STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KELLY and JOYCE KELLY,

Plaintiffs-Appellants,

v

R. D. WERNER CO, INC.,

Defendant-Appellee,

and

PRIME COAT TECHNOLOGY OF GRAND BLANC, PRIME COAT TECHNOLOGY, INC., PRIME COATINGS, INC., COLLIER CORPORATION, PRO COAT TECHNOLOGIES, INC., PRO COAT SYSTEMS, INC., PHOENIX AUTOMATION, INC., and PROCESS EQUIPMENT CORPORATION, a/k/a JODALL CORPORATION, a/k/a/ THE HASTINGS GROUP, INC.,

Defendants.

UNPUBLISHED
March 30, 1999

No. 199782
Genesee Circuit Court
LC No. 94-032041 NP

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's order granting defendant R.D. Werner Co.'s motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiffs first argue that the trial court improperly dismissed their design defect claim. We disagree. The trial court's disposition of a motion for summary disposition is reviewed de novo. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997).

A "simple tool" is a product all of whose essential characteristics are fully apparent. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 385; 491 NW2d 208 (1992). We agree with the trial court that the upper section of the extension ladder was a "simple tool." See *Rule v Giuglio*, 304 Mich 73; 7 NW2d 227 (1942). We find that *Willard v Dore*, 41 Mich App 508, 510; 200 NW2d 369 (1972), is distinguishable because the ladder involved in that case was of a unique design and there was a factual question whether the plaintiff lacked the prior knowledge and the ability to determine if the ladder was defective.

We also agree that the alleged danger of the ladder was "open and obvious." "There is no duty to warn *or protect* against dangers obvious to all." *Glittenberg*, *supra* at 160. Also, as this Court observed in *Mallard v Hoffinger (On Remand)*, 222 Mich App 137, 143, n 4; 564 NW2d 74 (1997), the portions of *Glittenberg* suggesting that a manufacturer may have a duty to reduce the risk posed by even an "obvious" danger inherent in a simple product constitute dicta and, accordingly, are not controlling.

Here, the trial court focused on the absence of evidence of "the magnitude of the risk." *Owens v Allis-Chalmers Corp*, 414 Mich 413; 326 NW2d 372 (1982). A prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of foreseeable risks, including the likelihood of occurrence of the type of accident precipitating the need for the safety device. *Gregory v Cincinnati Inc*, 450 Mich 1, 13, n 11; 538 NW2d 325 (1995). Plaintiff's expert's supplemental affidavit did not overcome the absence of evidence regarding the incidence of ladder slippage. The fact that a ladder without safety feet has a coefficient of friction "three to four times" lower than one with safety feet is not informative when the baseline risk of slippage is not known. While some decisions of this Court have permitted design defect claims to go forward without "magnitude of the risk" evidence, those cases did not involve a "simple tool."[1]

Plaintiffs also argue that the trial court erred in dismissing their failure to warn claim. We disagree. There was no duty to warn where the ladder was a "simple tool" and the alleged danger was open and obvious. *Glittenberg*, *supra*. Furthermore, in most failure-to-warn cases, proximate cause is not established absent a showing that the plaintiff would alter his or her behavior in response to a warning. *Bordeaux v Celotex Corp*, 203 Mich App 158, 166; 511 NW2d 899 (1993). Here, plaintiff Michael Kelly testified that he used the ladder because it was the only one available to him. Plaintiffs offered no evidence that he would have refused to use the ladder if a warning had been provided.

Accordingly, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder

[1] Plaintiff also cites several federal court decisions, but we are nonetheless bound by the decisions of our Supreme Court. *Mallard, supra* at 143, n 4.