NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

JASON MILLS and MELISSA MILLS,

Plaintiffs,

vs.

J-M MFG. CO., INC. d/b/a JM EAGLE and RAINMAKER SALES, INC.,

Defendants/Appellees,

and

CHARTER OAK PRODUCTION CO., LLC.

Defendant/Appellant,

and

C&M ROUSTABOUT SERVICES, LLC; SPL CONTROL LLC; and JOHN DOES 2-15,

Defendants.

Case No. 121,781

APPEAL FROM THE DISTRICT COURT OF
MCCLAIN COUNTY, OKLAHOMA

HONORABLE LEAH EDWARDS, TRIAL JUDGE

REVERSED AND REMANDED

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For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Charter Oak Production Co. LLC appeals the summary judgment of the district court that it cannot bring an indemnity claim against pipe manufacturer J-M Mfg. Co., Inc. d/b/a JM Eagle. We hold that the non-delegable duty of Charter Oak to pay damages occasioned purely by JM Eagle's allegedly defective product creates the legal relationship required to bring an indemnity claim against JM Eagle. The summary judgment of the court is reversed, and we remand this matter for further proceedings.

BACKGROUND

This litigation arose after a saltwater transfer pipe, being installed by defendant C&M Roustabout Services LLC on behalf of defendant and crossclaimant Charter Oak Production Co. LLC, failed under pressure and allowed saltwater to flow across the land of the plaintiffs, Jason and Melissa Mills. The pipe evidently failed because it was defectively manufactured and the pipe wall was too thin to withstand the specified pressure.[1] The pipe was

[1] The record indicates that this was a manufacturing defect, not a design defect. Correctly manufactured to specification, the pipe should have been able to withstand the rated pressure.

manufactured by defendant JM Eagle and sold to a distributor, defendant Rainmaker Sales, Inc. Rainmaker then sold the pipe to defendant C&M, an independent contractor that Charter Oak had retained to construct and install the saltwater transfer pipeline inside Charter Oak's easement across the plaintiffs' property. The pipe burst and damaged the land. The plaintiffs sued all defendants for property damage.

Charter Oak paid the plaintiffs for the damage pursuant to the common law that it had a non-delegable duty to the landowner to avoid damaging the easement, and the plaintiffs dismissed all parties with prejudice.[2] The remaining issue was then Charter Oak's claim for indemnity against JM Eagle and Rainmaker. JM Eagle and Rainmaker filed for summary judgment based on several theories that indemnity was not available as matter of law in this situation. The question was briefed extensively. In October 2023, the court granted summary judgment to Rainmaker and JM Eagle.

The court noted that Charter Oak was only vicariously liable for damage caused by the pipe failure. The court found, however, that Charter Oak had no contractual relationship with JM Eagle or Rainmaker and that Charter Oak sought indemnification from Rainmaker based only on monetary losses caused by a defective product. The court held that these losses were "purely economic" and not recoverable under a products liability theory, and hence, indemnity was not available. Charter Oak now appeals this decision.

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[2] No settlement agreement is in the record. Neither party bases any argument on the terms of any settlement.

STANDARD OF REVIEW

The appellate standard of review of summary judgment is *de novo*. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶7, 408 P.3d 183; *Tiger v. Verdigris Valley Electric Coop.*, 2016 OK 74, ¶13, 410 P.3d 1007. On appeal, this Court assumes plenary and non-deferential authority to reexamine a district court's legal rulings. *John v. St. Francis Hospital, Inc.*, 2017 OK 81, ¶8, 405 P.3d 681; *Stevens v. Fox*, 2016 OK 106, ¶13, 383 P.3d 269; *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶14, 859 P.2d 1081.

ANALYSIS

Charter Oak was liable for the saltwater damage to the Millses' property, even though it appears to have been without fault, because of the rule of *Bouziden v. Alfalfa Elec. Co-op., Inc.*, which holds that "easement law imposes a non-delegable duty on the dominant tenant to use the easement in a manner so as to not damage or injure the servient estate." 2000 OK 50, ¶ 16, 16 P.3d 450, 456. The non-delegable duty arises from the relationship between the dominant and servient tenants created by the easement grant. *Id.* Hence, even if Charter Oak was without fault, it breached a non-delegable duty not to damage or injure the Millses' property while using the easement and was required to pay for the damages caused by the saltwater.

Nonetheless, Charter Oak's liability for the saltwater spill does appear to be entirely vicarious. It had no evident part in producing or selecting the pipe, or directing the work of the independent contractor, C&M. The question here is whether Charter Oak, as a party that is only vicariously liable for the damage

caused by the admittedly defective pipe, may seek indemnity from JM Eagle and or Rainmaker[3] for the damages *Bouziden* requires Charter Oak to pay as a non-delegable duty.

National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc., notes that "the right of indemnity may arise out of an express (contractual) or implied (vicarious) liability." 1989 OK 157, ¶ 8, 784 P.2d 52. *See also Cities Serv. Gas Co. v. Christian,* 1957 OK 247, ¶ 5, 316 P.2d 1113, 1115; *Shell Pipe Line Corp. v. Curtis,* 1955 OK 212, 287 P.2d 68; *Oklahoma Nat. Gas Co. v. Pickett,* 1953 OK 138, 258 P.2d 186. We find no indication of a direct contractual relationship between Charter Oak and JM Eagle. Hence, Charter Oak seeks indemnity because it was vicariously liable for damages caused by the defectively manufactured pipe.

Charter Oak relies on the general rule of indemnity that "one without fault, who is forced to pay on behalf of another, is entitled to indemnification," provided that a "legal relationship exists between the parties." *National Union,* ¶ 7-8. Requiring one without fault, to pay on behalf of another is exactly how the rule of *Bouziden* acts in this case. JM Eagle argues, however, that the "legal relationship" between JM Eagle and Charter Oak required by *National Union* is

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[3] We note that Charter Oak's suit against Rainmaker appears peripheral to the case. Charter Oak's crossclaim alleges no independent actionable conduct by Rainmaker as the basis for its injury. It is based purely upon Rainmaker's distribution of a defective product. However, 12 O.S. § 832.1 requires JM Eagle to indemnify Rainmaker and "hold harmless a seller against loss arising out of a product liability action." An exception only applies if the manufacturer proves that the seller's independent conduct caused the plaintiff's injuries. *Honeywell v. GADA Builders, Inc.,* 2012 OK CIV APP 11, ¶ 31, 271 P.3d 88, 98. No such independent conduct is alleged here.

lacking. JM Eagle relies on *National Union,* which states that the right to indemnity "arises out of an independent legal relationship, under which the indemnitor owes a duty *either in contract or tort* to the indemnitee ...." *Id.* at ¶ 9. (emphasis supplied). The was no direct contractual relationship between Charter Oak and JM Eagle, and JM Eagle argues that no tort duty is involved, and hence there can be no indemnity.

JM Eagle's argument that there was no tort duty can be summarized as follows:

(1) JM Eagle's sole liability for manufacturing the defective pipe arises under product liability law, and product liability law does not allow for recovery of "purely economic losses."

(2) Charter Oak's loss was "purely economic" because it did not suffer damage to its own property, but only paid money damages for the harm the defective pipe caused to the Millses property.

(3) Charter Oak could not sue JM Eagle under product liability law for this purely economic loss, and hence JM Eagle has no "tort duty" to Charter Oak.

(4) As there is neither a contractual nor a tort duty between Charter Oak and JM Eagle, *National Union* bars Charter Oak's indemnity claim.

We do not agree that the law supports this argument.

The "purely economic loss" rule is examined in several product liability cases but not in this context. *Waggoner v. Town & Country Mobile Homes, Inc.*, stated the rule that a defective product claim will not lie where "[n]o personal injury or damage to other property occurred." 1990 OK 139, ¶ 23, 808 P.2d 649, 653. *Oklahoma Gas & Elec. Co. v. McGraw-Edison Co.* reaffirmed the prior holding of *Waggoner,* stating:

> The *Waggoner* holding controls here. No claim for personal injury or damage to other property is presented by this action. OG & E's action for damages to the product and consequential economic losses sounds in contract, not in manufacturers' products liability. In answer to the certified question, the plaintiff in this action may not recover damages for injury to the allegedly defective product itself and consequential economic harm flowing from that injury upon the theory of manufacturers' products liability.

1992 OK 108, ¶ 8, 834 P.2d 980.[4]

Unlike *Waggoner* and *Oklahoma Gas & Elec. Co.*, the defective product here *did* cause damage to other property. JM Eagle's argument is that this property damage transmuted into an unrecoverable "purely economic loss" when Charter Oak paid the Millses for the damage caused by the pipe. We disagree.

The basis of the economic loss rule is that a plaintiff cannot sue for *consequential* economic loss caused by a defective product. *See e.g., Oklahoma Gas & Elec. Co.* ¶ 3 (holding that consequential damages for repair and reinstallation of a defectively manufactured transformer, rental, and handling costs for a temporary transformer and lost profits are not recoverable under a product liability theory).[5] Had Charter Oak sought consequential damages for income lost due to its oil and gas operations being impacted by the defective pipe, or for the cost of repair of the pipeline itself, this would be a prime example of a

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[4] We further note that the product liability rule set by *Waggoner* was later clarified by *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187. *Dutsch* clarified that "[w]hen purely economic damages occur and there is no damage to person or other property" product liability claims are not viable because "U.C.C. remedies are sufficient to protect the plaintiff." *Id.* ¶ 28, (emphasis supplied). In this case, however, there was clearly damage to other property.

[5] *See also Anderson on the Uniform Commercial Code* (3d. ed.) § 2-715:223 *Nature of economic loss* (noting that consequential economic loss "includes the loss of profits resulting from the inability to use what was bargained for").

purely "economic loss" that cannot be recovered as part of a defective product suit. Charter Oak seeks no such consequential damages here, however.

We further reject JM Eagle's interpretation of *National Union* that indemnity can arise *only* where the indemnitor's duty arises either in contract or tort, but not statutory or common law. Statutory and common law duties were not at issue in *National Union.* Since *National Union* was published, the Supreme Court has defined indemnity rights in less restrictive terms, stating:

> Indemnity is a right possessed by one who discharges a duty owed by that party, but which, as between that party and another, should have been discharged by the other. Indemnity occurs when one party has a primary liability or duty that requires that party to bear the whole of the burden as between certain parties. This primary liability is not the result of fault, but a matter of allocation of risk, which is established by law.

Thomas v. E-Z Mart Stores, Inc., 2004 OK 82, ¶ 20, 102 P.3d 133, 139 (citations omitted). *Thomas* describes precisely how *Bouziden* operates with regard to easements. It requires Charter Oak to discharge a duty that should have been discharged by JM Eagle. Its primary liability was not the result of fault, but due to an allocation of primary liability established by law.

We find *Thomas* to be a later and more applicable statement on the indemnity rules compared to *National Union. National Union* neither involved nor considered a situation where the required "legal relationship" was created by statute rather than through a contract or tort duty. *Bouziden* creates a situation where one party has a primary liability or duty that requires that party to bear the whole of the burden as between certain parties, not as the result of fault, but

as a primary liability established by law. *Thomas* is clear that this supports an indemnity claim.[6]

Finally, our interpretation of the law favors a "reasonable and sensible construction that will avoid absurd consequences." *McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096. As JM Eagle interprets the interaction between easement law and the economic loss rule, a manufacturer of a defective product may be held liable for damages to person or property caused by the defect everywhere *except in an easement.* We do not view this as a "reasonable and sensible construction," and find no indication that the Supreme Court or legislature intended faultless easement owners to be liable to fee owners for damages caused by defective products installed in an easement without any recourse against the manufacturer or seller of a defective product that actually causes the damage to property.

As such, we hold that the non-delegable, legally imposed duty of Charter Oak to pay damages occasioned purely by JM Eagle's alleged fault establishes the legal relationship required to bring an indemnity claim under Oklahoma law. We make no finding on whether Charter Oak is entitled to indemnity, but we

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[6] The problem with JM Eagle's central argument—that property damage claims undergo a legal metamorphosis into purely economic losses when damages are paid—is clear when a hypothetical insurer is put in the place of Charter Oak. An insurer has no subrogation right until it pays for property damage caused by a defective product, but according to JM would have *no subrogation right afterwards either*, because paying the claim has transformed the injury into a "purely economic loss" which the insured could not claim under a defective product theory. We find no principle in law that subrogation is never available in such cases. Reams of cases would be wiped from the books. *See, e.g., Weir v. Fed. Ins. Co.*, 811 F.2d 1387 (10th Cir. 1987) (wherein a fire insurer, who had settled with insureds whose home and rare book collection had been destroyed by fire, sought subrogation from dryer manufacturer, alleging that a defective dryer had caused the fire).

reverse the summary judgment of the court that indemnity was not available as a matter of law and remand this matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HUBER, P.J., and FISCHER, J. (sitting by designation), concur.

October 11, 2024