

STATE OF MICHIGAN
COURT OF APPEALS

RITA M. KERSHAW and RUSSELL KERSHAW,

Plaintiffs-Appellants,

v

RIVERWOOD INTERNATIONAL USA,
INC., f/k/a Manville Forest Products Corporation,
a Delaware corporation; and M.C. AND J.D., INC.,
f/k/a Ouachita Machine Works, and KLASSIC
SERVICES, INC., a Michigan corporation, jointly and
severally,

Defendants-Appellees.

UNPUBLISHED

January 10, 1997

No. 182383

Kent Circuit Court

LC No. 92079118 NO

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

In this products liability action, plaintiffs appeal as of right from a grant of summary disposition for defendants pursuant to MCR 2.116(C)(10). They argue that a genuine issue of material fact existed warranting submission of the case to the jury. We agree and reverse.

I

Plaintiff Rita Kershaw was injured while working at a Coca-Cola bottling plant in Grand Rapids. She was standing on a grated floor when the grating underneath her gave way. She fell sustaining injuries. The grated floor was manufactured by defendant Ouachita Machine Works. It was designed, owned and supplied by defendant Riverwood International and installed by defendant Klassic Services.

Defendants moved for summary disposition claiming that there was no design defect. In response, plaintiffs submitted portions of the deposition of their expert, George Bowden. He testified

* Circuit judge, sitting on the Court of Appeals by assignment.

that, if the grates had had clips to hold them in place, the accident would not have occurred. The trial judge found that a genuine issue of material fact existed and denied the motion for summary disposition.

Defendants again moved for summary disposition. This time they alleged that the grate upon which plaintiff was injured was not one that they had manufactured, supplied or installed. They submitted an affidavit from Dale Abdo, owner of Klassic Services, that stated that the floor had been modified and changed by Coca-Cola after Klassic Services installed it. At the hearing on the motion, plaintiffs attempted to submit an affidavit from John Byrne, the operations manager at the bottling plant. He stated in the affidavit that plaintiff was injured on a portion of the platform that was unmodified by Coca-Cola.

Defendant objected to the Byrne affidavit because, under MCR 2.116(G)(1)(a), plaintiffs were required to supply it to the court and to defendants at least seven days before the hearing. The trial judge agreed with defendants. Absent the affidavit, the court ruled that plaintiffs presented no evidence that Rita Kershaw was injured on a portion of the platform designed, built or installed by defendants. Therefore, it granted summary disposition under MCR 2.116(C)(10). We find that the judge abused his discretion in refusing to consider the Byrne affidavit.

II

MCR 2.116(G)(1)(a) states:

unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing and

(ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.

According to the Staff Comments to MCR 2.116(G)(1), the intent of the rule was to provide the court adequate time to prepare for a hearing on a motion for summary disposition. Plaintiffs filed their response to both of defendants' motions for summary disposition on the day of the hearings on the motions. The judge took the first motion under advisement to consider plaintiffs' response. However, at the second motion hearing, the trial judge refused to consider the affidavit filed with the response.

We find that the judge could have considered the Byrne affidavit without conflicting with the intent of MCR 2.116(G)(1)(g). The rule clearly gives the judge the authority to depart from the seven-day filing requirement. Moreover, defendants were not prejudiced by the late filing, and the judge had ample time to prepare for the hearing despite it. Under these circumstances, we find that the judge abused his discretion in refusing to consider the affidavit.

III

We also find that the judge erred in granting summary disposition for defendants. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtko v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions and any other evidence in favor of the party opposing the motion. *Id.*

A prima facie products liability case consists of proof (1) that the defendant supplied a defective product and (2) that the defect caused injury to the plaintiff. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 249; 492 NW2d 512 (1992). In this case, defendants asserted that Coca-Cola's modification of the grating was a superseding act which cut off their liability. *Coy v Richard's Industries, Inc*, 170 Mich App 665, 670; 428 NW2d 734 (1988).

We find that a genuine issue of material fact exists on the issue of whether Coca-Cola modified the grating that was manufactured and installed by defendants. Byrne's affidavit directly contradicts Abdo's assertion that Coca-Cola modified the grating after Klassic installed it. Byrne stated that the portion of the platform that was modified by Coca-Cola was not the one on which Rita Kershaw was injured. Because the evidence is in direct conflict, there is a genuine issue of material fact for the jury to resolve. The trial judge erred in granting summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien