# STATE OF MICHIGAN

# COURT OF APPEALS

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MICHAEL J. VINCENT, as Personal Representative of the Estate of SINDALL JACOB SMITH, Deceased,

Plaintiff-Appellant,

v

ZIPPO MANUFACTURING COMPANY and SCRIPTO-TOKAI, INC.,

Defendants-Appellees,

and

ARBOR DRUGS, INC., PERRY DRUG STORES, INC., K-MART CORPORATION, MEIJER, INC. and RONSON CORPORATION,

Defendants.

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UNPUBLISHED
October 28, 1997

No. 193979
Washtenaw Circuit Court
LC No. 93-000767-NO

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the trial court granting summary disposition in favor of defendants[1] Zippo Manufacturing Company (Zippo) and Scripto-Tokai, Inc. (Scripto). We affirm.

Plaintiff's decedent, Sindall Jacob Smith, died at the age of twelve from acute congestive heart failure that resulted from butane inhalation. On numerous occasions prior to his death, Sindall and his older brother had inhaled the contents of butane fuel canisters in order to get "high." This intentional inhalation resulted in damage to Sindall's vital organs. Following Sindall's death, plaintiff filed the instant suit alleging that defendants failed to warn of the dangers associated with the use or foreseeable abuse of their butane fuel products and failed to add an odorant to the butane fuel in order to deter abuse of the product.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff's failure to warn claim was preempted by the Federal Hazardous Substances Act (FHSA), 15 USC 1261-1277, and that their butane fuel complied with the requirements of the FHSA. Defendants further argued that they did not have a duty to make their products accident-proof, foolproof, or incapable of producing an injury. Following a hearing, the trial court granted defendants' motion for summary disposition.

I

On appeal, plaintiff argues that the trial court erred in dismissing the failure to warn claim because the detailed affidavits of three experts supported plaintiff's claim that Scripto's butane label violated the FHSA by failing to affirmatively state the hazards of butane inhalation.[2] We disagree.

The FHSA prohibits the "introduction or delivery for introduction into interstate commerce of any misbranded hazardous substance or banned hazardous substance." 15 USC 1263(a). The FHSA defines "misbranded hazardous substance" as:

> [A] hazardous substance (including a toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted) intended, or packaged in a form suitable, for use in the household or by children, if the packaging or labeling of such substance is in violation of an applicable regulation issued pursuant to section 3 or 4 of the Poison Prevention Packaging Act of 1970 [15 USC 1472 or 1473] or if such substance, except as otherwise provided by or pursuant to section 3 [15 USC 1262], fails to bear a label -
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> (1) which states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Secretary [Commission] by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable," "Combustible," "Vapor Harmful," "Causes Burns," "Absorbed Through Skin," or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Secretary [Commission] pursuant to section 3 [15 USC 1262]; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h); (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the

> statement (i) "Keep out of the reach of children" or its practical equivalent, or, (ii) if the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of the children from the hazard. . . . [15 USC 1261(p).]

In analyzing plaintiff's allegation that Scripto's label failed to comply with the FHSA, the trial court concluded that plaintiff's experts' affidavits did not support his claim and dismissed the claim on this basis. We believe that plaintiff's experts' affidavits did support his claim that Scripto's label should have warned that death could result from inhaling butane and that a genuine issue of material fact exists regarding whether death from butane inhalation was a principal hazard of which consumers were required to be warned pursuant to the FHSA. The FHSA requires that the label of a hazardous substance contain "an affirmative statement of the principal hazard or hazards. . . ." 15 USC 1261(p)(1)(E). It does not limit the warning to only those hazards that result from the intended use of the product. Thus, even though death from butane inhalation results from a misuse of the product, that fact does not preclude such a hazard from being principal under the FHSA. Therefore, we find the basis for the trial court's ruling on this issue to be improper.

Despite our conclusion that the trial court's basis for granting summary disposition to Scripto on plaintiff's claim of inadequate warning was improper, we nonetheless hold that summary disposition in favor of Scripto on this claim was appropriate because plaintiff failed to demonstrate causation. This Court will not reverse a trial court's decision where the right conclusion was reached for the wrong reason. *Samuel D Begola Services, Inc v Wild Brothers*, 210 Mich App 636, 640; 534 NW2d 217 (1995).

Causation involves proof of two separate elements: (1) cause in fact, and (2) proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). With respect to this, our Supreme Court has noted:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. We find that the plaintiffs here were unsuccessful in showing a genuine issue of factual causation. [*Id.*, 163 (citations omitted).]

Applying *Skinner* to the instant case, we likewise find that plaintiff was unable to establish cause in fact. Although a plaintiff may demonstrate causation circumstantially, "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164. A party does not have a right to submit an evidentiary record to the jury that permits the jury to do nothing more than guess. *Id.* at 174. The Court in *Skinner* held:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Id.*. at 165].

Here, plaintiff has failed to present substantial evidence from which a jury could conclude that more likely than not, but for Scripto's failure to warn consumers of potential death from inhalation of butane as required by the FHSA, Sindall would not have died. Dixie Patton, Sindall's guardian, testified in her deposition that she discussed the dangers of butane abuse with Sindall, that she told him it could kill him, and that he knew that it could kill him. She also admitted that she did not know how more explicit warnings would have helped Sindall. Based on the foregoing, the only reasonable conclusion is that Sindall was aware of the dangers of inhaling butane, and despite that knowledge, chose to continue the activity. See *Pavlik v Lane Ltd Tobacco Exporters Int*, 1997 US Dist LEXIS 104 (ED Pa, 1997) (summary judgment granted where warnings on other brands of butane also used by decedent did not deter decedent from continuing to inhale butane, which led to his eventual death).

II

Plaintiff also argues that the trial court erred in dismissing his defective design claim where the affidavits of three experts supported plaintiff's claim that the defendant manufacturers should have added an odorant to their butane products to discourage inhalation by children such as Sindall. Again, we disagree. Like the trial court, we find that the butane canisters at issue were simple products. We find them to be simple products because the canisters are not highly mechanized and allow the users to maintain control over the product, and the *intended* use of the product does not place users in obviously dangerous positions. *Viscogliosi v Montgomery Elevator Co*, 208 Mich App 188, 189; 526 NW2d 599 (1994); *Raines v Colt Industries, Inc*, 757 F Supp 819, 825 (ED Mich, 1991).

Because the butane canisters are simple products, the open and obvious danger rule applies in this case. See *Mallard v Hoffinger Industries, Inc (On Remand)*, 222 Mich App 137; 564 NW2d 74 (1997). As a general rule, under Michigan law a manufacturer has a duty to design its product to eliminate unreasonable risk of foreseeable injury. *Id*. at 140. However, manufacturers and sellers are not insurers, and they are not absolutely liable for any and all injuries sustained from the use of their products. *Id.* at 143. It is now well settled that manufacturers of simple products do not have a duty to protect against dangers which are open and obvious. *Id.* at 141-143. In determining whether a danger associated with a simple product is open and obvious, the focus is on the *typical* user's perception and knowledge, and whether the feature that creates the danger is fully apparent, widely known, commonly recognized, and anticipated by the *ordinary* user. (emphasis added). *Resteiner v Sturm, Ruger & Co, Inc*, 223 Mich App 374, 380; 566 NW2d 53 (1997).

Here, applying the above test, we find that the danger associated with the butane refill canisters was within the perception and knowledge of the typical and ordinary user. Thus, the danger was open and obvious and summary disposition was properly granted on this claim as well.

Affirmed.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra

[1] For purposes of this opinion, the term "defendants" will apply only to Zippo and Scripto.

[2] Plaintiff does not argue that the FHSA does not apply to this case. Rather, plaintiff only argues that the trial court's determination that no genuine issue of material fact existed regarding whether Scripto's label violated the requirements of the FHSA was erroneous. Plaintiff does not allege that Zippo's label violated the FHSA. Regarding defendant Zippo, nowhere in the pleadings, affidavits or brief does plaintiff allege that Zippo's label failed to comply with the FHSA.