

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00499 COA

DANNY JOHNSON, A/K/A DANNY M. JOHNSON, AND WIFE, DIANNE JOHNSON

APPELLANTS

v.

MORRIS BROTHERS METALS, INC. AND GEORGIA-PACIFIC CORPORATION

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: GRENADA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

AL CHADICK

ATTORNEYS FOR APPELLEES:

JAY GORE, III AND SAM N. FONDA

NATURE OF THE CASE: PRODUCTS LIABILITY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DEFENDANTS

BEFORE THOMAS, P.J., COLEMAN, DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

Danny Johnson (Johnson) was injured in a work related accident. As a result, he collected workers

compensation benefits, as well as social security payments. Several years later, he filed a complaint against Morris Brothers, Inc. and Georgia-Pacific Corporation alleging products liability, failure to warn of an unreasonably dangerous condition, and injuries caused by a defective product. His wife Dianne joined in the complaint alleging loss of consortium. The Grenada County Circuit Court granted summary judgment in favor of both Morris Brothers, Inc. and Georgia-Pacific Corporation. Aggrieved, Johnson appeals to this Court alleging the following issue: the trial court erred in granting summary judgment for both of the defendants. After carefully reviewing the record, we find no reversible error in the proceedings below; therefore, we affirm the judgment of the circuit court.

FACTS

In the mid-1980's, Georgia Pacific Corporation (Georgia Pacific), constructed an oriented strand board factory in Grenada, Mississippi. Brown and Root, Inc. was the prime contractor for the construction of the facility. Although Georgia Pacific's engineers periodically inspected the progress of the construction, Brown and Root, Inc., and its subcontractors were responsible for the construction, as well as the supervision and control of their own employees. Pursuant to an agreement with Brown and Root, Inc., Morris Brothers Metals Inc. (Morris Bros.) provided a scrap metal collecting bin at the construction site. When the bin was full, Morris Bros. would replace it with an empty bin. Morris Bros. paid for the weight of the scrap metal collected. The bin was purchased on the open market as a standard commodity. Morris Bros. did not design, construct, or alter the bin.

On the date of the accident, Johnson was injured while placing scrap metal into the collecting bin in an unconventional fashion, however, it was the method the workers had used on this particular worksite. According to their method, they had a dump truck and a dump truck bed attached to a cherry picker. The workers would throw scrap metal into the dump truck bed. Once it was full, they used the cherry picker to lift the dump truck bed over the edge of the metal bin. When the bed was resting over edge of the bin, someone was required to remove the pins out of the tailgate of the truck bed allowing the tailgate to drop open. At that point, someone had to undo the back chokers of the truck so that the front end could be lifted in order to dump out the metal from the truck bed into the bin. On this particular instance, Johnson was injured when he stood on the edge of the bin in order to remove the pins from the tailgate. The contents of the truck shifted, causing the truck bed to slide down into the metal bin pinning Johnson's feet in between the truck bed, and the metal bin.

DISCUSSION OF LAW

This Court applies a de novo standard of review when reviewing a lower court's grant of summary judgment. *Seymour v. Brunswick Corp.*, 655 So. 2d 892, 894 (Miss. 1995) (citing *Short v. Columbus Rubber & Gasket Co.*, 535 So. 2d 61, 63 (Miss. 1988)). A trial court may grant summary judgment "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 facts and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56. The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. *Seymour*, 655 So. 2d at 895 (citations omitted). If the court finds the moving party is entitled to a judgment as a matter of law, summary judgment should be entered in his favor. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362

(Miss. 1983)). Otherwise, the court should deny summary judgment. *Id.*

MORRIS BROTHERS METALS, INC.

Johnson's complaint against Morris Bros. stems from section 388 of the *Restatement (Second) of Torts*. This section provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which it is supplied, if the supplier

(a) knows or has reason to know that the chattel is likely to be dangerous for the use it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (1965). While the movant bears the burden of demonstrating that there is no issue of material fact, Johnson, the non-movant for summary judgment in this case, must present "significant probative evidence demonstrating the existence of a triable issue of fact." *Newell v. Hinton*, 556 So. 2d 1037, 1042 (Miss. 1990) (citations omitted). We are not persuaded that Johnson has done so here.

Johnson's expert witness stated in his affidavit that the assembly *as a combination*, i.e. the metal bin and the dump truck bed, was dangerous. The expert testified that the assembly was dangerous when used to do what they were doing with it. The assembly was a combination of unorthodox uses of the equipment. Johnson's expert admits in his deposition testimony that he would not have thought of using the equipment in the manner Brown and Root had instructed its employees to dispose of scrap metal. It is undisputed that the metal bin was not dangerous in itself. Morris Bros. did not design, construct or alter the bin, and absent any defects, there is no duty to warn. *Holifield v. Pitts Swabbing Co.*, 533 So. 2d 1112, 1116 (Miss. 1988). Accordingly, we affirm summary judgment for Morris Bros.

GEORGIA-PACIFIC CORPORATION

In his complaint against Georgia-Pacific, Johnson contends that not only was Georgia-Pacific liable according to section 388 of the *Restatement (Second) of Torts*, but that as an employee of Brown

and Root, Johnson was a business invitee. Therefore, he alleges that since his tasks were for the benefit of both Brown and Root as well as Georgia-Pacific, they (Georgia-Pacific), had a duty to furnish him with a safe place to work, as well as warn him about the metal bin on their premises.

Upon review of the record, we cannot find an issue of material fact. Georgia-Pacific's plant manager and project engineer state in affidavits that Georgia-Pacific had no control over the day to day construction. Johnson testified that his supervisor, Gerald Ricks was from Brown and Root. Furthermore, it was Brown and Root's worker's compensation carrier who disbursed benefits to Johnson. Therefore, we find this issue without merit and accordingly, we affirm summary judgment for Georgia-Pacific.

THE JUDGMENT OF THE GRENADA COUNTY CIRCUIT COURT GRANTING SUMMARY JUDGMENT TO THE APPELLEES IS AFFIRMED. COSTS ARE ASSESSED AGAINST THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

MCMILLIN, J., NOT PARTICIPATING.