

2007

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

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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MARLENE YIRAK,
 Plaintiff/Appellant,
 vs.
 DAN'S SUPER MARKETS, INC,
 Defendant/Appellee,
 and DOLE FOOD COMPANY,
 INC.,and DOLE FRESH
 VEGETABLES, INC.,
 Defendants.

BRIEF OF APPELLEE DAN'S
 SUPER MARKETS, INC.
 Case No. 20070443-SCA

Julianne P. Blanch, USB 6495
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant and Appellee
10 Exchange Place, Suite 1100
Salt Lake City, UT 84111
Telephone: (801) 521-9000

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

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TABLE OF CONTENTS

	<u>Page</u>
<u>STATEMENT OF RELATED PARTIES</u>	1
<u>STATEMENT OF JURISDICTION</u>	1
<u>STATEMENT OF ISSUES PRESENTED, STANDARD OF REVIEW, AND PRESERVATION BELOW</u>	1
<u>DETERMINATIVE STATUTES OR RULES</u>	2
<u>STATEMENT OF THE CASE</u>	2
A. <u>Nature of the Case, Course of Proceedings and Disposition in the Court Below.</u> ..	2
B. <u>Statement of Facts</u>	3
<u>SUMMARY OF ARGUMENT</u>	5
<u>ARGUMENT</u>	6
<u>POINT I: DAN’S WAS A PASSIVE RETAILER OF THE PREPACKAGED BAG OF LETTUCE AND IS NOT LIABLE TO MRS. YIRAK IN PRODUCT LIABILITY.</u>	6
A. <u>SANNS IS APPLICABLE TO BOTH MRS. YIRAK’S NEGLIGENCE AND STRICT LIABILITY CLAIMS</u>	7
1. <u>Dan’s Cannot be Negligent Under the <i>Sanns</i> Analysis Because It Did Not Owe a Duty of Care to Mrs. Yirak.</u>	7
2. <u>Dan’s Cannot be Strictly Liable Merely for Selling a Product with an Alleged Defect.</u>	9
B. <u>MRS. YIRAK’S ALLEGATION OF WRONGDOING BY DAN’S IS SPECULATION UNSUPPORTED BY ANY EVIDENCE</u>	13
<u>POINT II: ALTERNATIVELY, THIS COURT COULD UPHOLD THE SUMMARY JUDGMENT FOR FAILURE TO FILE THE LAWSUIT WITHIN THE STATUTORY DEADLINE.</u>	14
<u>CONCLUSION AND RELIEF REQUESTED</u>	16

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Bishop v. Gentec, Inc.</i> , 2002 UT 36, 48 P.3d 218.....	15, 16
<i>Cory v. Smith Food King Store</i> , 531 P.2d 360 (Utah 1973)	7
<i>France v. Harley-Davidson, Inc.</i> , 2007 WL 1795722 (D. Utah).....	9
<i>House v. Armour of Am., Inc.</i> , 886 P.2d 542 (Utah Ct. App. 1994)	8
<i>Merino v. Albertsons, Inc.</i> , 1999 UT 14, 975 P.2d 467	7
<i>Mulherin v. Ingersoll-Rand Co.</i> , 628 P.2d 1301 (Utah 1996)	12
<i>Robertson v. Utah Fuel Co.</i> , 889 P.2d 1382 (Utah Ct. App. 1995).....	14
<i>Sanns v. Butterfield Ford</i> , 2004 UT App. 203, 94 P.3d 301.....	5, 6, 7, 8, 9, 10, 11, 12
<i>Sharon Steel Corp. v. Aetna Cas. and Sur. Co.</i> , 931 P.2d 127 (Utah 1997).....	15
<i>Speros v. Fricke</i> , 2004 UT 69, 98 P.3d 28 (Utah 2004)	13, 14
<i>Strickland v. General Motors Corporation</i> , 852 F.Supp. 956 (D. Utah 1994).....	16
<i>WebBank v. American Gen. Annuity Serv. Corp.</i> , 2002 UT 88, 54 P.3d 1139.....	1

Statutes

Utah Code Ann. § 78-12-25 (3)	15
Utah Code Ann. § 78-15-3 (1989)	2, 3, 14, 15, 16
Utah Code Ann. § 78-15-5.....	10, 16
Utah Code Ann. §§ 78-27-37, et seq.....	11, 12

Other Authorities

<i>36A C.J.S. Food</i> § 84 (2007).....	11
<i>Restatement (Second) of Torts</i> § 401	8

STATEMENT OF RELATED PARTIES

Appellant named Dole Food Company, Inc. and Dole Fresh Vegetables, Inc. as defendants to this action. The court below dismissed these defendants through summary judgment. (R. 285-86). Appellant is not appealing the granting of summary judgment to these defendants.

STATEMENT OF JURISDICTION

Appellee Dan's Super Markets, Inc. ("Dan's") agrees with the Statement of Jurisdiction contained in Appellant Marlene Yirak's principal brief.

STATEMENT OF ISSUES PRESENTED, STANDARD OF REVIEW, AND PRESERVATION BELOW

1. Did the trial court properly grant summary judgment to Dan's on Mrs. Yirak's product liability claims because Dan's was a passive retailer of the prepackaged lettuce that allegedly contained a shard of glass?

Appellant correctly states the standard of review for this issue. Appellate courts review grants of summary judgment for correctness. *WebBank v.*

American Gen. Annuity Serv. Corp., 2002 UT 88, 54 P.3d 1139.

This issue was preserved at R. 99-101, Dan's Motion for Summary Judgment.

2. Did Mrs. Yirak's failure to bring her product liability claims within two years after knowledge of her harm and her injury constitute an alternative basis for dismissal of her claims against Dan's?

The appellate court also reviews this issue for correctness.

This issue was preserved at R. 247-49, the Memorandum Decision and Order dismissing Mrs. Yirak's strict liability claim against Dole Food Company, Inc. and Dole Fresh Vegetables, Inc. ("the Dole Defendants").

DETERMINATIVE STATUTES OR RULES

Regarding the second issue on appeal, the determinative statute is Utah Code Ann. § 78-15-3 (1989):

A civil action under this chapter shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause.

STATEMENT OF THE CASE

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

Mrs. Yirak brought this product liability action in April 2005 against Dan's and the Dole Defendants. (R. 1-7) She alleged that on May 20, 2002, she was eating salad from a prepackaged bag of Dole lettuce that she had purchased at Dan's a couple of days beforehand. She claimed that while she was eating the salad, she bit into a sliver of glass that was in the lettuce, resulting in physical injury. (R. 8-12) Her causes of action were for negligence, strict liability, and punitive damages. (R. 8-12)

After the parties conducted discovery, Dan's moved for summary judgment in August 2006, on the ground that it was a passive retailer and therefore could not be liable to Mrs. Yirak for any defective condition in the prepackaged bag of lettuce. (R. 99-101) The Dole defendants moved for summary judgment in

October 2006, contending that Mrs. Yirak did not file her lawsuit within the two-year statute of limitations for product liability actions set forth in Utah Code Ann. § 78-15-3. (R. 152-54)

Judge Randall Skanchy of the Third Judicial District Court heard oral argument in December 2006, on Dan's Motion for Summary Judgment. On January 17, 2007, Judge Skanchy granted summary judgment to Dan's on the ground that Dan's was a passive retailer because Mrs. Yirak "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" (R. 251-52)

In April 2007, Judge Robert Faust of the Third Judicial District Court dismissed Mrs. Yirak's negligence claim against the Dole defendants, noting that Mrs. Yirak "has presented absolutely no evidence to support her claim of negligence against these defendants." (R. 282-84) Judge Skanchy had previously dismissed the strict liability claim against the Dole Defendants on January 12, 2007, ruling that Mrs. Yirak had missed the two-year statute of limitations for product liability actions. (R. 248)

Mrs. Yirak appealed the trial court's grant of summary judgment to Dan's on May 30, 2007. (R. 291-92)

B. Statement of Facts

On May 18, 2002, Mrs. Yirak purchased a prepackaged bag of Dole lettuce from her local Dan's grocery store. (R. 102, 139) She did not notice any holes in

the bag. (R. 112) Later that day, her children opened the bag and consumed part of the lettuce without incident. (R. 112)

On May 20, 2002, Mrs. Yirak emptied the rest of the lettuce from the bag into a bowl and ate it. (R. 116) At some point while eating the salad, her mouth began bleeding, and she sustained lacerations to her tongue. (R. 116). She spit out what she was eating, and her sister later found a “thin sliver” of glass in what she had spit out. (R. 112, 116, 119)

Mrs. Yirak is not aware of any other Dan’s customers or any other consumers in the country who have found glass in a bag of Dole lettuce. (R. 115-16) She has since purchased Dole lettuce in prepackaged bags from Dan’s and has not found any foreign objects. (R. 116)

In support of its motion for summary judgment, Dan’s produced an affidavit from store director Thomas Carillo. (R. 128-29) Mr. Carillo testified that Dan’s employees do not manufacture, design, repackage, label or inspect the Dole’s prepackaged lettuce that are sold at the store in question. (R. 128-29) Moreover, the store had never received a report from a customer other than Mrs. Yirak that there was glass in a bag of the packaged lettuce. (R. 128-29) Mrs. Yirak did not dispute any of the facts alleged in Dan’s motion for summary judgment, including those contained in Mr. Carillo’s affidavit. (R. 139) She did not present any evidence that the piece of glass found its way into the bag while in Dan’s possession. (R. 139-42)

The trial court granted summary judgment to Dan's, stating that "Dan's was a passive retailer within the meaning of *Sanns v. Butterfield Ford*, 2004 UT App. 203, 94 P.3d 301."

SUMMARY OF ARGUMENT

POINT I: Mrs. Yirak's appeal hinges upon the speculation that the glass sliver could have entered the bag while in Dan's possession. She argues that Dan's cannot be considered a passive retailer because of her theory that Dan's could have caused the product, the prepackaged lettuce, to become defective.

Significantly, Mrs. Yirak has no evidence whatsoever that Dan's put the glass in the bag of lettuce. She does not even contend that she has any evidence; rather, she states that her product liability claims should go to a jury so that it can speculate about how and when the glass entered the bag. Speculation is not enough to sustain a product liability lawsuit, and it was proper for the trial court to grant summary judgment to Dan's. Dan's is a passive retailer because it did not know and had no reason to know that there was a glass sliver in the sealed bag.

POINT II: Even if it were permissible for a plaintiff to take a case to the jury simply with conjecture and no evidence, Mrs. Yirak missed the statute of limitations for product liability lawsuits. The injury occurred on May 20, 2002, and she was aware at the time of who could potentially be at fault and what caused her injury. She did not file her lawsuit until April 6, 2005, missing the statutory deadline by nearly a year. It would therefore be appropriate for this Court to sustain the summary judgment on this alternative ground.

ARGUMENT

POINT I: DAN’S WAS A PASSIVE RETAILER OF THE PREPACKAGED BAG OF LETTUCE AND IS NOT LIABLE TO MRS. YIRAK IN PRODUCT LIABILITY.

Mrs. Yirak notes that “[t]his is a products liability action.” (Appellant’s Brief, p. 3.) She sued Dan’s for negligence and strict liability for selling a product that allegedly contained a defect, a sliver of glass. The parties agree that Dan’s is a retailer, but they disagree whether Dan’s is a passive retailer, such that it has no liability for the allegedly defective condition in the bag of lettuce.

In opposing Dan’s motion for summary judgment and on appeal, Mrs. Yirak argues that *Sanns v. Butterfield Ford*, 94 P.3d 301 (Utah Ct. App. 2004) has no applicability here because that case is supposedly limited to cases involving manufacturing or design defects. (R. 140-41) She additionally argues that Dan’s cannot be a passive retailer “if” the glass entered the bag while in Dan’s possession. (Appellant’s Brief, p. 6.)

Her two arguments overlap in that both stem from the commonsense notion that a retailer must do something wrong in order to be held liable in product liability; if there is no evidence of wrongdoing, a retailer must be dismissed. Namely, in *Sanns*, the Utah Court of Appeals held that a retailer cannot be sued for negligence or strict liability if it is a passive retailer who did not create the manufacturing or design defect. *Id.* at 307-08. It defined a “passive retailer” as a seller of a product who does not know, and has no reason to know, of a defective condition. *Id.* at 307-08. Similarly, if there were admissible evidence that the

glass entered the bag while in Dan's possession, that could potentially raise the question of whether Dan's knew or should have known about the defective condition.¹ However, Mrs. Yirak's appeal must fail because she has no absolutely no evidence that Dan's was responsible for the defective condition of the bag of lettuce.

A. *SANNS IS APPLICABLE TO BOTH MRS. YIRAK'S NEGLIGENCE AND STRICT LIABILITY CLAIMS*

1. Dan's Cannot be Negligent Under the *Sanns* Analysis Because It Did Not Owe a Duty of Care to Mrs. Yirak.

In *Sanns v. Butterfield Ford*, the plaintiff sued Butterfield Ford, a Ford automobile dealership, for negligence and strict liability. Mr. Sanns was a passenger in a Ford van that rolled several times, causing him personal injury. Mr. Sanns also sued Ford for strict liability and negligence. The trial court granted summary judgment to Butterfield Ford on both claims, and the Utah Court of Appeals upheld the ruling.

This Court treated each claim separately, dealing with Mr. Sanns' negligence claim first. The Court of Appeals recognized that the concept of actual or constructive knowledge of a defect is pertinent in determining whether Butterfield Ford could be liable for negligence. Citing to *House v. Armour of Am.*,

¹ Significantly, such evidence would not automatically mean that Dan's knew or should have known about the glass. For example, if Mrs. Yirak had produced evidence that a rogue customer intentionally inserted the glass in the bag while it was on the shelf at Dan's, but there was no evidence that Dan's knew of it and did nothing or that Dan's received any forewarning that this could happen, summary judgment in Dan's favor would be appropriate. This analysis is similar to that found in premises liability law, where a storeowner owes no duty as a matter of law to a customer who is injured on the premises if there is no evidence that the storeowner knew or had reason to know of the dangerous condition on the premises. *See, e.g. Merino v. Albertsons, Inc.*, 1999 UT 14, 975 P.2d 467; *Cory v. Smith Food King Store*, 531 P.2d 360 (Utah 1973).

Inc., 886 P.2d 542, 547 (Utah Ct. App. 1994), this Court emphasized that “[a] duty to warn a consumer of a defective product lies with a seller . . . of a product who ‘knows or should know of a risk associated with its product.’” *Sanns*, 94 P.3d at 304. This Court observed that the *Restatement (Second) of Torts* § 401 also espouses the concept that retailer liability arises when the seller “knows or has reason to know that the [product] is, or is likely to be, dangerous.” *Sanns*, 94 P.3d at 304 n.3. If a plaintiff has no evidence that the seller knew or should have known of a defect with the product, the seller does not owe a duty of care to the purchaser, and a negligence claim fails as a matter of law. *Id.* at 304.

Mr. Sanns produced no evidence that Butterfield Ford had actual or constructive knowledge of a defect in the van. While Butterfield Ford knew the particular van had a higher center of gravity than most other vehicles, common sense dictates that most vans have higher centers of gravity than other vehicles, and there was no evidence that Butterfield Ford knew or should have known that the particular model of van contained a manufacturing or design defect that made it susceptible to rollovers. *Id.* at 304. Because the plaintiff could not show that the retailer “was anything but a passive retailer of the vehicle,” the Court of Appeals determined that the trial court had correctly granted summary judgment to Butterfield Ford on the negligence claim because it owed no duty of care as a matter of law. *Id.* at 305.

Similarly, Mrs. Yirak has no evidence that Dan’s knew or should have known that the prepackaged bag of lettuce contained a sliver of glass. To her

credit, she does not pretend to have such evidence. On the other hand, Dan's produced testimony from the store director explaining that Dan's does not manufacture, design, repackage, or inspect² the prepackaged bags of lettuce; and that no other customer had reported glass in a Dole bag before May 2002. In *France v. Harley-Davidson, Inc.*, 2007 WL 1795722 (D. Utah), Judge Ted Stewart granted summary judgment to a motorcycle shop because these circumstances made it a passive retailer:

It is undisputed that Defendants are passive retailers. Defendants did not participate in any design, testing, manufacturing or assembly or warnings in association with this or any motorcycle. . . . It is not disputed that Defendants performed only routine checks on the bike and never tampered with or altered the fuel line or any other component parts.

France v. Harley-Davidson, Inc., 2007 WL 1795722 at *2.

Sanns governs Mrs. Yirak's claim against Dan's for negligence. Just as it was appropriate to grant summary judgment to Butterfield Ford for lack of evidence that it knew or should have known of a defective condition, so the trial court here correctly dismissed the negligence claim.

2. Dan's Cannot be Strictly Liable Merely for Selling a Product with an Alleged Defect.

Mrs. Yirak complains that *Sanns v. Butterfield* has no relevance because it involved a lawsuit where the plaintiff sought to hold a retailer strictly liable for a

² Mrs. Yirak faults Dan's on appeal for not inspecting the bags of lettuce, although she does not cite to any legal authority that might impose a duty upon a grocery store to inspect all of the items it sells for defects. She offers no details on how a grocery store could practically inspect delicate, packaged and sealed produce for tiny foreign objects. She does not elaborate on whether a one-time inspection of each item would be sufficient or whether each item would need to be checked on a daily basis. Finally, she does not suggest that any inspection of the bag would have actually been fruitful and revealed what she herself describes as a "tiny sliver." She cannot impose a duty that, with good reason, does not exist in the law.

manufacturing and design defect. Her complaint raises the question of what type of defect Mrs. Yirak is claiming. If the glass entered the bag while it was in the Dole defendants' possession, she ostensibly would say that the product had a design or manufacturing defect. If the glass entered the bag while it was in Dole's possession, it is hard to characterize the defect she would be claiming, and she has never identified the type of defect herself. One might call the defect an "alteration defect," in that it would have occurred after the design or manufacture of the product, although Dan's is unaware of any court or other legal authority recognizing a defect under that name.³

Thus, Mrs. Yirak's contention that *Sanns* is not applicable instantly exposes two problems with her strict liability claim. First, it forces her to choose between alleging a defect that occurred while in Dole's hands and a defect that occurred while in Dan's hands. However, she concedes that she has no idea when the alleged defective condition occurred, underscoring the weakness of her case. "The glass shard could have entered the bag at any time between the manufacture and the ultimate purchase of the salad by Mrs. Yirak from Dan's." (Appellant's Brief, p. 5.) "It's hard to say where the glass came from, where in the process." (R. 299, p. 8) Second, she may be seeking to hold Dan's strictly liable for a defect that is not recognized in the law, or at least for a defect that is more appropriately pursued through a negligence theory than a strict liability theory. *See 36A C.J.S.*

³ Utah's Product Liability Act states that "fault" can include the alteration of a product, but it addresses alteration by the "initial user or consumer," not by the retailer. Furthermore, it does not create a separate category of defect known as "alteration defect." Utah Code Ann. § 78-15-5.

Food § 84 (2007) (“Although a manufacturer may be held strictly liable for defects in food products it manufactures and sells, a distributor or retailer who purchases food products in sealed packages is not liable for non-obvious defects absent negligence.”)

To the extent Mrs. Yirak is claiming that Dan’s should be strictly liable for a defect that occurred while the bagged lettuce was in Dole’s control, it is clear that *Sanns* precludes this claim. The Court of Appeals explained that due to the prohibition in the Utah Liability Reform Act, Utah Code Ann. §§ 78-27-37, et seq., against a party bearing more than its share of fault, “strict liability cannot be apportioned to Butterfield Ford, a passive seller, and also to Ford.” *Sanns*, 94 P.3d at 307. This Court therefore established that when a product manufacturer is a defendant in a lawsuit (as is the case here), a passive retailer cannot be sued for strict liability. *Id.* at 307-08.

To the extent Mrs. Yirak is claiming that Dan’s should be strictly liable on the presumption that the glass entered the bag while in its possession, regardless of whether it was aware of the occurrence, this also runs afoul of the Utah Liability Reform Act. She has no evidence that Dan’s was responsible for the glass entering the bag, and she therefore would seek to hold Dan’s accountable potentially for someone else’s wrongdoing. Moreover, her strict liability claim rests upon a presumption, and nothing more. She does not know how or when the glass entered the bag. While strict liability is often described in terms of “liability without fault,” that is not synonymous with absolute liability. She wishes to

pursue Dan's based upon the mere fact that it sold a product that she says contained a shard of glass. She is essentially requesting that this Court create absolute liability for retailers, making them absolute insurers of the safety of the products they sell. This request is not consistent with the Utah Liability Reform Act or with product liability jurisprudence. *See Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1302 (Utah 1996) (strict liability is not the equivalent of making the manufacturer or seller absolutely liable as an insurer of the product and its use).

Although the plaintiff in *Sanns* alleged a manufacturing or design defect, and Mrs. Yirak says she is not alleging either one of these, she cannot explain why the reasoning in *Sanns* would be inapplicable to whatever defect she is claiming here. The *Sanns* court noted that the passive retailer status derives from the principle that a nonmanufacturing defendant, who has not been shown to have created or contributed to the alleged defect, should not be strictly liable when the manufacturer has been named in the lawsuit. *Sanns*, 94 P.3d at 306. In other words, if the retailer has not done anything affirmatively or actively to cause the dangerous condition, but merely passed the product through the stream of commerce, it cannot be strictly liable.

The trial court was correct in determining that Dan's was a passive retailer who cannot be liable in negligence or strict liability. There is no fact in the record that suggests Dan's had any fault.

B. MRS. YIRAK'S ALLEGATION OF WRONGDOING BY
DAN'S IS SPECULATION UNSUPPORTED BY ANY
EVIDENCE

Mrs. Yirak states that Dan's cannot be a passive retailer "if the unsafe condition occurred while the bagged salad was within Dan's possession."

(Appellant's Brief, p. 6.) She asks this Court to reverse the summary judgment so that a jury can wonder whether the glass might have entered the bag while in Dan's possession and if so, whether Dan's should be responsible.

Mrs. Yirak has no evidence that the glass entered the bag while under Dan's control. She freely admits that the glass could have entered the bag at any time from the point Dole put the lettuce in the bag and sealed it to the point when she left the store, and that she has no idea how or when it got into the sealed bag. She did not notice any hole in the sealed bag when she bought the lettuce, and it is difficult to imagine how glass could have entered the bag at Dan's without making a hole. Moreover, she does not dispute Dan's evidence that it does not repackage or alter the bags of Dole lettuce that come prepackaged and sealed to its store.

A party cannot survive a summary judgment motion with mere speculation that a defendant might have done something wrong. Utah courts have consistently determined that a jury cannot hear a case where there is no admissible evidence against a defendant, but simply theories or conjecture that the defendant might have been at fault. In *Speros v. Fricke*, 2004 UT 69, 98 P.3d 28 (Utah 2004), the Utah Supreme Court upheld a summary judgment granted to a driver whose passenger had grabbed the steering wheel and veered into oncoming traffic,

injuring the plaintiff. The driver submitted an affidavit that the passenger grabbed the steering wheel without warning during an argument. The plaintiff did not contest the affidavit but instead maintained that the driver could have been negligent for failing to reduce speed or take evasive action after the passenger grabbed the steering wheel. The court explained that “[w]hile such conclusions may be theoretically possible, [plaintiff] created no genuine issue of fact on these issues because it failed to introduce *any* evidence from which a jury could arrive at such conclusions.” *Speros*, 98 P.3d at 33 (emphasis in original); *see also Robertson v. Utah Fuel Co.*, 889 P.2d 1382, 1388 n.4 (Utah Ct. App. 1995) (affirming cited line of Utah cases stating that unsubstantiated assertions cannot defeat summary judgment motion).

Similarly, Mrs. Yirak cannot pursue a lawsuit against Dan’s when she has absolutely no evidence that Dan’s did anything but innocently sell a bag of sealed lettuce. She has no evidence that the sliver of glass got into the bag while in Dan’s possession or otherwise due to some act or omission of Dan’s.

POINT II: ALTERNATIVELY, THIS COURT COULD UPHOLD THE SUMMARY JUDGMENT FOR FAILURE TO FILE THE LAWSUIT WITHIN THE STATUTORY DEADLINE.

The trial court dismissed Mrs. Yirak’s strict liability claim against the Dole defendants because she failed to file her lawsuit within the two-year statute of limitations set forth in Utah Code Ann. § 78-15-3. Mrs. Yirak suffered her injury on May 20, 2002, when she bit into salad allegedly containing a sliver of glass. She knew at the time what caused her injury and who she could potentially sue for

it. She nonetheless waited until April 2005, to file her Complaint, after the statute of limitations expired.

The trial court did not refer to § 78-15-3 as an alternative basis for the dismissal of the strict liability claim against Dan's, but this Court may affirm summary judgment on any basis found in the trial court record. *Sharon Steel Corp. v. Aetna Cas. and Sur. Co.*, 931 P.2d 127, 131-32 (Utah 1997). There is no reason why the statute of limitations argument that was successful for the Dole defendants would be inapplicable to Dan's.

Not only is the statute of limitations an undeniable basis for affirming the dismissal of the strict liability claim against Dan's, it is a basis for affirming the dismissal of the negligence claim, as well. Although Judge Faust felt that § 78-15-3 does not apply to products liability claims for negligence, Judge Skanchy, who first presided over the lawsuit, felt that it did. (R. 237) Although Mrs. Yirak admits that her lawsuit is a product liability lawsuit, she nonetheless argued to the trial court that her negligence claim should be covered by the four-year statute of limitations in Utah Code Ann. § 78-12-25 (3) "for relief not otherwise provided by law."

In *Bishop v. Gentec, Inc.*, 2002 UT 36, 48 P.3d 218, 225-26, the court explained that the term "product liability" includes claims for design or manufacturing defect, negligence or strict liability:

Alternative theories are available to prove different categories of defective product, including negligence, strict liability, or implied warranty of merchantability Thus, allegations of negligence

contained in a products liability claim do not transform the claim into one for ordinary negligence.

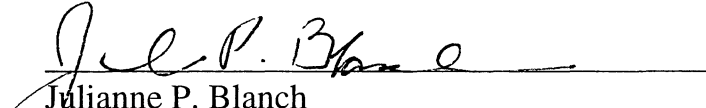
Bishop, 48 P.3d at 226. The court in *Strickland v. General Motors Corporation*, 852 F.Supp. 956, 959 (D. Utah 1994) similarly held that “all claims against a manufacturer, based on a defective product” are subject to the two-year limitations period in Utah Code § 78-15-3. The Utah Product Liability Act provides a two-year statute of limitations for “a civil action under this chapter” Utah Code § 78-15-3. Mrs. Yirak acknowledges that her lawsuit is a product liability lawsuit, and her claims for negligence and strict liability are both subject to the same limitations period.

CONCLUSION AND RELIEF REQUESTED

Dan’s was a passive retailer. It simply sold the sealed bag of Dole lettuce, without altering or tampering with it. It did not know or have reason to know that the bag contained a sliver of glass. The trial court correctly granted summary judgment. Dan’s asks that this Court affirm the summary judgment.

DATED this 30th day of November, 2007.

SNOW, CHRISTENSEN & MARTINEAU


Julianne P. Blanch
Attorneys for Defendant and Appellee
Dan’s Super Markets, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **BRIEF OF APPELLEE** upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Joe Cartwright
CARTWRIGHT LAW FIRM, P.C.
4084 South 300 West, Suite 200
Salt Lake City, Utah 84107

and causing the same to be mailed, first-class, postage prepaid, on the 30th day of November, 2007.

