

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40354

ENCLEAN SPECIALTY CHEMICALS, INC.
d/b/a Alphachem,

Plaintiff-Appellant,

VERSUS

BAKER TANKS GULF SOUTH, INC.,
f/k/a Baker Tanks (Louisiana) Inc., and
ABELL CORP., d/b/a Poly Processing Co., Inc.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(1:91-CV-2244)

(March 8, 1995)

Before DAVIS, JONES and EMILIO M. GARZA, Circuit Judges.

DAVIS, Circuit Judge:¹

Enclean Specialty Chemicals, Inc. (Enclean) appeals the take-nothing judgment rendered by the district court on summary judgment. We affirm in part and reverse in part.

I.

Enclean filed this products liability action against Baker Tanks Gulf South, Inc. (Baker) and Abel Corporation, d/b/a Poly Processing Company (Poly Processing) for indemnity and contribution

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

following a spill of hazardous materials. The incident occurred when hydrochloric acid spilled onto a Louisiana highway from a leased tank carried by an Enclean truck. Enclean named the owner- lessor of the tank, Baker, and the manufacturer of the tank, Poly Processing, as defendants.

The parties do not dispute the cause of the accident. A component in the discharge valve assembly of the portable chemical tank broke and permitted the discharge of the tank's contents. The discharge assembly, as manufactured by Poly Processing, was fully contained within the tank's protective housing. Baker, however, added to this assembly so that part of the discharge assembly extended outside the protective housing. This exterior portion of the assembly vibrated during transportation, added stress to the assembly, and ultimately failed, thus allowing the tank's contents to escape. Following the spill, Enclean incurred cleanup costs and also expended sums settling private property and personal injury claims. It seeks to recoup these losses from the two defendants.

Enclean contends in this court, as it did in the district court, that Poly Processing should have warned of the dangers inherent in transporting the tank with part of the discharge assembly located outside the protective housing. Enclean sought recovery against Baker on negligence and breach of warranty theories.

Both Baker and Poly Processing filed motions for summary judgment. The district court granted both motions. It concluded that Baker was shielded from liability under the indemnification

clause in its rental agreement with Enclean. The court also concluded that Poly Processing was not obliged to warn of the danger of transporting the tank with a part of the hose assembly extended outside the protective housing because both Baker and Enclean should have been aware of this danger. After the district court entered final judgment, Enclean lodged this appeal.

II.

We affirm this dismissal in all respects except one. We agree with the district court that Enclean is bound by the terms of its contract with Baker. Under that contract, Enclean agreed to hold harmless and indemnify Baker from any losses arising out of the use of the tank. In a separate section of the contract Enclean agreed that Baker would not be responsible "for any damage or loss caused by the negligence of Baker's employees in connection with the performance of [the] Rental Agreement." Thus, we agree that these provisions in the rental agreement, when read together, preclude Enclean's action against Baker.

We conclude, however, that there are material issues of fact which preclude the grant of summary judgment in favor of Poly Processing on Enclean's failure-to-warn claim. Under Louisiana law, a manufacturer such as Poly Processing must warn of dangers that may arise from normal use of its product. LSA-R.S. 9:2800.57. This includes dangers from reasonably anticipated modifications to the product. LSA-R.S. 9:2800.54(C). Based on our review of the summary judgment record, we are persuaded that there are questions of fact as to whether Poly Processing should have anticipated that

a user of its tank would modify the tank by adding a discharge line that extended outside the tank's protective housing and then transport the tank with the added line. A jury could infer that lines of various lengths might be needed to drain the tank depending upon the location of the receptacle into which the tank's contents were to be drained. A jury could also infer that the manufacturer could reasonably anticipate that without a warning the user might transport the tank with a line in place that extends beyond the tank's protective housing. The parties agree that this is an unsafe practice that increases the risk that the contents of the tank will be spilled.

There is also a question of fact as to whether Enclean should have known that the change in the discharge assembly made the tank unsafe. Poly Processing argues that Department of Transportation (DOT) regulations, together with the exemption granted by that agency for this model tank, should have put Poly Processing on notice of this danger. However, neither the regulations nor the DOT exemption expressly address this particular hazard. Thus, while we are satisfied that a jury is entitled to consider the regulations and the extent to which they put Enclean on notice of the danger of using the tank as it did, we conclude that the regulations do not, as a matter of law, establish Enclean's knowledge of the danger and preclude its failure-to-warn claim against Poly Processing.

We therefore affirm the judgment in favor of Baker, vacate the judgment rendered in favor of Poly Processing and remand this case

to the district court for further proceedings consistent with this opinion.

AFFIRMED in part and REVERSED in part and REMANDED.