NOT DESIGNATED FOR PUBLICATION

FRANCES GRANDPRE	*	**NO. 2002-CA-0032**
VERSUS	*	**COURT OF APPEAL**
K & B SERVICES, INC., GRACIOUS LIVING INDUSTRIES, INC. AND XYZ INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-8751, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
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JUDGE MAX N. TOBIAS, JR.
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(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias, Jr., and Judge David S. Gorbaty)

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AFFIRMED.

In this products liability case, the plaintiff has appealed from the granting of a summary judgment by the trial court dismissing all claims under the Louisiana Products Liability Act, La. R. S. 9:2800.52, *et seq*. For the following reasons, we affirm the judgment and remand the matter to the lower court for further proceedings.

Plaintiff, Frances Grandpre ("Mrs. Grandpre"), purchased a plastic folding lawn chair from a K&B Drug Store on 7 May 1996. About ten days later, while sitting in the chair for the first time, the chair collapsed, causing Mrs. Grandpre to fall to the ground. She sued K&B Services, Inc. ("K&B") and Gracious Living Industries, Inc. ("GLI"), the chair's manufacturer, under the Louisiana Products Liability Act (hereinafter "LPLA").

The defendants filed motions for summary judgment, arguing that the plaintiff had insufficient evidence to proceed to trial on claims under the LPLA. The trial court granted the motion in favor of GLI, dismissing all

claims against it, and granted partial summary judgment in favor of K&B, dismissing all but the failure to warn claim. No written reasons were given for judgment.

Plaintiff and K&B each filed motions for new trial, which were denied on 27 June 2001. The plaintiff appeals from that judgment.

Pursuant to La. C. C. P. art. 966 (C), summary judgment is granted "when there is no genuine issue as to material fact and the mover is entitled to judgment as a matter of law." To show that no genuine issue of material fact exists, a defendant must shoe that the plaintiff lacks factual support for any essential element of the claims on which the plaintiff will bear the burden of proof at trial. La. C. C. P. art. 966 (C)(2). We perform a *de novo* review of summary judgments.

The record shows that Mrs. Grandpre purchased the chair at the K&B in the Gentilly portion of New Orleans, Louisiana ten days before the accident. It is a light plastic lawn chair that may be folded when not in use. Mrs. Grandpre does not recall if there were any labels of any kind on the chair when she purchased it. She testified in her deposition that when she purchased the chair, there was no packaging, wrapping, instruction booklet

and/or separate warnings concerning weight limitations of the chair.

The accident occurred on the porch of the plaintiff's home when for the first time the chair was used. Mrs. Grandpre was on the porch in the early evening to converse with her husband, Arthur Grandpre, her adult children, Mark and Ramona, and her daughter's two young children. Mr. Grandpre carried the chair out to the porch from inside and opened it for his wife. Mrs. Grandpre was seated in the chair for several minutes when it collapsed beneath her, leaving her in a seated position on the floor of the porch.

By her own admission, Mrs. Grandpre weighed 287 pounds at the time of the accident. She testified in her deposition that she did not see the 220-pound weight limit warning on the chair and maintained that if she had, she would not have sat in the chair. According to their deposition testimony, neither Mr. Grandpre nor the Grandpre children recalled seeing any such warning.

The chair was manufactured by GLI. According to the affidavit of John D. Slater, GLI Operations Manager, the chair is a "Rimini" model manufactured in 1996. During the manufacturing process and before the

chair was shipped to New Orleans, two weight capacity warnings were attached to the chair. The first was an adhesive label printed in, *inter alia*, English in bold black letters on a yellow background and bordered in red. This label cautioned: "This chair is intended for use by persons weighing less than 220 lbs (100 kg)." The label was attached to the upper rear of the seating surface.

The second weight-capacity warning was a molded label cast into the actual plastic body of the chair which states: "WEIGHT NOT TO EXCEED 100KG 220 LBS." This warning is positioned on the reverse of the backrest and is visible at all times.

Plaintiff's expert, Dr. Courtney C. Busch, examined the damaged chair. He testified that instructions on opening and folding the chair were attached to the chair back and bottom and the weight limitation was cast into the back of the chair.

An exemplar chair was purchased for testing by Dr. Busch at a local K&B Drug store. It came wrapped in clear plastic. On the upper rear of the seat was a yellow tag with a weight limitation of 220 pounds. The same weight limitation was cast on the rear of the seat back. He found nothing

wrong with the composition or construction of the chair itself, but concluded that the chair failed due to "overload forces." Dr. Busch testified that a 220 pound sandbag dropped onto the chair from two inches above the seat ("dynamic load"), caused it to collapse in the same manner as the chair collapsed under the plaintiff; however, the chair was able to hold the same sandbag when it was gently placed on it ("static load").

Based on his testing, Dr. Busch found that the chair is capable of supporting 282 pounds statically, although the occupant would have to exert extreme care while seated and particularly while settling onto the seat.

The plaintiff's first assignment of error is that the trial court erred in failing to find that the chair was unreasonably dangerous and dismissing the LPLA claims against GLI. The plaintiff argues that a cause of action exists under all four of the theories of liability outlined in La. R. S. 9:2800.54B.

Generally, under the LPLA, a manufacturer of a product is liable for damage proximately caused by a characteristic of the product that rendered it "unreasonably dangerous." La. R.S. 9:2800.54A. The plaintiff bears the burden of proof under the statute. La. R.S. 9:2800.54D. The plaintiff maintains that the chair manufactured by GLI was unreasonably dangerous

because of (1) its construction or composition; (2) its design; (3) its inadequate warnings; and (4) non-conformity to an expressed warranty. *See* La. R.S. 9:2800.54B(1)-(4).

A product is "unreasonably dangerous in construction or composition" as defined in La. R.S. 9:2800.55:

> if, at the time the product left the manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer.

The plaintiff contends that the chair was defective because it could not support the amount of weight it was designed and/or constructed to hold. As the GLI points out, the plaintiff's expert testified that the chair was able to hold a static load of up to 282 pounds, which is the type of load contemplated by the weight limitations warnings.

We find the chair is not defective in design, construction or composition because it cannot sustain a 220-pound dynamic load. As the plaintiff's expert testified, the chair was not defective as alleged by Mrs. Grandpre. In addition, this is not an instance where the product's user was at or near the weight limitation. The chair was not designed for users in excess of 220 pounds, as evidenced by the warning labels and Dr. Busch's

testimony. Therefore, this assignment of error is without merit.

Next, the plaintiff argues that the chair was unreasonably dangerous due to an inadequate warning. This is because the yellow sticker, which GLI claims was on the chair when it left the factory, was not on the chair when purchased by Mrs. Grandpre. While the plaintiff admits that there is a 220-pound weight limit warning cast into the plastic back of the chair, she argues that it is difficult to read and, therefore, inadequate.

A product may also be unreasonably dangerous because:

> at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

La. R. S. 9:2800.57A.

The only evidence in the record regarding the warnings that were placed on the chair by GLI before shipping is the affidavit of Mr. Slater. The affidavit states that a red and yellow warning label was placed on the chair by GLI before it was sent to K&B. On the other hand, the plaintiff testified that when she purchased the chair from K&B, the chair was not in any packaging and did not have this warning label on it. By dismissing the failure to warn claim, the trial court must implicitly found that the label was in place when it left GLI's control, but was later removed before the sale to

Mrs. Grandpre.

It is significant that the exemplar chair purchased by Dr. Busch for testing was wrapped in plastic with the red and yellow label in place. This indicates that it is more likely than not the warning label was on the chair in question when it left the control of GLI. The only reasonable conclusion based on the record is that the label was removed when the chair was placed on display by K&B or while the chair was on display.

We also find that the label present on the plaintiff's chair when purchased adequately informed her of the 220-pound weight limitation. GLI cannot be held responsible for the plaintiff's failure to read a visible warning before she sat on the chair. Mrs. Grandpre admits that if she had read the warning, she would not have sat on the chair. Therefore, the warning was adequate and this assignment of error is without merit.

The final theory under the LPLA is that a product may be unreasonably dangerous because it does not conform to an express warranty made by the manufacturer about the product. *See* La. R. S. 9:2800.57B(4). While the plaintiff claims that this theory applies to the facts of the instant case, the argument is not discussed in her brief. In addition, the plaintiff admits in her deposition that no warranty was extended to her and she does not allege that she was induced to use the chair by any labels on it.

Therefore, this assignment is also without merit.

Consequently, we find that the trial court correctly entered summary judgment in GLI's favor, dismissing it with prejudice from the lawsuit. The evidence shows that the chair was adequately designed and constructed for use by individuals weighing 220 pounds or less and could even sustain static loads of up to 282 pounds. In addition, the chair, when sold by GLI, adequately warned users of the weight limitations. Therefore, we affirm the judgment in favor of GLI.

In addition to suing GLI, the plaintiff also asserted LPLA claims against K&B, the non-manufacturer seller of the chair. A "seller" is defined by La. RS. 9:2800.53(2) as a "a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value." In order for a seller to be held liable as a manufacturer, the plaintiff must prove that party meets one of the definitions of "manufacturer" found in La. R.S. 9:2800.53 (1).

The plaintiff argues that at the time she purchased the chair, she believed the chair to be a K&B product because (1) there was no labeling on it to suggest that it was not manufactured by K&B and (2) over the years she had purchased a number of items known as "K&B items." However, the

plaintiff has not produced any evidence to show that K&B labeled the product as its own or held itself out to the public as the manufacturer of the chair. In fact, the chair in question clearly identified GLI as its manufacturer when purchased by the plaintiff.

The trial court obviously recognized that the yellow warning label may have been removed by K&B employees before the chair was placed on display at the store. Therefore, the court did not dismiss the failure to warn claim asserted against K&B. However, the LPLA claims against K&B were correctly dismissed.

Based on the foregoing, we affirm the trial court's dismissal of all LPLA claims against the defendants and the entry of judgment in favor of GLI. The remaining claim against K&B is remanded for further proceedings. All costs of the appeal are assessed against the plaintiff.

AFFIRMED.