

STATE OF MICHIGAN
COURT OF APPEALS

MARK BROWN, Individually and as Next Friend
of DOMINICK BROWN, a Minor,

UNPUBLISHED
June 15, 2001

Plaintiffs-Appellees,

v

No. 215056
Wayne Circuit Court
LC No. 95-509406-NO

NATIONAL PRESTO INDUSTRIES, INC.,
WELSH CO., SHERRY BROWN, EVENFLO
PRODUCTS CO., INC., COSCO, INC., GERRY
BABY PRODUCTS, INC., KOLCRAFT
ENTERPRISES, INC., CENTURY PRODUCTS
CO., BABY TREND, INC., SPECTRUM
INDUSTRIES, FISHER PRICE, SAFETY FIRST,
INC., and GERBER BABY PRODUCTS, INC.,

Defendants,

and

TOYS R US, INC.,

Defendant-Appellant.

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant Toys R Us, Inc., appeals as of right from a default judgment entered in favor of plaintiffs. We reverse and remand.

This case stems from an accident in which Dominick Brown was severely burned. On the day of the accident, Dominick, then aged eight months, was in a walker that plaintiffs contend had been purchased at one of defendant's stores. Dominick was burned by hot oil when he knocked over a deep fryer by pulling on the appliance's electrical cord. The fryer was sitting on a kitchen counter, and apparently Dominick had maneuvered to it by using his walker. The fryer was manufactured by National Presto Industries, Inc. Because the walker had been discarded after the accident, plaintiffs did not know who manufactured it. Accordingly, they named all

known walker manufacturers as defendants. During the course of the proceedings, all of these manufacturers, except Welsh Co., were dismissed from the action. Welsh never filed an answer and did not appear at trial. Eventually, Presto was dismissed from the lawsuit after settling with plaintiffs.

Appellant filed a motion for summary disposition arguing, in part, that the danger associated with the walker was open and obvious. Plaintiffs countered that the walker was not a simple tool, and therefore the open and obvious doctrine was inapplicable. The trial court agreed with plaintiffs and denied appellant's motion.

On May 11, 1998, the first day of trial, appellant informed the trial court that a petition for removal to United States District Court, Eastern District of Michigan, had been filed earlier that same morning. Plaintiffs responded that the removal was improper and stated that an emergency motion to remand the case back to the state court would be filed. The trial court ruled that appellant had waived the right of removal by waiting too long to file a petition. The court stated that the parties could resolve the matter in federal court, and that in the meantime the court would move forward with jury selection. Appellant argued that it could not participate in jury selection because doing so might subject it to the trial court's jurisdiction. Plaintiffs then moved for a default judgment, which the trial court granted.

That afternoon, plaintiffs obtained an order from the federal district court remanding the case back to the state court. The district court reasoned that appellant's petition was untimely. The next day, the trial court reiterated that going forward with the proceedings the day before had been proper. Given that appellant refused to go forward with jury selection, the trial court stated that the default judgment had been properly granted.

At the subsequent hearing on plaintiffs' motion for entry of the default order, appellant again argued that the trial court had lacked jurisdiction on the matter when the default judgment had been granted. The court responded that because the petition for removal had not been filed with the court until after 3:00 p.m. on May 11, 1998, the court retained jurisdiction at the time it ruled.

We agree with appellant that the trial court erred in finding that the walker is not a simple tool. The walker was not "a highly mechanized and intricately complex machine." *Cacevic v Simplistic Engineering Co*, 241 Mich App 717, 729; 617 NW2d 386 (2000). Rather, the walker was "a simple thing of universally known characteristics," *Jamieson v Woodward & Lothrop*, 101 US App DC 32, 37; 247 F2d 23 (1957), whose "relevant condition or feature that creates the danger associated with its use is fully apparent, widely known, commonly recognized, and anticipated by the ordinary user or consumer." *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 392; 491 NW2d 208 (1992).

Generally, a seller of a product has a "duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products." *Id.* at 387 (footnote omitted). However, no duty to warn is imposed for open and obvious dangers that are readily apparent in cases involving simple tools. *Id.* at 399. Plaintiffs' argument seems to be that Dominick would not have been burned if the walker had not made him mobile. Thus, plaintiffs are arguing that the very behavior the walker is intended to promote is the very thing that makes

it dangerous. Not only is such a danger readily anticipated, it is expected, indeed desired, by those who purchase child walkers.

Appellant also argues that when the circuit court granted plaintiffs' default motion on May 11, 1998, the court did not have jurisdiction of the case. Appellant contends that the federal district court obtained jurisdiction once defendant filed its petition of removal with the district court and gave notice of removal to the circuit court. We agree. 28 USC § 1446(d) states:

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

The problem here centers on when notice was filed with the trial court. At the hearing on plaintiffs' motion for entry of the default order, the trial court indicated that it retained jurisdiction at the time it granted plaintiffs' motion for default because the petition for removal had not been filed with the court until after 3:00 p.m. on the first day of trial. We disagree with this.

The reason the statute calls for the filing of notice of removal with the clerk of the state court is to make certain that the state court is informed that it "can no longer proceed with the case until the federal court decides whether it will retain jurisdiction or not. There can be no other purpose for this requirement." *Adair Pipeline Co v Pipeliners Local Union No 798*, 203 F Supp 434, 437 (SD Tex, 1962), *aff'd* 325 F2d 206 (CA 5, 1963). Accord *United States ex rel Echevarria v Silbergliitt*, 441 F2d 225, 227 (CA 2, 1971). See also *People v Wynn*, 73 Mich App 713; 253 NW2d 123 (1977). The record shows that on the first day of trial defendant verbally notified the court of the removal petition immediately after the settlement with Presto was placed on the record. It also appears that the court was handed a copy of the removal petition at that time. This was sufficient to satisfy the notice requirement of 28 USC § 1446(d). See *Manufacturers & Traders Trust Co v Hartford Accident & Indemnity Co*, 434 F Supp 1053, 1055 (WD NY, 1977)(observing that "the filing of a copy of the petition for removal is a procedural and ministerial act, failure of which does not defeat the federal court's jurisdiction").

Reversed and remanded for entry of summary disposition for appellant. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.

I concur in result only.

/s/ William B. Murphy