318 (1978).

18. *Id.* A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such a person may use, consume or be affected by the goods and if such a person is injured in

Section 55-2-318, the court determined that the warranty provisions of the U.C.C. protect only those persons who purchase products from sellers within the distribution chain of the goods.[19] Armijo did not purchase the dump truck but merely worked for the purchaser.[20] Therefore, the court reasoned, the warranties did not run to him.[21] The court noted that such a holding was in accord with developments in other jurisdictions.[22]

Finally, the appellate court held that Armijo's complaint was sufficient to state a claim for relief under strict liability theory, and that the district court's dismissal of the complaint was error.[23] The opinion discusses New Mexico Civil Procedure Rule 1-008(A)(2) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[24] In reviewing New Mexico case law the court reaffirmed that the rules of procedure "reject the approach that pleading is a game of skill," but rather, "accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[25] Armijo's complaint pleaded allegations sufficient to state a claim in strict liability even though Armijo did not mention the words "strict liability."[26] Therefore, the trial court should not have dismissed Armijo's claim.[27]

In holding that the trial court must construe pleadings to allow plaintiffs to proceed on causes of action pleaded by implication, the court expanded the plaintiff's ability to collect damages. Distinctions between causes of action could otherwise be crucial in cases where the statute of limitations would bar action. For example, under Uniform Commercial Code Section 55-2-725, the limitations period for a warranty action runs for four years from the date of tender of delivery of the product.[28] On the other hand, the limitations period for negligence in torts expires three years from the

person by breach of the warranty. A seller may not exclude or limit the operation of this section. N.M. STAT. ANN. § 55-2-318.

19. *Armijo*, 105 N.M. at 423-24, 733 P.2d at 871-72. Note that the Official Text of the Uniform Commercial Code includes a total of three versions of section 2-318. New Mexico adopted the most restrictive of the alternatives. (Almost half of the jurisdictions that have incorporated section 2-318 warranty liability have adopted one of the other alternatives.) The court in *Armijo* interpreted New Mexico's choice as a manifestation of legislative intent to exclude employees of purchasers from the warranty protections of the Uniform Commercial Code. *Id.* at 424, 733 P.2d at 872. See J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE SECTION § 11-3 "PRIVITY—PERSONAL INJURY" (3d ed. 1988) for a more complete discussion of this issue.

20. *Armijo*, 105 N.M. at 423, 733 P.2d at 871.

21. *Id.* at 424, 733 P.2d at 872.

22. *Id.*

23. *Id.* at 425, 733 P.2d at 873.

24. *Id.* at 424, 733 P.2d at 872; SCRA 1986, 1-008(A)(2).

25. *Armijo*, 105 N.M. at 424, 733 P.2d at 872 (quoting Hambaugh v. Peoples, 75 N.M. 144, 153, 401 P.2d 777, 782 (1965)).

26. *Armijo*, 105 N.M. at 424-25, 733 P.2d at 872-73.

27. *Id.* at 425, 733 P.2d at 872.

28. N.M. STAT. ANN. § 55-2-725 (1978).

date the plaintiff knew or should have discovered the injury.[29]

III. JOINT AND SEVERAL LIABILITY

A. Pre-Statute

Trujillo v. Berry,[30] the most significant products liability case of the year, questioned whether a cause of action for indemnity exists in a strict liability case under New Mexico's comparative negligence theory. In a difficult opinion, the New Mexico Court of Appeals held that comparative negligence doctrine has no effect on strict products liability in the indemnity context.[31]

In *Trujillo,* defendant H & P company manufactured, sold, and installed equipment which fell from the ceiling at defendant Suds-Z Car Wash.[32] The falling equipment injured plaintiff Trujillo.[33] Trujillo sued both H & P company and the Car Wash for negligence, strict products liability, breach of warranty, and outrageous and reckless conduct.[34] The Car Wash cross-claimed against H & P for indemnification should plaintiff recover against the Car Wash under either strict products liability or warranty theories.[35] The trial court dismissed the cross-claim on the ground that New Mexico's pure comparative negligence doctrine supersedes traditional indemnity principles.[36]

The court of appeals reversed the dismissal and held that common law indemnity rights between the manufacturer, H & P, and the retailer, Suds-Z Car Wash, survive under New Mexico's pure comparative negligence doctrine.[37] According to the *Trujillo* holding, after the fact-finder apportions liability among the parties, if the retailer's liability results solely from its passive role as the seller of the product furnished by the manufacturer, the retailer may be entitled to indemnification from the manufacturer.[38] The court emphasized that indemnity is not always appropriate; however, the indemnity action will not fail under strict liability doctrine as a matter of law.[39]

The court reasoned that the doctrine of strict liability in New Mexico is not based on fault but is intended to allow an injured user or consumer

29. N.M. STAT. ANN. § 37-1-8 (1978).
30. 106 N.M. 86, 738 P.2d 1331 (Ct. App.), *cert. denied,* 106 N.M. 24, 738 P.2d 518 (1987).
31. *Id.* at 87, 738 P.2d at 1332.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 89-90, 738 P.2d at 1334-35.
39. *Id.* at 90, 738 P.2d at 1335.

to recover against a supplier or manufacturer without the requirement of proving negligence or breach of contract.[40] A retailer does not become a joint tortfeasor subject to apportionment of damages under comparative negligence doctrine merely because it has been found strictly liable for injuries caused by a defective product.[41] The *Trujillo* decision addresses one way a party held strictly liable may seek recovery of a damages award.

B. Statute

In 1982, the New Mexico Court of Appeals abolished the doctrine of joint and several liability in *Bartlett v. New Mexico Welding Supply, Inc.*,[42] because it found that joint and several liability was incompatible with "our pure comparative negligence system."[43] The 1987 New Mexico Legislature codified this general abandonment of joint and several liability in causes of action to which the doctrine of comparative fault applies but retained joint and several liability for the sale and manufacture of defective products.[44] The 1987 statute holds co-defendants jointly and severally liable only for that portion of the damages attributed to them under a strict liability theory.[45] Liability under another theory such as negligence, however, will be assessed separately against each co-defendant, whether or not the co-defendant is also liable under the strict products liability doctrine.[46]

The same statute codifies the preservation of the New Mexico common law of indemnity.[47] That is, as discussed in the *Trujillo*[48] case, it preserves the right of a strictly liable defendant to seek indemnity from a co-defendant.

---

40. *Id.* at 88, 738 P.2d at 1333.

41. *Id.* at 89, 738 P.2d at 1334.

42. 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

43. *Id.* at 158, 646 P.2d at 585.

44. 1987 N.M. Laws, ch. 141 § 1 (codified at N.M. STAT. ANN. § 41-3A-1 (Cum. Supp. 1987)):

> A. In any cause of action to which the doctrine of comparative fault applies, the doctrine imposing joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished except as otherwise provided hereafter. The liability of any such defendants shall be several . . . . C. The doctrine imposing joint and several liability shall apply: . . . (3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; . . . .

45. *Id.*

46. *Id.*

47. *Id.* § 41-3A-1F: "F. Nothing in this section shall be construed to affect or impair any right of indemnity or contribution arising out of any contract of agreement or any right of indemnity otherwise provided by law."

48. 106 N.M. 86, 738 P.2d 1331 (Ct. App.), *cert. denied*, 106 N.M. 24, 738 P.2d 518 (1987). For a discussion of this case see *supra* text accompanying notes 30-41.

IV. FORESEEABILITY

Van de Valde v. Volvo of America Corp.,[49] addresses the plaintiff's burden of proving foreseeability of injury in a strict products liability case. Plaintiff, Van de Valde, was attempting to load wrought iron curtain rods onto the roof luggage rack of a Volvo station wagon when car owner Rosenwald handed plaintiff two straps she found at the rear of the car.[50] One of the straps was designed by defendant, Volvo, to hold the spare tire secure in the tire well.[51] While Van de Valde and Rosenwald were attaching the strap to the luggage rack, it snapped and struck Van de Valde in the eye.[52] The car had come equipped with the strap, in place, holding the spare tire; the Volvo's owner's manual contained no information or directions for use of the strap and its hooks were specifically designed to fit into slots located on either side of the spare tire well.[53] Van de Valde was not aware of the intended use of the strap until after the accident.[54]

Van de Valde sued Rosenwald, Volvo of America and Santa Fe Mazda-Volvo, the dealer.[55] The trial court granted summary judgment dismissing the action against the manufacturer and dealer.[56]

The court of appeals affirmed the ruling of the lower court, holding that Van de Valde's use of the strap was not reasonably foreseeable as a matter of law and thus the manufacturer and dealer were not liable under strict products liability.[57] In reaching this conclusion, the court noted that foreseeability, ordinarily a fact question, was properly taken from the jury in this case because the product's use was "so unintended and unforeseeable" by the manufacturer.[58] The court cautioned that there are instances where an unintended use of a product could be reasonably anticipated, therefore requiring special safety measures or warnings; to attach liability, however, the product's use must be "objectively reasonable to expect, not merely what might conceivably occur."[59] Product liability doctrine does not make the manufacturer and dealer insurers of any and all risks attendant to the use of the product.[60]

49. 106 N.M. 457, 744 P.2d 930 (Ct. App. 1987).
50. *Id.* at 457, 744 P.2d at 930.
51. *Id.*
52. *Id.* at 458, 744 P.2d at 931.
53. *Id.*
54. *Id.*
55. *Id.* at 457, 744 P.2d at 930.
56. *Id.*
57. *Id.* at 460, 744 P.2d at 933.
58. *Id.* at 458-59, 744 P.2d at 931-32.
59. *Id.* at 459, 744 P.2d at 932.
60. *Id.*

V. STRICT PRODUCTS LIABILITY WITHOUT PRODUCT DEFECTS

In *Armijo v. Ex Cam, Inc.*,[61] plaintiff Armijo's brother shot and killed Armijo's husband and attempted to shoot Armijo and her daughter. The assailant used a handgun imported and distributed by defendant Ex Cam and manufactured by defendant Armi Tanfoglio Guiseppe.[62] Armijo sued defendants under four tort theories: the doctrine of strict products liability; an ultra-hazardous activity theory; negligence; and a "Saturday Night Special" theory previously adopted by the Maryland Supreme Court.[63]

This federal diversity case addressed an issue of first impression before the court, i.e., whether a handgun manufacturer is liable to a victim of criminal activity which involves the use of one of its products.[64] The federal court held that New Mexico would recognize no tort cause of action in such a case.[65]

To reach its decision, the court reviewed the elements of a strict products liability action in New Mexico: (1) the product was defective; (2) the product was defective when it left the hands of the defendant and was substantially unchanged when it reached the hands of the user; (3) because of the defect, the product was unreasonably dangerous to the user; (4) the user was injured; and (5) the defective condition of the product proximately caused the injury.[66] The court, however, refused to accept plaintiff's argument that the gun was defective merely because the risk of intentional misuse of the product is so great as to outweigh any potential societal benefit of the product.[67]

The court considered comment g to the *Restatement (Second) of Torts*, section 402A, which determines whether the product is defective by looking to the condition of the product as contemplated by the ultimate consumer.[68] Since any potential consumer would recognize that a gun could be used as a murder weapon, the mere fact that a product is capable of being misused to criminal ends does not render it defective.[69] Further, the court reasoned that New Mexico courts would follow the overwhelming weight of authority which rejects strict products liability as a theory

61. 656 F.Supp. 771 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988).
62. *Id.* at 772.
63. *Id.* at 773.
64. *Id.* at 772.
65. *Id.*
66. *Id.* at 773 (citing Tenny v. Seven-up Co., 92 N.M. 158, 584 P.2d 205 (Ct.App.), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978)).
67. *Armijo*, 656 F.Supp. at 773-74.
68. *Id.* at 773; RESTATEMENT (SECOND) OF TORTS § 402A comment g (*1965*): "*g. Defective condition.* The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him . . . ."
69. *Armijo*, 656 F.Supp. at 773.

for holding handgun manufacturers liable for the criminal misuse of their products.[70] The court went on to hold that under New Mexico law, plaintiff's "ultra-hazardous activity" claim (based on *Restatement (Second) of Torts,* section 519) failed because guns are commonly distributed, and the dangers of misuse are so obvious as not to require any manufacturers' warnings.[71]

The court also declined to impose a duty upon the manufacturers of firearms not to sell their products because they have a potential to be misused for the purpose of criminal activity.[72] Thus, the court disposed of the negligence claim.

Finally, the court dismissed the Maryland cause of action which pertains to strict liability for manufacturers of inexpensive, easily concealed handguns which have little societal value but are often used in criminal activity.[73] The federal district court could find no New Mexico support for such a theory.[74] The court commented upon the inherent difficulty of enforcing "Saturday Night Special" liability considering that all weapons are capable of being used in criminal activity, and that the more expensive, more accurate firearms, which logically are deadlier, would not expose manufacturers to liability under the Maryland theory.[75]

VI. CONCLUSION

Although strict products liability is not new to the common law of New Mexico, the four cases decided in 1987 have added definition to the theory and have articulated the courts' willingness to modify the doctrine in the face of evolving statutory and case law developments. The principal philosophy of *Restatement* section 402A, however, that a user or consumer injured by a defective product need not prove fault to recover, remains essentially unchanged.

70. *Id.*
71. *Id.* at 774-75.
72. *Id.* at 775.
73. *Id.*(discussing Kelley v. R.G. Indus., Inc., 304 Md. 124, 497 A.2d 1143 (Ct. App. 1985)).
74. *Armijo,* 656 F. Supp. at 775.
75. *Id.*