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1987

Annual Survey of South Carolina Law/ Tort Law: Plaintiff Does Not Need to Allege a "Sale" in a Strict Liability Action

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VII. PLAINTIFF DOES NOT NEED TO ALLEGE A "SALE" IN A STRICT LIABILITY ACTION

In *Henderson v. Gould, Inc.*¹⁴⁵ the South Carolina Court of Appeals reversed a trial court's decision to strike a cause of action alleging strict liability in tort. The trial court ruled that the plaintiff could not recover under strict liability because the defendant was not a "seller" of the product.¹⁴⁶ In remanding the case for further development of the facts,¹⁴⁷ the court of appeals held that the doctrine of strict liability may be applied even though no "sale" has occurred if the requirements for its application are otherwise met.¹⁴⁸ The decision and reasoning of the court, however, failed to specify the requirements necessary for a recovery in strict liability.

A contractor-employee of Gould employed Henderson in the construction of Gould's new plant. The action arose after Henderson was allegedly injured while he was installing a switchboard manufactured and supplied by Gould. Henderson's complaint alleged in part that "Gould was engaged in the design and manufacture of all types of switchboards . . . sold in this state . . . for use by persons employed to install and repair switchboard devices for consumers."¹⁴⁹ In this instance, however, the

144. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

145. 288 S.C. 261, 341 S.E.2d 806 (Ct. App. 1986).

146. Record at 30.

147. The court of appeals recognized that the imposition of an actual sale requirement in a strict liability action created a question of novel impression for South Carolina "which could have far reaching effect and should not be decided by way of a motion to strike." 288 S.C. at 269, 341 S.E.2d at 811.

148. *Id.* at 268, 341 S.E.2d at 810.

149. Record at 9 (emphasis added).

switchboard manufactured by Gould was being installed in his own plant; therefore, since the trial court found that the complaint did not allege a sale, the trial judge struck Henderson's breach of warranties cause of action.¹⁵⁰

Regarding the tort question, the court of appeals sought guidance from *Schall v. Sturm, Ruger Co.*,¹⁵¹ a 1983 South Carolina Supreme Court decision which held that recovery under section 15-73-10 of the South Carolina Code¹⁵² does not depend upon any rights or duties framed by a "transaction," as it would in a suit for breach of warranty.¹⁵³ The *Henderson* court expanded this reasoning and concluded that "a sale is not required for the doctrine [of strict liability] to be applied."¹⁵⁴ In fact, the court appeared to dispose of the actual sale requirement, replacing it with the requirement that the product only be "injected into the stream of commerce."¹⁵⁵

Section 15-73-10 of the South Carolina Code requires that a defendant engaged in the business of selling a product must sell the product in a defective condition unreasonably dangerous to the user or consumer before he will incur strict liability. The

150. 288 S.C. at 268, 341 S.E.2d at 810. In affirming the part of the order striking the breach of warranties cause of action, the court concluded that there could be no breach of either express or implied warranties in the absence of a sale or allegation of express warranty.

151. 278 S.C. 646, 300 S.E.2d 735 (1983).

152. S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976) reads, in pertinent part:

(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 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.

This section is an almost verbatim codification of the RESTATEMENT (SECOND) OF TORTS § 402A (1965). 288 S.C. at 267, 341 S.E.2d at 809.

153. 278 S.C. at 648, 300 S.E.2d at 736. The court emphasized that strict liability does not turn on a transaction, as does warranty, or upon an injury, as does tort, but "is best analogized to a legal status: inchoate at the moment when the product leaves the seller's hands in a defective condition that is unreasonably dangerous; ripe for determination at the instant of injury; and fixed by action and final judgment." *Id.* at 649, 300 S.E.2d at 736.

154. 288 S.C. at 268, 341 S.E.2d at 810. The court cited *Link v. Sun Oil Co.*, 160 Ind. App. 310, 316, 312 N.E.2d 126, 130 (1974), which held, "[t]he word 'sells' as contained in the text of § 402A is merely descriptive, and the product need not be actually sold if it has been injected into the stream of commerce by other means. The test is not the sale, but rather the placing in commerce."

155. 288 S.C. at 268, 341 S.E.2d at 810.

lower court apparently interpreted this section to require that Gould must have been a seller in the transaction at issue.¹⁵⁶ The court of appeals disagreed, holding that the plaintiff need not allege that the manufacturer made a sale in the specific transaction.¹⁵⁷ Henderson, therefore, had to establish that Gould was a seller engaged in the business of selling, but he did not have to allege a particular sale.¹⁵⁸

While the *Henderson* court reached a foreseeable conclusion regarding the interpretation to be given South Carolina law on strict liability,¹⁵⁹ it nonetheless left a question of interpretation unanswered. The case was remanded for further factual development to determine whether the product was "injected into the stream of commerce" by Gould, but the court gave no guidance in determining when a product has been sufficiently "injected" absent a sale.¹⁶⁰ Practitioners should be alert for subsequent cases that delineate activities sufficient to meet the "injected into the stream of commerce" requirement.¹⁶¹

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156. *Id.* at 265, 341 S.E.2d at 809.

157. *Id.* at 268, 341 S.E.2d at 810.

158. Although the court stated that "it is of no consequence . . . that Henderson's complaint does not allege Gould was a seller," *id.*, the court intended to treat the term "seller" as meaning a seller in the transaction at issue.

159. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY 43 (1986), which states the following: "It has been held that a sale is an unnecessary predicate to the imposition of strict liability in tort upon the manufacturer where the manufacturer has placed a defective product in the stream of commerce by other means."

160. 288 S.C. at 268-69, 341 S.E.2d at 811. The court stated that the parties' briefs were devoid of information concerning the extent to which the switchboard was introduced into the stream of commerce. The court, however, did note that "other jurisdictions have held the doctrine of strict liability does not apply where the defendant has kept the product for its own purpose." *Id.* Unfortunately, however, the court let slip an opportunity to define the acceptable scope of injection. The trial court is left on remand to define the limits of the requirement and what other means would satisfy it.

161. Considering the goals and policies of strict tort liability and that South Carolina appears to be following the liberal interpretations of the Restatement (Second) of Torts, a broad interpretation of the "stream of commerce" requirement may well emerge. See, e.g., *Schenfeld v. Norton Co.*, 391 F.2d 420 (10th Cir. 1968) (where grinding wheel was supplied to plaintiff's employer on a trial basis, strict tort liability finding was not dependent on sale); *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964) (manufacturer of defective forklift held liable for injuries even though injured party was an employee of a prospective purchaser of the machine to whom it was lent); *Perfection Paint & Color Co. v. Konduris*, 147 Ind. App. 106, 258 N.E.2d 681 (1970) (where lacquer, furnished without cost, ignited and caused death of plaintiff's son, court held that actual sale was not required to invoke strict liability doctrine and it was enough that defendant placed product in the stream of commerce).