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Volume 9, Issue 18

THE BASSETT BULLETIN™

A BEER BOTTLE A DANGEROUS WEAPON?

Recently, in the case of *Gann v. Anheuser-Busch, Inc. and Falls Distributing*, 08-11-00017-CV, 2012 WL 3026369 (Tex. App.-El Paso July 25, 2012), the Court of Appeals addressed a Plaintiff's product liability claim against Anheuser-Busch and Falls Distributing, the manufacturer and distributor, alleging that a long neck beer bottle was a dangerous weapon. Based on their analysis, the Court of Appeals upheld the trial court's ruling on a Motion for Summary Judgment against the Plaintiff. The Court of Appeals discussed the factors needed to prevail in a product liability case and determined that the Plaintiff did not meet her burden in proving the factors needed for a product liability case.

THE FACTS OF THE CASE

While celebrating a friend's birthday at a bar known for its violence, Marty Gann was assaulted by a patron wielding a Budweiser "long neck" glass beer bottle. Gann was struck twice in the face with the long neck bottle and suffered various lacerations resulting in permanent scarring. Gann filed a lawsuit against Anheuser-Busch and Falls Distributing on theories of liability including (1) strict products liability; (2) negligence; and (3) breach of warranty. Without stating its reasons, the trial court granted both of Defendant's Motions for Summary Judgment and dismissed Gann's claims against Anheuser-Busch and Falls Distributing. As a result, the appeal by Gann followed.

On appeal, the Eighth District Court of Appeals in El Paso affirmed the granting of the Motions for Summary Judgment. This newsletter focuses on Gann's products liability against Anheuser-Busch and Falls Distributing.

THE ELEMENTS NEEDED IN A PRODUCTS LIABILITY CASE

In a products liability action in which a claimant alleges a design defect, a claimant must prove by a preponderance of the evidence that:

- (1) the defect renders the product unreasonably dangerous;
- (2) the defect was a producing cause of the personal injury, property damage, or that for which the claimant seeks recovery; and
- (3) there was a safer alternative design. Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a)

Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 311 (Tex. 2009).

In addition to the elements above, the Court of Appeals also outlined the following factors that determine whether a product is defectively designed so as to render it unreasonably dangerous. In doing so, they applied a risk-utility analysis that required consideration of the following factors:

1. The utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
2. The availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
3. The manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its cost;
4. The user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions; and
5. The expectations of the ordinary consumer.

Timpte Indus., Inc., 286 S.W.3d at 311.

THE COURT OF APPEALS' RULING

Anheuser-Busch argued in its Motion for Summary Judgment that Gann produced no evidence as to any of the elements in her design defect claim, including evidence that the risk and injury from the long neck bottle outweighs its utility. Gann simply contended that there was more than a scintilla of evidence that the risk of injury from a long neck bottle outweighs its utility. Specifically, Gann referred to evidence that (1) beer bottles are used commonly in assaults in the local community, as well as overseas, (2) that the long neck portion of the bottle is cosmetic and serves no useful purpose, and (3) that Anheuser-Busch uses stubby glass bottles and plastic bottles for containers for beer.

However, Gann produced no evidence that the risk of injuries from the long neck bottle outweighed its utility and therefore that the bottle was defectively designed so as to render it unreasonably dangerous.

According to the court, Gann did not address the majority of the factors enumerated in *Timpte Indus., Inc.* For example, Gann failed to address (1) whether manufacturing a stubby glass bottle or plastic bottle is economically feasible; (2) whether eliminating the unsafe character of the long neck bottle significantly impairs its usefulness or significantly increases its costs; and (3) what the expectations of the ordinary consumer are. Gann simply stated that the cost of plastic bottles is now the same as glass bottles, but did not develop her analysis fully. She did not preserve her assertion that manufacturing an alternative product is economically feasible and she did not address whether eliminating the unsafe character of a long neck bottle significantly impaired its usefulness or significantly increased its costs and what the expectations of the ordinary consumer are. Gann's arguments of these issues consisted of conclusory allegations. Additionally, she did not provide citations to the record in her brief or refer to summary judgment evidence in a response thus resulting in a waiver on appeal of the contentions made.

For these reasons, the Court of Appeals stated that Gann failed to address the majority of factors enumerated in *Tempte Indus., Inc.* and failed to produce any evidence raising issues of these factors. Gann just argued that the risk of injury from a long neck outweighed its utility, and thus the bottle was defectively designed and unreasonably dangerous. The Court of Appeals accordingly ruled that the trial court did not err by granting the Motion for Summary Judgment.

WHAT DOES THIS MEAN?

It is clear from this ruling that in order for a party to prevail on a products liability claim, that party has to prove by a preponderance of the evidence that a product was defectively designed so as to render it unreasonably dangerous. However, a claimant also needs to identify all the factors noted above and analyze each of the following elements to be successful on his/her claim. In defending such a case, a Defendant needs to determine if the Plaintiff has proven up all the factors they are supposed to. If not, file a Motion for Summary Judgment addressing this issue.

Another thing to be mindful of is that typically an expert will need to be retained to analyze such factors, especially when addressing whether a substitute product would have fulfilled the same need. If the Plaintiff has not retained a qualified expert think about filing a Motion to Strike this expert and then proceed with the Motion for Summary Judgment.

Most importantly, this case explains why detailed briefing of a party's position is important. Regardless of whether you are a Plaintiff or a Defendant, analyzing case law and citing it in your motion or response is crucial for a successful outcome upon appellate review.



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