STATE OF MICHIGAN

COURT OF APPEALS

HOSEA DAVILA-MARTINEZ and PENNY DAVILA-MARTINEZ,

Plaintiffs-Appellants,[1]

V

BRINKS GUARDING SERVICES INC. and HAMPTON PRODUCTS INTERNATIONAL CORP.,

Defendants-Appellees,

and

AEROSPACE AMERICA, INC.

Defendant.

UNPUBLISHED
November 15, 2005

No. 261941
Tuscola Circuit Court
LC No. 03-021827-NP

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition under MCR 2.116(C)(10) to defendants in this product liability action. We affirm.

I

As a favor to a friend, plaintiff agreed to erect an archery tree stand on his father's property in a tree approximately twenty feet above ground in preparation for the 2001 bow hunting season. Plaintiff had purchased the involved tree stand two years earlier. The tree stand as purchased was accompanied by a fastening chain and an "S" hook. According to the manufacturer's instructions, the fastening chain wraps around the selected tree and the "S" hook

---

[1] Penny Davila-Martinez's claims are derivative of her husband. Therefore, this opinion will refer only to Hosea Davila-Martinez as the plaintiff.

serves as a grapple to the links at each end of the chain, thus securing the tree stand to the selected tree. Plaintiff, however, preferred to erect the tree stand in a tree with a wider circumference than the chain and "S" hook provided by the manufacturer could accommodate. Thus, plaintiff customarily used an additional chain and a padlock to extend the length of the fastener securing the tree stand. Plaintiff used the "S" hook to secure one end of the manufacturer's chain to one end of the add-on chain, and then used the lock to secure the other end of the add-on chain to the other end of the manufacturer's chain. When he purchased and first used the tree stand, plaintiff used a Master-brand padlock with a key to secure the chain. According to plaintiff, this arrangement adequately secured the tree stand to the tree and generally worked well, except that he would lose the key to the Master lock and have to replace the lock.

In 2001, plaintiff purchased the Brinks combination lock at issue in order to eliminate the risk of losing the key as had happened previously. Plaintiff testified that when he purchased the Brinks lock he saw nothing on the packaging to indicate any use limitations, and he believed that because the "U" or hook portion of the lock appeared to have the same thickness as the chains to which the lock would be attached, the use of the combination lock for this purpose would be appropriate. Unfortunately, however, the combination lock failed to hold when plaintiff sat on the tree stand. Although plaintiff owned a safety harness, he was not wearing the harness when he sat on the tree stand because it was not his custom to use a safety harness until after he had positioned the tree stand on the tree. Plaintiff fell to the ground, fractured a vertebrae and suffered permanent paralysis.

Plaintiff's complaint alleged that the defendants failed to use reasonable care in the design, manufacture and assembly of the padlock to eliminate all risks of harm which were unreasonable and foreseeable. Plaintiff also asserted that the lock was defective in that it failed to comply with ASTM[2] standard governing the classification of pounds of force a padlock should withstand, and that defendants failed to adequately warn against foreseeable misuse of the padlock.[3] During discovery, defendants introduced evidence that defendant Brinks licensed the use of its name to defendant Hampton under a trademark license agreement and defendant Hampton contracted with a third party company in China to manufacture the combination lock purchased by the plaintiff. The licensing agreement provided in relevant part:

> . . . . [A]ll padlock products provided with a Brinks brand name will meet or exceed Grade 1 requirements as specified per ASTM designation F 883-90

---

[2] The American Society for Testing and Materials (ASTM) is a voluntary standards development organization that develops technical standards for materials, products, systems, and services worldwide.

[3] The tree stand manufacturer, Aerospace America, Inc., was dismissed from the action following a settlement agreement.

> specification[4] except for luggage locks, which are classified as ASTM ungraded padlock. [Footnote added.]

Although plaintiff did not produce the original packaging that accompanied the lock in question, evidence established that defendants used two different types of packaging for the type of Brinks lock at issue in this case. One type of packaging described the padlock as a "sports lock" with references to "indoor/outdoor" and "best used for luggage . . . locker" contained on the packaging. The packaging also listed a security index; basic, high, and max, and characterized the security index of the kind of lock at issue as "basic." The second type of packaging contained only the Brinks logo and a depiction of a security truck with no description of potential uses.

Defendants filed a motion for summary disposition under MCL 2.116(C)(10), arguing that plaintiff's claims failed as a matter of law because (1) they were sellers, and not manufacturers under MCL 600.2947(6); (2) plaintiff used the lock in a manner inconsistent with its intended use, (3) defendants had no duty to warn about the unforeseeable misuse of the padlock; and (4) plaintiff's failure to wear a safety harness was the sole proximate cause of his injuries. In support of their motion, defendants relied upon lay and expert testimony that the lock in question was a convenience lock, appropriate for use on luggage, back packs and sports equipment like bicycles as an anti-theft device, and not a security lock, that because the lock was not a security lock the ASTM Standards were inapplicable, and that because there was insignificant evidence that convenience locks were used by consumers for security purposes, no warnings against the use of the lock for security purposes were necessary. In opposition to the motion, plaintiff asserted that ASTM Standard F 883-90 applied to the lock and that the lock failed to comply with this standard. Plaintiff also argued that defendants failed to adequately warn against using the lock in question for any application involving personal safety.

Following oral arguments, the trial court granted defendants' motion on the basis that the implied warranty running with the padlock was that the padlock would remain locked for anti-theft purposes once a consumer secured property with it. The trial court further concluded that there was no implied warranty of fitness for the purpose of securing a tree stand with the padlock in the manner that plaintiff did, and that the plaintiff had an unreasonable belief that, because the shackle appeared to be the same diameter as the chain, plaintiff could use the padlock to ensure his personal safety. Plaintiff now appeals.[5]

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits,

---

[4] To meet Grade 1 requirements, a padlock must sustain 225 pounds of force.

[5] Defendants also filed a motion to strike plaintiff's proposed expert, Johanson, as a witness under MRE 702. The trial court did not rule on this motion, and this issue is not before us.

depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

III

A.

Plaintiff contends the trial court improperly granted summary disposition on the basis that plaintiff misused the padlock in a materially different manner than the padlock's intended use. Plaintiff first argues that the evidence shows the product was intended to comply with ASTM Standard F 883-90 by handling weight-bearing loads of up to 225 pounds but was defective. Plaintiff next argues that even if the product was not intended to comply with ASTM Standard F 883-90, the padlock's misuse for load-bearing purposes was foreseeable. We find no error.

MCL 600.2947(2) provides:

> A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

The term "misuse" is defined in MCL 600.2945(e), which provides:

> "Misuse" means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances. [See also, *Greene v AP Products*, 264 Mich App 391, 408; 691 NW2d 38 (2004).]

"[A] manufacturer has a duty to design its product to eliminate any unreasonable risk of foreseeable injury." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 55; 649 NW2d 783 (2002). "The intended use of a product can be taken into account in a determination whether an alleged defect in the design of the product created an unreasonable risk of foreseeable injury." *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 758; 593 NW2d 219 (1999). To maintain a manufacturing defect action, a plaintiff "'must prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains.'" *Crews v General Motors Corp*, 400 Mich 208, 217; 253 NW2d 617 (1977), quoting *Piercefield v Remington Arms Co, Inc*, 375 Mich 85, 98-99; 133 NW2d 129 (1965).

We first reject plaintiff's assertion that the padlock in question was defective because it failed to comply with ASTM Standard F 883-90. The licensing agreement between defendant Hampton and the third party company clearly provides for the manufacture of *both* Grade 1 and ungraded locks. As such, plaintiff's assertion, that because the packaging did not designate the lock as an ungraded lock there is an issue of fact as to whether it was intended to be a Grade 1 lock, is unfounded. As our Supreme Court has noted:

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994), quoting *Mulholland* at 416, n 18, 443 NW2d 340, quoting Prosser & Keeton, Torts (5th ed.), § 41, p 269.]

The absence of a particular grade designation on the packaging for the lock is not evidence but instead is mere speculation as to whether defendants intended the lock in question to be a Grade 1 lock as opposed to an ungraded lock. In addition, plaintiffs' reliance on their expert's testimony, that the lock had to be a Grade 1 lock because ASTM Standard F 883-90 was the only standard in existence when the lock was produced, is also insufficient to establish a defect in the product. "[T]here must be facts in evidence to support the opinion testimony of an expert." *Skinner, supra* at 173, citing *Mulholland, supra* at 411. The mere existence of the ASTM standard is insufficient evidence to support plaintiffs' expert's bald assertion that the existence of the standard establishes an intent to comply with the standard.

B.

We next reject plaintiffs' assertion that the evidence raises a question of fact as to whether the misuse of the lock for weight-bearing purposes was foreseeable.

A negligent failure to warn renders a product defective even if the design chosen does not render the product defective. *Greene, supra* at 399, citing *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). While "[m]anufacturers have a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products, the scope of the duty is not unlimited." *Green, supra* at 399 (citation and footnote omitted). MCL 600.2948(2) provides in pertinent part:

> A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

On the other hand, the foreseeable misuse of a product may be inherent in the product itself or may be established by evidence that the manufacturer had knowledge of a particular type of misuse. *Portelli v IR Construction Products Co*, 218 Mich App 591, 599; 554 NW2d 591 (1996), citing *Shipman v Fontaine Truck Equipment Co*, 184 Mich. App. 706, 713; 459 NW2d 30 (1990).

We find no error in the trial court's determination that the misuse of the lock in question for weight-bearing purposes was not foreseeable. Plaintiff presented no evidence that defendants should have been aware that freestanding chains and padlocks were used to supplement the chain and "S" hook configuration designed by manufacturers of tree stands. MCL 600.2947(2); *Greene, supra* at 408-409.

C.

We further find that the trial court properly granted summary disposition because legally plaintiff misused the lock at issue here by utilizing it to secure his personal safety. Locks are designed as anti-theft devices intended to provide security for property. In this case, no evidence established that plaintiff's alternate use to secure his personal safety was one that others considered to be suitable for locks and, therefore, plaintiff's use of the lock for weight bearing purposes cannot be considered reasonably foreseeable. *Id*; MCL 600.2947(2) and MCL 600.2945(e).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Hilda R. Gage

I concur for the reasons stated in Part III C.

/s/ Joel P. Hoekstra