

STATE OF MICHIGAN
COURT OF APPEALS

SERRA Y. LEDESMA by her Next Friend,
HARVEY HOFFMAN,

UNPUBLISHED
January 21, 1997

Plaintiff-Appellant,

v

No. 175457
LC No. 93-74098-NI

RHEEM MANUFACTURING COMPANY,

Defendant-Appellee.

Before: MacKenzie, P.J. and Saad and Youngblood,* JJ

PER CURIAM.

Plaintiff appeals from the circuit court's order granting summary disposition in favor of defendant Rheem Manufacturing Company. We affirm.

In March of 1990, when plaintiff was four years old, she was left unattended by her parents while bathing and was severely burned by hot water in her bathtub. She suffered disfigurement and scarring as a result of her burns. Defendant manufactured, sold and distributed the water heater for plaintiff's home. Plaintiff sued defendant for negligence, breach of express and implied warranties, and failure to warn. Defendant moved for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(8) and (10), which the circuit court granted.

I.

Plaintiff argues that the circuit court should not have considered defendant's motion for three procedural reasons, namely: (1) the deposition of plaintiff's expert witness, Dr. Kaplan, was not yet available; (2) the scheduling order's deadline for filing and hearing summary disposition motions had passed; and (3) defendant's reply brief was mailed to plaintiff only six days before the hearing. We find these arguments meritless.

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

Contrary to plaintiff's contention, the record shows that the transcript of Dr. Kaplan's deposition was available at the time of the hearing; in fact, defense counsel had a copy of the deposition at the hearing.

Although the circuit court's scheduling order originally gave a March 1, 1994, deadline for filing and hearing a motion under MCR 2.116(C), the court extended this deadline on defendant's motion to April 18, 1994. Plaintiff's counsel did not oppose this extension. Defendant's motion for summary disposition was filed within that deadline. Although defendant's motion was not heard until after the deadline, the record indicates that the reason for this delay in hearing the motion was the circuit court's own schedule.

The proof of service indicates that defendant's reply brief was served on plaintiff's counsel May 2, 1994. The hearing was held May 9, 1994. Defendant's reply brief was served upon plaintiff seven days before the motion hearing.

II.

Plaintiff claims that the circuit court erred by ruling that the instructions on the water heater did not constitute an express warranty regarding its safe operation. We find no error.

The trial court properly found that there was no factual support for plaintiff's claim of an express warranty. The label on the water heater read "SET DIAL D TO DESIRED TEMPERATURE." Plaintiff maintained that this instruction constituted an express warranty that the dial could be safely set at the maximum temperature. The instruction to set the dial to the desired temperature cannot be read as a warranty that any temperature setting would be safe for bathing. MCL 440.2313(1); MSA 19.2313(1); *See, Guaranteed Construction Co v Gold Bond Products*, 153 Mich App 385, 390; 395 NW2d 332 (1986).

III.

Plaintiff contends that the circuit court committed an error of law by considering plaintiff's parents' alleged negligence relevant to her failure to warn claim against defendant. We disagree that the court considered the parents' negligence in its ruling.

The record shows that the circuit judge did not find that plaintiff's parents were negligent or impute any negligence to plaintiff. Instead, the circuit court stated that manufacturers generally did not have a duty to safeguard children from open and obvious dangers presented by simple tools. This is a correct statement of law. *Adams v Perry Furniture*, 198 Mich App 1, 11-14; 497 NW2d 514 (1993); *National Bank of Bloomington v Westinghouse*, 600 NE2d 1275, 1282-1283. (Ill App 1992).

For all these reasons, we affirm the trial court's grant of summary disposition.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Carole F. Youngblood