UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7714
Summary Calendar

JOHN L. HUNTER, II,

Plaintiff-Appellant,

VERSUS

PORTEC, INC., a Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(1:92 CV 273)

(April 28, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:[1]

Plaintiff, John L. Hunter, appeals the take-nothing judgment rendered against him when the district court granted summary judgment in Mr. Hunter's products liability case in favor of the defendant Portec, Inc. We find no error and affirm.

I.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Portec, Inc. manufactured a piece of heavy equipment called a "Twin Roll Crusher," which it sold to Mallette Brothers in 1974. The Roll Crusher was installed in the Mallette Brothers' asphalt plant in Gauthier, Mississippi. To install the equipment, Mallette poured a cement foundation, and the Twin Roll Crusher was bolted permanently to this foundation. A shed built specifically to house the crusher's control mechanism was constructed adjacent to the roll crusher. The crusher began operation in late 1974 or early 1975. No employee of Portec was on the Mallette Brothers' premises in Gauthier, Mississippi after the roll crusher was installed and before this accident occurred.

Mr. Hunter, who was employed by Mallette Brothers, was injured in July 1989 while working at the Gauthier asphalt plant. Mr. Hunter slipped, and his leg became entangled in the roll crusher resulting in the amputation of his leg.

In June 1992, Mr. Hunter filed this action seeking damages under product liability theories of strict liability and negligence. Portec filed a motion for summary judgment contending that plaintiff's action, filed some eighteen years after the roll crusher was delivered to Mallette Brothers, was barred by the Mississippi Statute of Repose codified at § 15-1-41 (Miss. Code Ann. 1972). The district court agreed with defendant's argument that the action was time barred and granted defendant's motion for summary judgment dismissing this suit. This appeal followed.

The sole issue presented on appeal is whether the Mississippi Statute of Repose bars this action. The statute bars all claims

for personal injuries "arising out of any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property if such claims are filed more than six years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof." Miss. Code. Ann. 15-1-1-41.[2]

II.

Hunter argues that Portec is a mere product supplier of non-building materials and a machine manufacturer, and as such, is not protected by § 15-1-41. Specifically, Hunter argues that because Portec did not participate in the designing, planning, or construction of the asphalt plant or its building materials, it is not an entity subject to repose. Furthermore, Hunter contends that if Portec is entitled to the statute of repose, then any non-building material supplier may avail itself of § 15-1-41 so long as its product is large and can be connected to other machines.

We agree with the district court that the focus on Portec's status as a manufacturer is misplaced. **Trust Co. Bank v. U.S. Gypsum Co.**, 950 F.2d 1144 (5th Cir. 1992)(while some states have denied repose protection to the manufacturers of defective building products, Mississippi is not one of those states). The critical issue is whether the Twin Roll Crusher qualifies as an improvement

[2] The district court concluded that the previous statute amended in 1972 granting a ten-year limitations period applied. The determination of whether the unamended statute applies turns on whether the cause of action accrued after January 1, 1986. We need not decide which statute applied. The claim is clearly time-barred under either statute.

to real property. **Smith v. Fluor Corp.**, 514 So.2d 1227 (Miss. 1987) is dispositive of this issue.

In **Smith**, the Mississippi Supreme Court held that the addition of a heat exchanger to an oil refinery was an improvement to real property under the statute, and therefore the manufacturer of the machinery was entitled to repose. Like the plaintiff in this case, the plaintiffs in **Smith** argued that the heat exchanger was an appliance or product, rather than an improvement to real estate. The Mississippi Supreme Court determined that because the heat exchanger was interconnected with other parts of the machinery and equipment of the refinery it was a part of the refinery machinery and within the statutory language, "improvement to real property." **Id.** at 1230. **See also, Phipps v. Irby Construction Co., et al.**, No. 89-CA-0174, 1993 Miss. LEXIS 418 (Miss. Sept. 16, 1993)(companies that designed and constructed second phase of electric distribution lines entitled to repose because addition was an improvement to real estate); **Trust Co. Bank**, 950 F.2d at 1151-52 (asbestos fireproofing material that was applied to steel structure was an improvement to real property because it was a permanent addition that increased the value of the property and made the property more useful).

The uncontested facts demonstrate that the Twin Roll Crusher is an improvement to real property under § 15-1-41. The machine was permanently installed and bolted to the concrete foundation. It was connected to a hopper and a series of conveyer belts. The Mallette Brothers had a shed built adjacent to the Twin Roll

Crusher to house the control mechanism. Once installed, the Twin Roll Crusher was a permanent addition, interconnected with the plant. It increased the value of the plant and made the property more useful because it performs an essential function in the plant's production process.

Therefore, the district court did not err in granting summary judgment to Portec based on § 15-1-41.

AFFIRMED.