STATE OF MICHIGAN

COURT OF APPEALS

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.

UNPUBLISHED

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

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

MICHAEL J. KELLY, J. (dissenting).

I respectfully dissent.

This action was initially filed against both manufacturers and retailers. Plaintiff's decedent, a twelve-year-old, died of acute congestive heart failure that resulted from butane inhalation. The decedent and his older brother had a history of sniffing butane canisters in order to get "high." The gravamen of plaintiff's complaint against the retailers was breach of duty to warn consumers of dangers associated with the foreseeable misuse of butane fuel, and the gravamen of the complaint against the manufacturers was both failure to warn and failure to add an odorant to the butane fuel in order to deter abuse of the product. Apparently there was conflict between the manufacturers' claims that warnings were ordered placed on their products, stating that they should be kept out of the reach of children, and

evidence produced that young teens were routinely able to purchase the products at retail ostensibly for use in hobby torches, model airplane and boat engines, hair dryers, and curling irons. In any event, the claims against the retailers were settled either before or after the trial court granted defendants Zippo and Scripto's motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court held that plaintiff's second amended complaint did not clearly articulate a claim of failure to comply with the Federal Hazardous Substance Act, 15 USC 1261, and also that the manufacturer had no duty to warn because butane canisters are simple products. I would reverse.

I

The majority agrees that the trial court erred in granting summary disposition to Scripto on plaintiff's claim of inadequate warning. It nevertheless affirms for the reason that plaintiff "failed to demonstrate causation." It hardly needs citation to recall that proximate cause is ordinarily a question of fact for the jury. *Comstock v General Motors Corp*, 358 Mich 163, 180-181; 99 NW2d 627 (1959). As Professor White has put it, "[T]he resolution of 'proximate cause' issues are [sic] not to be made in law books but in jury deliberation rooms." White, Michigan Torts, § 1:2, p 8. The majority has found, however, that plaintiff is unable to surmount the formidable obstacle presented by *Skinner v Square D Co*, 445 Mich 153; 316 NW2d 475 (1994), which states that when a trial court tests factual support for a plaintiff's claim on a motion for summary disposition under MCR 2.116(C)(10), its task is not only to review the record evidence, but also to assess *all reasonable inferences to be drawn therefrom to adequately establish "cause in fact," i.e., "a genuine issue of causation." Id.* at 162-163 (emphasis added). *Skinner* goes on to provide the modifying morass in which plaintiffs' otherwise adequately shown causation circumstances disappear into the swamp of juridical esoterica:

> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at 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.[8]

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[8] However, where several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a "substantial factor" in producing a plaintiff's injuries. [*Skinner*, *supra* at 164-165 (citations omitted).]

Is it speculative to say that before *Skinner* a plaintiff had to present a factually supported causation theory to get to a jury, but after *Skinner* a plaintiff must also go through a much narrower hoop to have the evidence graded as "substantial" by the trial judge, which, obviously, is a discretionary call? The *Skinner* majority decided that a Rube Goldberg evidentiary contraption did not warrant

permitting jury assessment of plaintiff's circumstantial proofs "in inferring a logical causal relationship between defendant's negligence and the plaintiff's injuries." *Id.* at 169. Not because plaintiff's theories were not possible, but because they were "not probable." Another qualitative judicial assessment to precede jury trial. Now we have the camel of "probability" to put through the eye of the "substantial evidence" needle.

Here, the majority says plaintiff failed to present "substantial evidence" that, but for Scripto's failure to warn, plaintiff's decedent would not have died. Doesn't that assume that plaintiff's decedent would have ignored dire warnings, not read them, not believed them, and or not appreciate them? Plaintiff argues that, in the absence of a manufacturers' warning, a jury could infer that decedent thought butane sniffing was like cigarette smoking -- not guaranteed to kill immediately, but probably allowing, at least statistically, a long, full life beyond the age of twelve. Plaintiff analogizes that many children began smoking at the age of twelve and are still around at the age of sixty-six to tell about it. The majority countenances defendants' use of Dixie Patton, the decedent's grandmother and legal guardian, as a surrogate for the manufacturers, fulfilling in fact the parameters of the duty to warn and thus forgiving the manufacturers' non-compliance with the FHSA. This only encourages manufacturers' non-compliance with the FHSA. Even if this "nanny warning" was probative, it was contradicted by the testimony of decedent's brother, Quentin Smith, who clearly denied such warnings. Presumably the trial court didn't believe Smith's testimony, although he was also addicted and was also a ward of Dixie Patton, the grandmother. It seems to me that a grandmother's warning is no substitute for a manufacturer's, and presumably could not satisfy the federal legislature's intent as to the need and assessment of the adequacy of such warnings.

I would reverse as to Scripto on the failure to warn claim as questions of fact and credibility were presented.

II

I also believe that the trial court erred in dismissing plaintiff's defective design claim that defendant manufacturers should have added an odorant to their butane products to discourage inhalation. The affidavits of plaintiff's experts so completely refute these "simple product" and "open and obvious" inhalation risk defenses as to persuade me that the trial court's dismissal turns the favorable view requirements of the summary disposition rule upside down and, in this case, had the effect of construing the evidence most favorably for the defendants. In my view, the affidavit of Mr. Arnold Schwartz, the president of a competing butane marketer, standing alone, would require a reversal of the trial court's ruling. That affidavit is reproduced as appendix A to this dissent. I believe it also convincingly distinguishes this case from *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1; 497 NW2d 514 (1993), and *Pavlik v Lane Ltd/ Tobacco Exporters Int*, 1997 US Dist LEXIS 104 (ED Pa, 1997), relied upon by the majority.

Appended to appellant's brief, as Exhibits I and J, are affidavits of William J. Kitzes, a well-credentialed expert, and Dr. David Benjamin, a clinical pharmacologist and toxicologist who likewise convincingly buttress plaintiff's claims on this issue. They are not appended to this unpublished opinion, but are referenced for the benefit of the higher court.

I would reverse.

/s/ Michael J. Kelly