NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1028

ASHLEY MCLAUD,
Appellant

v.

INDUSTRIAL RESOURCES, INC.; INDUSTRIAL RESOURCES OF MICHIGAN; DAN DYKSTRA; IROM, INC.; CHEP (USA), INC.; CHEP INTERNATIONAL, INC.; CHEP CONTAINER AND POOLING SOLUTIONS, INC.; GERRY DYKSTRA

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-14-cv-00737)
District Judge: Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 20, 2017

Before: AMBRO, KRAUSE, and SCIRICA, *Circuit Judges*

(Filed: October 26, 2017)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SCIRICA, *Circuit Judge*.

After she was injured on the job by a conveyor belt, plaintiff Ashley McLaud sued Industrial Resources, Inc., Industrial Resources of Michigan ("IROM"), IR Ventures, Inc. ("IR"), CHEP International, Inc. and CHEP Container and Pooling Solutions, Inc. (collectively, "CHEP"), and Gerald Dykstra asserting claims of strict products liability, negligence, and breach of the implied warranty of merchantability. The trial court granted summary judgment for defendants, and plaintiff appeals.[1] We will affirm.[2]

I.

A.

On April 17, 2012, McLaud suffered injuries to her right hand and forearm when they were caught in a roller on an assembly line conveyor belt. [App. 57] McLaud acknowledged the incident was an accident: her arm was trapped in the machine as the result of her attempt to pull a prank on a co-worker. [App. 332] McLaud and a co-worker, Nick Cona, planned to place a rat trap so that a colleague would step on it. [App. 59] Cona tossed the trap in McLaud's direction, but the trap landed on the assembly line conveyor belt next to McLaud. [*Id.*] When McLaud tried to grab the trap off the conveyor

[1] We review de novo a district court's decision to grant summary judgment. *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260 (3d Cir. 2007).

[2] The trial court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291. To ensure final judgment has been rendered against all parties, as required by 28 U.S.C. § 1291, we asked the parties for supplemental briefing on the status of McLaud's original claims against IROM. As plaintiff's counsel stated in his responsive brief filed on August 18, 2017, McLaud ultimately did not pursue her claims against IROM because she is instead pursuing them against IR as IROM's alleged successor.

belt, her hand and arm became stuck in the machine's roller. [*Id.*]

At the time of the incident, McLaud worked for Millwood, a Pennsylvania company that repaired wooden pallets for other companies, including defendant CHEP International, Inc. [App. 57–58] The machine that injured McLaud had traded hands several times until it ended up at Millwood. It was originally produced by Omni Metal Craft Corporation and sold to IROM. IROM sold the machine to Endless Warehouse in 1997, which sold the machine to Millwood in 2007. [App. 60–61]

At some point before McLaud's injury, the machine was refitted, though the parties dispute who undertook the refit. McLaud alleges that CHEP was involved, but CHEP insists that Millwood was solely responsible for the refit. [App. 61–62]

IR is a party to this dispute as the alleged successor to IROM. When IROM dissolved, IR purchased some of IROM's assets through a bill of sale that stated IR was not responsible for any of IROM's existing legal obligations. [App. 61] As the trial court observed, "IR is owned by a different group of investors" than IROM, and "IR is located at an address that is different from where IROM was located, changed most of its staff and employees, continues to manufacturer material handling equipment, has developed new products for sale, and has a customer base that is materially different from the customer base of IROM." *McLaud v. Indus. Res., Inc.*, No. 3:14-CV-00737, 2016 WL 7048987, at *3 (M.D. Pa. Dec. 5, 2016) (internal citations omitted). But the court also noted that "IR continues to use IROM's slogan and utilizes some of the same manufacturing work force." *Id.*

B.

McLaud's claims can be sorted into two groups.[3] First, McLaud asserts claims for strict products liability, negligence, and breach of warranty against IR as the purported successor to IROM. Although a successor generally does not assume liability of a predecessor by virtue of an asset purchase agreement, McLaud alleges that the product-line exception applies. Second, based on the allegation that CHEP was involved with the machine's refit, McLaud asserts the same claims against CHEP.

The trial court granted summary judgment in favor of IR and CHEP on all claims. With respect to IR, the trial court concluded that the product-line exception did not apply and IR was therefore not liable. As to CHEP, the court concluded there was no evidence that it was involved with the machine's refit.

II.

McLaud raises four arguments on appeal. First, she contends that the trial court erred in ruling on the applicability of the product-line exception to her claims against IR rather than leaving this question to a jury. Second, she alleges there is a material dispute of fact regarding her claims against IR. Third, and relatedly, McLaud contends that the court violated her Seventh Amendment right to a jury trial on this issue. Finally, she contends that the court erred in granting summary judgment on her claim against CHEP for negligently refitting the machine.

[3] McLaud asserted the same claims against Gerald Dykstra but consented to their dismissal before the trial court issued its summary judgment decision.

A.

We agree with the trial court's decision rejecting McLaud's successor liability claims against IR. Under Pennsylvania law, when "one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor." *Polius v. Clark Equip. Co.*, 802 F.2d 75, 77 (3d Cir. 1986); *see also Cont'l Ins. Co. v. Schneider, Inc.*, 873 A.2d 1286, 1291 (Pa. 2005). The only relevant exception to this rule is the product-line exception, which provides that

> [w]here one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

Keselyak v. Reach All, Inc., 660 A.2d 1350, 1353 (Pa. Super. Ct. 1995) (quoting *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 825 (N.J. 1981)). McLaud contends that the product-line exception applies in this case. She alleges IR is the successor to IROM who purchased the machine from Omni (the original manufacturer).

To determine whether the product-line exception applies, Pennsylvania courts consider three factors:

> (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.

Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 109 (Pa. Super. Ct. 1981) (quoting *Ray v.*

Alad Corp., 560 P.2d 3, 9 (Cal. 1977)). The trial court concluded that the product-line exception did not apply in this case. McLaud objects to both the manner in which the court reached its conclusion and the substance of its determination.

1.

McLaud contends the trial court erred by balancing the product-line exception factors itself rather than submitting them to a jury. In reaching its conclusion, the trial court relied on the Pennsylvania Supreme Court's decision in *Schmidt*, which suggests in dicta that the equitable nature of the product-line exception analysis and the nature of its multi-factor balancing test favors allocating the decision to a judge. *McLaud*, 2016 WL 7048987, at *6 n.3; *see also Schmidt v. Boardman Co.*, 11 A.3d 924, 946 n.24 (Pa. 2011). The court also cited to the Pennsylvania Superior Court's *Dawejko* decision, which noted that "in any particular case the court may consider whether it is just to impose liability on the successor corporation." *McLaud*, 2016 WL 7048987, at *5 (quoting *Dawejko*, 434 A.2d at 111).

Challenging this analysis, McLaud suggests it was error to follow *Schmidt*'s dicta and that the Superior Court's decision in *Schmidt* held otherwise. We disagree. In *Schmidt*, the Superior Court did not consider the question of whether a judge or a jury was to make the product-line exception determination. The issue before the Superior Court was whether the trial judge had accurately summarized existing substantive law on the product-line exception in its jury instructions. *See Schmidt v. Boardman Co.*, 958 A.2d 498, 509–11 (Pa. Super. Ct. 2008).

Regardless, we need not decide whether a judge or jury should usually decide the applicability of the product-line exception because, based on the undisputed record evidence, *see infra* subsection II.A.2, no reasonable juror could have concluded that the product-line exception applied here. *See Faush v. Tuesday Morning Inc.*, 808 F.3d 208, 215 (3d Cir. 2015) ("'When a legal standard requires the balancing of multiple factors, as it does in this case, summary judgment may still be appropriate even if not all of the factors favor one party,' so long as the evidence 'so favors' the movant that 'no reasonable juror' could render a verdict against it." (quoting *In re Enterprise Rent-A-Car Wage & Hour Emp't Litig.*, 683 F.3d 462, 471 (3d Cir. 2012))); *see also Kradel v. Fox River Tractor Co.*, 308 F.3d 328, 330 (3d Cir. 2002) (affirming summary judgment granted on basis of the product-line exception under Pennsylvania law); *LaFountain v. Webb Indus. Corp.*, 951 F.2d 544, 545 (3d Cir. 1991) (same).

2.

McLaud next contends that a genuine issue of material fact existed on whether the product-line exception applied. We disagree. While no single factor is dispositive in examining whether the product-line exception applies, *see Schmidt*, 11 A.3d at 945, several courts have concluded that the first factor (whether remedies are still available against the original manufacturer) is logically the most important. *See Kradel*, 308 F.3d at 332 (3d Cir. 2002); *Keselyak*, 660 A.2d at 1353–54. This reflects the public policy purpose of the product-line exception, namely requiring the manufacturers of defective products to act as insurers against the risk of injury that their products may cause. *See Dawejko*, 434 A.2d at 109. Here, it is undisputed that Omni, the company that

manufactured the machine, is still a viable entity whom McLaud chose not to sue.

We also agree that the second factor, the successor's ability to assume a risk spreading role, does not favor applying the product-line exception, because IR's predecessor (IROM) did not manufacture the defective product.

Finally, the third factor is not satisfied in this case because the undisputed record evidence makes clear IR did not enjoy Omni's good will. As the trial court noted, IR's manufacturing operation is distinct from that of IROM, IR is owned by a different group of investors, it services a different customer base, it uses different manufacturing designs than IROM, and it has developed new products for sale. *Id.* And IROM didn't even manufacturer the machine in question—Omni did. IR did not enjoy Omni's good will and McLaud has failed to rebut these underlying facts.[4]

C.

McLaud also argues that the trial court erroneously granted summary judgment on her negligence claim against CHEP. Although the court identified and addressed four theories of negligence alleged by McLaud against CHEP, McLaud principally argues on appeal that there was a genuine dispute of material fact as to whether CHEP negligently

[4] McLaud also contends that the trial court violated her Seventh Amendment right to a jury trial by granting summary judgment on the question of the product-line exception. However, it is well settled that summary judgment, when properly granted, does not violate the Seventh Amendment. *See In re TMI Litig.*, 193 F.3d 613, 725 (1999). McLaud's citation to *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525, 537–538 (1958), does not support her argument. *Byrd* held that a plaintiff had a right to a jury trial where there were genuine disputes of material fact, even if state law provided for the trial judge to make the factual determination. *Byrd*, 356 U.S. at 537–538. As discussed above, there are no genuine disputes of material fact and no reasonable juror could have concluded that the product-line exception applied here.

refitted the machine. If CHEP was not involved in the refit, it cannot be liable here. The trial court concluded that McLaud had only produced "speculative evidence" in support of her argument that CHEP was involved in refitting the machine. *See McLaud*, 2016 WL 7048987, at *8. We agree.

In support of her claim that CHEP was involved with the machine's refit, McLaud points to the statement of David Shingler, Millwood's Plant Manager. [App. 71] When asked if CHEP was involved with the refit, Shingler responded, "I don't know." App. 61. McLaud argues this uncertainty creates an inference that CHEP *was* involved. McLaud also relies on the "Services Agreement" between Millwood and CHEP, which includes boilerplate language requiring Millwood to provide safe working conditions for its employees. According to McLaud, this, and Shingler's testimony suggest CHEP was involved with the machine's refit.

McLaud's allegations are purely speculative. At the summary judgment stage, the non-movant is entitled to have all "justifiable inferences" drawn in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But McLaud is not asking for a justifiable inference; instead, she speculates that CHEP was involved in refitting the machine in the face of direct evidence to the contrary. Speculation, however, "does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 333 (3d Cir. 2005) (quoting *Hedberg v. Ind. Bell Tel. Co., Inc.*, 47 F.3d 928, 932 (7th Cir. 1995)).

The undisputed record evidence establishes that CHEP was not involved in the refit. Shingler testified that Millwood was responsible for refitting the machine and that

Millwood employees implemented the refit. [App. 61] Additionally, Brad Arnold, Millwood's Executive Vice President of Operations, testified that Millwood controlled all operations related to the machine. [App. 60] In short, there is no actual evidence CHEP had any involvement in the machine's refit. To survive summary judgment, the non-movant must produce more than a "mere scintilla" of evidence. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del.*, 998 F.2d 1224, 1230 (3d Cir. 1993). McLaud has failed to do so. [5]

III.

For the foregoing reasons, we will affirm the judgment of the District Court.

[5] In the final two paragraphs of her opening brief, McLaud also contends the trial court erred in granting summary judgment on her claim of a de facto joint enterprise or joint venture between Millwood and CHEP. McLaud did not raise this claim in her amended complaint, only introducing it for the first time in her response to CHEP's motion for summary judgment. *See McLaud*, 2016 WL 7048987, at *8 n.5. This was improper, and we agree that the trial court properly refused to consider it. *See Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in her brief in opposition to a motion for summary judgment."). In any event, McLaud failed to present a substantive argument on this claim in her opening brief before this Court, so this argument is waived. *See Reynolds v. Wagner*, 128 F.3d 166, 178 (3d Cir. 1997).