

2007

Marlene Yirak v. Dan\'s Super Markets : Brief of Appellant

Utah Court of Appeals

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Julianne P. Blanch; Snow, Christensen & Martineau; Attorney for Defendant and Appellee.

Joe Cartwright; Cartwright Law Firm; Attorney for Plaintiff and Appellant.

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IN THE UTAH COURT OF APPEALS

MARLENE YIRAK,)
)
) **BRIEF OF THE APPELLANT**
 Plaintiff and Appellant,)
)
 vs.)
) Case No. 20070443-SC
 DAN'S SUPER MARKETS INC.,)
)
 Defendant and Appellee,)
)
 and DOLE FOOD COMPANY,)
 INC., and DOLE FRESH)
 VEGETABLES, INC.,)
)
 Defendants.)
)

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE ROBERT P. FAUST PRESIDING

Julianne P. Blanch
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
PO Box 4500
Salt Lake City, UT 84145-5000
Attorney for Defendant and Appellee

Joe Cartwright #7697
CARTWRIGHT LAW FIRM, P.C.
4084 South 300 West, Suite 200
Salt Lake City, UT 84107
Telephone: (801) 994-6980
Attorney for Plaintiff and Appellant

IN THE UTAH COURT OF APPEALS

MARLENE YIRAK,)

Plaintiff and Appellant,)

vs.)

DAN'S SUPER MARKETS INC.,)

Defendant and Appellee,)

and DOLE FOOD COMPANY,)
INC., and DOLE FRESH)
VEGETABLES, INC.,)

Defendants.)

BRIEF OF THE APPELLANT

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Julianne P. Blanch
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
PO Box 4500
Salt Lake City, UT 84145-5000
Attorney for Defendant and Appellee

Joe Cartwright #7697
CARTWRIGHT LAW FIRM, P.C.
4084 South 300 West, Suite 200
Salt Lake City, UT 84107
Telephone: (801) 994-6980
Attorney for Plaintiff and Appellant

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Section 78-2a-3(2)(j) of the Utah Code Annotated and Utah Rule of Civil Procedure 54(b).

ISSUE ON APPEAL

Did the Trial Court err in ordering that Dan's Foods was a passive retailer within the meaning of Sanns v. Butterfield Ford, 94 P.3d 301 (Utah App. 2004)?

This issue was raised in the Plaintiff's Memorandum in Opposition to Dan Food's Motion for Summary Judgment (R. 140) and at Oral Argument.

STANDARD OF REVIEW

The propriety of a Trial Court's grant of Summary Judgment is a question of law, which this court reviews for correctness. E.g., *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, 54 P.3d 1139. The Court determines only whether the Trial Court correctly held that there were no genuine issues of material fact and whether it correctly applied the governing law. It accords no deference to the Trial Court's conclusions on these issues. *Id.*

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

Utah R. Civ. P. 56(c) is determinative of the issue on appeal. This provision is set forth in the addendum.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This is a products liability action. The plaintiff, Marlene Yirak, was seriously injured when she bit into a large shard of glass she allegedly found in her packaged salad. She brought this action against Dole Food Company, Inc.; Dan's Supermarkets Inc.; and Dole Fresh Vegetables, Inc., alleged claims for strict liability and negligence. (R 8-12).

Dole Food Company, Inc. and Dole Fresh Vegetables, Inc. were ultimately dismissed from the case on summary judgment. (R. 285-290).

Defendant Dan's Supermarkets Inc. moved for summary judgment on the grounds that the store is a passive retailer and, therefore cannot be liable to Plaintiff for her injuries. (R.102-138.)

Ms. Yirak opposed the motion, arguing that Dan's was not a "purely passive distributor" of the packaged salad. (R. 139-142.)

On January 17, 2007, the Honorable Randall Skanchy granted Dan's Motion for Summary Judgment, finding that Dan's was a passive retailer within the meaning of *Sanns v. Butterfield Ford*, 94 P.3d 301 (Utah App. 2004) and that Dan's is not subject to liability on the ground that Plaintiff failed to present evidence that Dan's knew or should have known that the product was defective or unreasonably dangerous at the time it was sold to Plaintiff. (R. 251-252.)

B. Statement of Facts

Plaintiff, Marlene Yirak, purchased a packaged salad from Dan's Store on May 18, 2002. (R. 102.) On May 20, 2002, after she removed the salad from the packaged salad bag, Ms. Yirak bit into the salad and injured her mouth and throat on a large piece of glass. (R. 102.) Plaintiff purchased the Dole's packaged salad at Dan's grocery store in Salt Lake City. (R. 103.)

Dole supplied the packaged salad to the Dan's Store. (R. 128.) Dan's employees did not inspect the packaged salads supplied by Dole before selling the salad to Ms. Yirak. (R. 129.)

SUMMARY OF ARGUMENT

Dan's may be held strictly liable for the injuries received as a result of the defective packaged salad. The glass shard entered into the bag at some unknown time before it was eaten by Plaintiff. Dan's sold the bagged salad to Ms. Yirak, without inspecting it, with a defective condition (the hidden glass shard) which was unreasonably dangerous to Plaintiff. As such, Dan's may be held strictly liable for the hidden dangers in the bagged salad.

Dan's is not protected from strict liability under the "passive retailer" doctrine, as this case is factually different from the Butterfield Ford case which limits liability of passive retailers.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING THAT DAN'S WAS A PASSIVE RETAILER AND DISMISSING THE STRICT LIABILITY CLAIM.

The trial Court relied upon *Sanns v. Butterfield Ford*, 2004 UT App 203; 94 P.3d 301, wherein this Court limits liabilities to a purely “passive retailer”. In that case, Sanns was riding as a passenger in a large van when the van rolled several times, seriously injuring Sanns and other passengers. The van was designed and manufactured by Ford Motor Company and delivered to Butterfield Ford. Butterfield Ford then sold the van to Sanns’ employer. Sanns brought claims against Ford and Butterfield Ford for strict liability, for manufacturing and design defects in the van. This Court found that Butterfield Ford was merely a passive retailer with no knowledge of any design or manufacturing defects, and that it was therefore not strictly liable.

In the Sanns case, it was explained that the “fault” in that case, if any, lies with the manufacturer, not with Butterfield Ford which made no changes to the van. The van was delivered to Sanns’ employer by Butterfield Ford in exactly the same condition as it left the manufacturer.

Unlike Sanns, the large glass shard hidden within the bagged salad entered into the bag at some unknown time. The glass shard could have entered the bag at any time between the manufacture and the ultimate purchase of the salad by Ms. Yirak from Dan’s. Dan’s did not inspect the bagged salad at any time, and the glass shard could have entered into the bag while in storage with Dan’s, on the shelf, or in the process of bagging the salad upon purchase.

It is impossible for Dan's to be a "passive reseller" if the unsafe condition occurred while the bagged salad was within Dan's possession. Otherwise, Dan's would be absolutely immune from strict liability claims for any dangerous condition they caused to their products before the ultimate sale to the purchaser.

On Dan's Motion for Summary Judgment, the Trial Court was required to view the facts in the light most favorable to the Plaintiff and draw all reasonable inferences in her favor. *E.g., Frisbee v. K & K Construction Co.*, 676 P.2d 387,389 (Utah 1984), *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Viewed in this light, the evidence presented a jury question as to whether Dan's caused the glass shard to enter into the bagged salad. Viewed in this light, the Court erred in finding that Dan's was a passive retailer.

Plaintiff does not claim a design defect unlike the claims in the Butterfield case. The present scenario is exactly the type of facts envisioned under the strict liability doctrine.

Dan's may be held strictly liable for the injuries received as a result of the unreasonable dangerous condition of the packaged salad. The law of strict products liability was first applied by Utah courts in *Ernest W. Hahn, Inc. v. Armco Steel Company*, 601 P.2d 152 (Utah 1979). In *Hahn*, the Utah Supreme Court adopted Restatement (Second) of Torts § 402A (1965), which provides that "[o]ne 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," provided the seller is engaged in the business of

selling the product and the product is expected to and does reach the user or consumer without substantial condition in which it is sold. *Id.* §402.

Dan's sold the bagged salad, without inspecting it, with a defective condition (the hidden glass shard) and unreasonably dangerous to Ms. Yirak. As such, Dan's may be held strictly liable for the hidden dangers in the bagged salad.

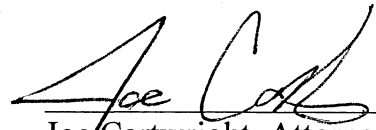
CONCLUSION

In granting summary judgment to Dan's Supermarkets, Inc., the trial court erroneously ruled that Dan's was a passive reseller according to the *Butterfield Ford* case because, under the liability reform act, no fault can be assessed against a purely passive distributor.

This court should therefore reverse the trial court's Order granting summary judgment to Dan's and remand this case for further proceedings against Dan's Supermarkets, Inc.

Dated this 1st day of November, 2007.

CARTWRIGHT LAW FIRM, PC



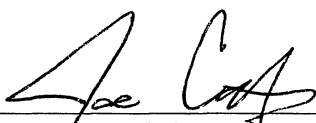
Joe Cartwright, Attorney for Plaintiff-
Appellant Marlene Yirak

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2007, I served two copies of the foregoing document upon the person(s) named below by placing such document in the United States mail, postage prepaid, addressed to the following:

Julianne P. Blanch
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
PO Box 4500
Salt Lake City, UT 84145-5000

Attorney for Defendant and Appellee



Joe Cartwright

ADDENDUM

Utah Rule of Civil Procedure 56 (c). Summary Judgment.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

J. Angus Edwards (USB #4563)
 JONES, WALDO, HOLBROOK & McDONOUGH
 170 South Main Street, Suite 1500
 Salt Lake City, Utah 84145-0444
 Telephone: (801) 521-3200
Attorneys for Defendant, Dan's Supermarkets

FILED DISTRICT COURT
 Third Judicial District

JAN 17 2007
 SALT LAKE COUNTY
 By _____ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
 STATE OF UTAH

MARLENE YIRAK,	:	
	:	
Plaintiff,	:	SUMMARY JUDGMENT DISMISSING
	:	CLAIMS AGAINST DAN'S
	:	SUPERMARKETS, INC.
vs.	:	
	:	
DOLE FOOD COMPANY, INC.; DAN'S	:	Civil No. 050906354
SUPERMARKETS, INC.; and DOLE FRESH	:	
VEGETABLES, INC.,	:	Judge Randall Skanchy
	:	
Defendants.	:	

This matter came on for hearing before the Court on December 20, 2007, on the Motion for Summary Judgment of Dan's Supermarkets, Inc. ("Dan's"), pursuant to Utah R. Civ. P. 56. J. Angus Edwards of Jones, Waldo, Holbrook & McDonough appeared on behalf of Dan's, Joe Cartwright appeared on behalf of Marlene Yirak, and David Kelley appeared on behalf of Dole Food Co. and Dole Fresh Vegetables, Inc. The Court having considered the pleadings, documents on file, memoranda, deposition testimony, and Affidavit of Thomas Carillo, the Court being fully advised and good and sufficient cause appearing therefor, it is hereby

ORDERED, that there are no genuine issues as to any material fact and Dan's is entitled to summary judgment for the failure of Plaintiff to controvert any of the material facts cited by Dan's in its Memorandum and Affidavit in Support of Summary Judgment, and it is further

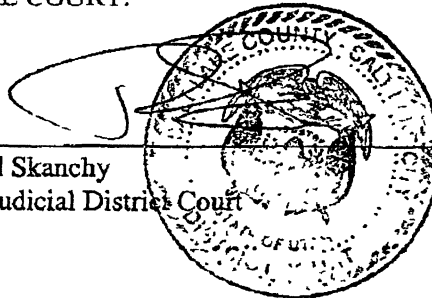
ORDERED, that Dan's was a passive retailer within the meaning of Sanns v. Butterfield Ford, 94 P.3d 301 (Utah Ct. App. 2004), and Dan's is not subject to liability on the ground that Plaintiff failed to present any admissible evidence that Dan's knew or should have known that the product Plaintiff alleges injured her was defective or unreasonably dangerous at the time it was sold to Plaintiff, and it is further

ORDERED, that Summary Judgment be entered in favor of Dan's, dismissing all of Plaintiff's claims and causes of action against Dan's.

DATED this 17 day of ~~December~~ ^{January}, 2006.

BY THE COURT:

Randall Skanchy
Third Judicial District Court



APPROVED AS TO FORM AND CONTENT

CARTWRIGHT LAW FIRM

By: Joe Cartwright
Joe Cartwright

FABIAN & CLENDENIN

By: David N. Kelley
David N. Kelley