March 29, 2011

JUDGMENT

The Fourteenth Court of Appeals

F & F RANCH, A PARTNERSHIP, Appellant

NO. 14-09-00901-CV V.

OCCIDENTAL CHEMICAL CORPORATION, DOW CHEMICAL COMPANY, ELEMENTIS CHEMICALS, MONSANTO COMPANY, AVENTIS PHARMACEUTICALS, INC., Appellees

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This cause, an appeal from the judgment in favor of appellees, OCCIDENTAL CHEMICAL CORPORATION, DOW CHEMICAL COMPANY, ELEMENTIS CHEMICALS, INC., MONSANTO COMPANY, AND AVENTIS PHARMACEUTICALS, INC., signed September 17, 2009, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, F & F Ranch, A Partnership, to pay all costs incurred in this appeal. We further order this decision certified below for observance.

Affirmed and Memorandum Opinion filed March 29, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00901-CV

F & F RANCH, A PARTNERSHIP, Appellant

V.

OCCIDENTAL CHEMICAL CORPORATION, DOW CHEMICAL COMPANY, ELEMENTIS CHEMICALS, INC., MONSANTO COMPANY, AND AVENTIS PHARMACEUTICALS, INC., Appellees

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 47219

MEMORANDUM OPINION

In this appeal, F & F Ranch sought indemnification from appellees for a judgment against it in an underlying lawsuit. Appellees moved for summary judgment on the grounds that, *inter alia*, (a) F & F Ranch was not entitled to statutory indemnification because it is not a "seller" as defined by the strict products liability statutory scheme and (b) F & F Ranch was not entitled to common law indemnification because (1) there was no determination that appellees were liable to the plaintiff in the underlying suit, and (2)

F & F Ranch was not an "innocent retailer." We affirm the summary judgments granted in favor of the appellees.

BACKGROUND

This appeal arises from a lawsuit originally filed by Shane Bowers in the fall of 1992, styled *Bowers v. The Dow Chemical Company*, No. 92-G-3022 in the 239th District Court of Brazoria County. Bowers alleged that, while working on certain properties owned by F & F Ranch (the "Ranch"),[1] one of the defendants in the suit, he was exposed to the chemicals 2-4 D and 2-4-5 T (collectively, the "chemicals"), which caused him to contract non-Hodgkins lymphoma. The Ranch apparently owned or operated at least two Southern Pine tree-farming properties. At these properties, the chemicals were used to control the growth of undesired hard wood trees. Bowers sued numerous chemical companies for products liability and sued the Ranch for negligence and gross negligence. The suit was subsequently dismissed for want of prosecution in 1994 but was reinstated when Bowers claimed unintentional mistake. In 1995, several defendants were granted summary judgment, including Dow Chemical Company ("Dow"), Occidental Chemical Corporation ("Occidental"),[2] Elementis Chemicals, Inc. ("Elementis"),[3] and Monsanto Company ("Monsanto").[4] Various amended petitions were filed, adding and removing defendants.

When the case was again dismissed for want of prosecution in 2001, Bowers filed a bill of review. The trial court heard the bill of review in 2002, and the case was

[1] Although the original petition included claims against Thomas Matthew Foster d/b/a North Fork Farms, apparently F & F Ranch was the name of the partnership that owned the tree farms at issue. For the sake of clarity, we refer to this party as F & F Ranch.

[2] The trial court concluded that neither Occidental nor its predecessors-in-interest ever manufactured or produced the chemicals.

[3] The trial court likewise concluded that neither Elementis nor its predecessors-in-interest ever manufactured or produced the chemicals.

[4] The trial court determined that Monsanto conclusively established that it sold the chemicals in question only to the United States Government.

reinstated against the Ranch only. The new petition included claims against the Ranch for strict products liability, breach of warranty, negligence, and gross negligence. Because Bowers had died during the time the case was inactive, the case was restyled with the executor of his estate as the plaintiff: *Stirman v. F & F Ranch, a Partnership*, No. 19197*JG02 (the "underlying action"). In 2003, the Ranch sought and was granted leave to file a third-party petition against, as is relevant here, Harcos Chemicals, Inc., which was a predecessor-in-interest to Elementis; Monsanto; and Am Chem, Inc., an alleged predecessor-in-interest to Aventis Pharmaceuticals ("Aventis"). However, on Monsanto's motion for reconsideration, in May 2003, the trial court struck the Ranch's third-party petition, dismissed these third-party defendants, and precluded the Ranch from filing any additional third-party petitions. The case proceeded with the Ranch as the only defendant.

After a two-day bench trial, on July 6, 2006, the trial court signed a judgment submitted by the parties. This judgment provides, in pertinent part:

> On May 30, 2006, the case was called to trial. Over a two-day bench trial, counsel presented evidence in each party's case-in-chief, including fact and expert witness testimony, called both live and by deposition. Before the Court rendered its ruling in this case, Plaintiffs and Defendant tendered to this court this Final Judgment. Defendant is liable to plaintiffs for compensatory damages, based solely upon the causes of action alleged in Paragraph III B of Plaintiffs' Amended Original Petition, for strict products liability, due to Mr. Bower's exposure to the chemicals 2 4 D and 2 4-5 T while working on the Defendant's ranch in Cloudy, Oklahoma. Defendant is liable to Plaintiffs for compensatory damages in the amount of $3,250,000.00, together with post-judgment interest, continuing to accrue on the amount of the Judgment at the highest lawful rate.[5]

[5] We note that, prior to entry of this judgment, the Ranch's attorney informed the trial court that the parties had reached a settlement. Our records contain a copy of a confidential release signed by the plaintiffs and their attorney in the underlying action. This document indicates that the plaintiffs released the Ranch from any liability for their causes of action "based solely upon strict product liability (as alleged in Paragraph III B of Plaintiffs' Amended Original Petition) for Mr. Bower's alleged exposure to the chemicals 2 4 D and 2 4-5 T, while working at Defendant's Ranch in Cloudy, Oklahoma." The parties further agreed to tender the final judgment, excerpted above, to the trial court for entry. In fact, the final judgment later signed by the trial court was attached as an exhibit to the release. After this final

Based on this judgment, the Ranch filed suit against Maxus Energy, Dow, Elementis, TH Agriculture and Nutrition, L.L.C., Monsanto, Evergreen Helicopters, Inc., Weyerhauser Company, Aventis, and Forestry Suppliers, Inc. on April 24, 2008, seeking indemnification for $3.25 million and post-judgment interest. The Ranch filed an amended petition on June 2, 2009, in which it (1) dropped Maxus Energy from its petition, (2) added Occidental to the claim, and (3) indicated that it had non-suited its claims against Weyerhauser Company and Forestry Suppliers, Inc.

Monsanto, Elementis, Occidental, Dow and Aventis responded by generally denying the allegations and subsequently filed summary-judgment motions. In their motions, they argued, *inter alia*, that the Ranch is not entitled to (a) statutory indemnity because it is not a "seller" as defined by Chapter 82 of the Civil Practice & Remedies Code, governing products-liability actions, or (b) common-law indemnity because the Ranch is not an "innocent retailer," and none of the appellees has admitted liability or been adjudicated liable in the underlying action. [6] On July 13, 2009, the trial court granted summary judgments in favor of all the appellees. On that same date, the Ranch non-suited Evergreen Helicopters, Inc. These summary judgments became final on September 17, 2009, when the last defendant, TH Agriculture and Nutrition, L.L.C., was severed from this case. This appeal timely followed.

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judgment was signed, the plaintiffs non-suited all their other claims against the Ranch in the underlying action.

[6] Specifically, Aventis, Elementis, Monsanto, and Occidental sought summary judgment on the grounds that: (1) the Ranch was not entitled to statutory indemnity because it was not a "seller," the underlying action was not one for "products liability," and the Ranch had not suffered a "loss" and (2) the Ranch was not entitled to common-law indemnity because it was not an "innocent retailer" and none of the defendants had been adjudicated liable or admitted liability for Bowers's damages. In its summary-judgment motion, Dow asserted that the Ranch was not entitled to either statutory or common-law indemnity because it was neither a "seller" nor an "innocent retailer," and Dow had neither been adjudicated liable nor admitted to liability for Bowers's damages.

ANALYSIS

A. Standard of Review

We review a trial court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference, and we resolve any doubts in the nonmovant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985). Where, as here, the trial court grants the judgment without specifying the grounds, we affirm the summary judgment if any of the grounds presented is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

A traditional summary judgment is proper when the defendant either negates at least one element of each of the plaintiff's theories of recovery or pleads and conclusively establishes each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Cullins v. Foster*, 171 S.W.3d 521, 530 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). When the defendant has carried its summary judgment burden, the burden shifts to the nonmovant to raise a material fact issue precluding summary judgment. *Va. Indonesia Co. v. Harris County Appraisal Dist.*, 910 S.W.2d 905, 907 (Tex. 1995). Finally, the nonmovant must expressly present to the trial court any ground that would defeat the movant's right to summary judgment by filing a written answer or response to the motion; the nonmovant may not later assign any new ground as error on appeal, other than a complaint that the evidence is legally insufficient to support the summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979); *Argovitz v. Argovitz*, Nos. 14-07-00206-CV, 14-07-00396-CV, 2008 WL 5131843, at *8 (Tex. App.—Houston [14th Dist.] Dec. 9, 2008, pet. denied) (mem. op.).

B. Indemnification

1. Statutory Indemnification

Chapter 82 of the Texas Civil Practice & Remedies Code governs a manufacturer's indemnity obligations arising from a "products liability action":

> A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omissions, such as negligently modifying or altering the product, for which the seller is independently liable.

Tex. Civ. Prac. & Rem. Code § 82.001(2) (West 2011). This chapter defines a "seller" as

> A person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.

Id. § 82.001(3). A "seller" is one who "commercially distributes a product." *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 449 (Tex. 2008). The legislature drafted Chapter 82 to provide indemnity for all *retailers* of a defective product. *See New Tex. Auto Auction Servs., L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 405 (Tex. 2008).

2. Common-Law Indemnification

The comparative-negligence statute essentially "has abolished the common law doctrine of indemnity between joint tortfeasors even though the statute does not expressly mention that doctrine." *Aviation Office of Am., Inc. v. Alexander & Alexander of Tex., Inc.*, 751 S.W.2d 179, 180 (Tex. 1988) (per curiam); *see also Compton v. Texaco, Inc.*, 42 S.W.3d 354, 361 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). An entity is entitled to common-law indemnity for products liability only if its liability is entirely vicarious or if it qualifies as an "innocent product retailer" involved in the chain of distribution. *See Aviation Office of Am.*, 751 S.W.2d at 180. Further, common-law indemnity requires an adjudication of the manufacturer's liability or an admission of

liability by the manufacturer. *See Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255 (Tex. 2006). ("The indemnitor must be liable or potentially liable for the product defect, and *his liability must be adjudicated or admitted*." (emphasis added)).

C. Application

1. "Equitable" Indemnity

In its first issue, the Ranch contends that "equity" requires that it be indemnified. However, the Ranch has not cited, nor have we found, any cases in which a party has been "equitably indemnified." Further, the Ranch failed to raise this argument in its response to the summary judgment motions filed by appellees. Thus, even if we were to craft such a legal doctrine, which we are certainly disinclined to do, the Ranch cannot obtain reversal of the summary judgments on that basis because it did not preserve this argument for appeal. *See Argovitz*, 2008 WL 5131843, at *8. We thus overrule the Ranch's first issue.

2. Statutory Indemnity

In its second issue, the Ranch asserts that it is entitled to statutory indemnification because it is a "seller" as defined by Chapter 82 of the Civil Practice & Remedies Code. We disagree. The Ranch stipulated that it is a ranch and timber farm and "has never been a retailer of chemicals or chemical products of any kind, and, in particular has never sold chemical products containing 2,4-D or 2,4,5-T." Chapter 82's definition of a seller clearly contemplates that the defective product, either by itself or as a component part of another product, actually be sold by the party seeking indemnification. *See* Tex. Civ. Prac. & Rem. Code § § 82.001(3) (defining "seller"), 82.002(d) (including a wholesale distributor or retail seller that completely or partially assembles a product in accordance with manufacturer's instructions in definition of "seller"); *see also Fresh Coat Inc. v. K-2, Inc.*, 318 S.W.3d 893, 899 (Tex. 2010) (noting that Chapter 82's definition of "seller" does not exclude sellers who provide services).

The Ranch cites the Texas Supreme Court opinion *Fresh Coat Inc. v. K-2, Inc.* to support its proposition that because it placed something into the stream of commerce, *i.e.*, Southern Pine wood, and it may have used the appellees' products to "enhance the growth of the good commercial product[,]" *i.e.*, by applying the chemicals to destroy the undesirable hard wood trees, it qualifies as a "seller" under Chapter 39. But the indemnitee in *Fresh Coat Inc.* actually sold services in which it installed the defective product in accordance with the manufacturer's instructions, and the manufacturer trained and certified the indemnitee's personnel in the installation of the defective product. *See Fresh Coat Inc.*, 318 S.W.3d at 899. Thus, the Supreme Court determined that the indemnitee was both a seller and service provider: it was in the business of providing the defective product combined with the service of installing it. *See id.* Here, the Ranch is not a service provider that used the appellees' chemicals as part of the services it sold. In fact, the Ranch's use of the allegedly defective products did not place these chemicals into the stream of commerce at all. Rather, it is clear that the Ranch used these chemicals to kill unwanted types of trees that it did not intend to place into the stream of commerce.[7] Thus, *Fresh Coat Inc.* is inapposite to the Ranch's situation.[8]

In sum, the Ranch was, at most, a user of the allegedly defective products, rather than a seller as contemplated by Chapter 82; the product the Ranch sold was Southern Pine wood, not any type of these chemicals. *See SSP Partners*, 275 S.W.3d at 449

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[7] Indeed, if the Ranch's reasoning were valid, all end users of an allegedly defective product who were also in the business of selling something unrelated to the defective product would qualify as a "seller."

[8] A single sentence in the *Fresh Coat Inc.* opinion may imply that selling any products could qualify a party seeking indemnity as a "seller" under Chapter 82: "We agree with the court of appeals that 'Chapter 82's definition of "seller" does not exclude a seller who is also a service provider, *nor does it require the seller to only sell the product*.'" *Id.* (emphasis added). But the court clearly holds that the party seeking indemnity must *provide* the defective product as part of its sales and services:

> Chapter 82, like the Restatement, anticipates that a product seller may also provide services. Thus, we conclude that w*hen a company contracts to provide a product that is alleged to be defective* . . . , the company's installation services do not preclude it from also being a seller.

Id. (emphasis added).

(stating that Chapter 82 requires a manufacturer only to indemnify an innocent seller); *see also Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999) (determining, on a certified question from the United States Court of Appeals for the Fifth Circuit, that a retailer who sells *products of the same or similar type* as that involved in a products liability suit is entitled to indemnity even if it did not sell the particular product claimed to have harmed the underlying plaintiff); *cf. Hadley v. Wyeth Labs., Inc.*, 287 S.W.3d 847, 850 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("[A] seller must 'be engaged in the business' of distributing or placing *the product* in the stream of commerce and . . . the purpose of doing so must be a 'commercial purpose'" (emphasis added)). Because we have concluded that the Ranch does not qualify as a "seller" under Chapter 82, the trial court did not err in granting the appellees' summary judgments on this basis. We therefore overrule the Ranch's second issue.

3. Common-Law Indemnity

In issue three, the Ranch contends that it is entitled to common-law indemnification because it is merely an "innocent conduit" or vicariously liable "for the acts and omissions of the [a]ppellees who manufactured the defective product." However, as discussed above, the doctrine of common-law indemnity requires that the manufacturer either be adjudicated liable or admit to liability for the product defect. *See Gen. Motors Corp.*, 199 S.W.3d at 255. Here, the Ranch acknowledges that "there has not yet been an adjudication that each [a]ppellee is responsible for the [c]laimant's injuries." Further, none of the appellees admitted to liability in any of their pleadings; indeed, they all filed general denials and argued in their summary-judgment motions that there was neither a finding of liability against them nor an admission of liability from them.[9]

[9] And, as noted above, the trial court in the underlying action determined that Occidental and Elementis did not even make the chemicals and that Monsanto established it had only sold the chemicals to the United States government.

Moreover, for the reasons discussed above in section C.2 of this opinion, the Ranch is not an "innocent retailer," because it neither sold these chemicals nor marketed them. *See Hernandez*, 249 S.W.3d at 403; *Duncan v. Cessna*, 665 S.W.2d 414, 432 (Tex. 1984). Under these circumstances, the trial court properly granted appellees' summary judgments on the Ranch's common-law indemnification claims. We overrule its third issue.

CONCLUSION

The Ranch is not entitled to "equitable," statutory, or common-law indemnity from any of the appellees. We overrule appellant's first three issues. Because of our disposition of these issues, we need not reach the Ranch's fourth issue regarding the trial court's prior rulings.[10] We affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justice Christopher (Brown, J. not participating).

[10] *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").