STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE J. HOSTE,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION PLYMOUTH, U.S. RECREATIONAL SKI ASSOCIATION, and SHANTY CREEK MANAGEMENT,

Defendants,

and

RELIABLE RACING SUPPLY,

Defendant-Appellee.

UNPUBLISHED
July 13, 2004

No. 245804
Antrim Circuit Court
LC No. 93-006013-NO

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In this products liability case, plaintiff appeals as of right the trial court's order granting summary disposition in favor of Reliable Racing Supply (Reliable) under MCR 2.116(C)(10). This case arises out of a skiing accident that left plaintiff a quadriplegic. We affirm.

At a ski race that was a part of the Plymouth All American Ski Series at Schuss Mountain, the course was marked by a series of slalom gates that consisted of a flexible pole, a bamboo pole, and a banner affixed between the two. Plaintiff was asked to "forerun" the course the night before the race, and was injured when his head struck one of the gate banners, which failed to give way. Defendant Reliable manufactured the flexible pole that was a part of the gate. Plaintiff's complaint alleged, in part, that Reliable breached its duty to warn of the dangers associated with solidly fastening a banner to the two gate poles.

On appeal, plaintiff argues that the trial court erred when it found that Reliable did not have a duty to warn of this danger due to the lack of evidence establishing that Reliable had actual or constructive knowledge of the danger. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). All of the affidavits,

pleadings, depositions, admissions, and other evidence submitted by the parties are viewed in the light most favorable to the nonmoving party. *Id*. If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*.

To support a finding for negligent design, a theory based on a failure to warn "renders the product defective even if the design chosen does not render the product defective." *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). The standard of care "includes the duty to warn about dangers regarding the intended uses of the product, as well as foreseeable misuses." *Id*. A duty to warn is imposed on a manufacturer if: (1) the manufacturer had "actual or constructive knowledge of the claimed danger," (2) the manufacturer had "'no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition,'" and (3) the manufacturer "fail[ed] to exercise reasonable care to inform [users] of [the product's] . . . dangerous condition or of the facts which make it likely to be dangerous." *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 389-390; 491 NW2d 208 (1992), quoting 2 Restatement Torts, 2d, § 308, p 301.

To establish that defendant had actual or constructive knowledge of the danger, plaintiff relied on the following rule of the Federation Internationale de Ski (FIS):

> In giant slalom and Super-G two pairs of slalom poles are used, each pair carrying a banner between them. Of these four slalom poles, the one which is the turning pole must be a flex-pole. The banners should not be fastened solidly to the slalom poles. Fixations which could cause injury are forbidden.

We conclude that this rule indicates that the solid affixation of a banner between gate poles negatively impacts the gate's safety. Considerable dispute arose below concerning the relationship between the third and fourth sentences of the rule. While we agree with the trial court that the link between solid fastening of a banner and potential injury is not precisely set forth in the rule, such a connection is clearly implied. Indeed, the only "fixation" referenced in the rule is the solid fastening of gate banners. In essence, fixations causing injury is the category within which the subcategory "fastened solidly" resides. In turn, it is reasonable to conclude that this subcategory would include all manners of affixing the banner that prevent it from tearing or breaking away from the poles.

Nevertheless, while product "[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." *Glittenberg*, *supra* at 387-388. One of the limits on this duty is the sophisticated-user doctrine. The sophisticated-user doctrine presumes that "where a purchaser is a 'sophisticated user' of a manufacturer's product, the purchaser is in the best position to warn the ultimate user of the dangers associated with the product, thereby relieving the sellers and manufacturers from the duty to warn the ultimate user." *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591, 599; 554 NW2d 591 (1996).

> The rationale behind the sophisticated-user doctrine is that the manufacturer markets a particular product to a class of professionals that are presumed to be experienced in using and handling the product. Because of this special knowledge, the sophisticated user will be relied upon by the manufacturer to

> disseminate information to the ultimate users regarding the dangers associated with the product. [*Id*. at 601.]

Shanty Creek, which purchased Reliable's pole and was responsible for setting up the course, could be presumed by Reliable to be experienced in using and handling its product. Further, Shanty Creek acknowledged that it was familiar with the FIS rules including the rule applicable here.[1] Accordingly, it is Shanty Creek that was in the best position to warn the ultimate user of the dangers associated with solidly affixing a banner between the two poles of the slalom gate, or to avoid those dangers by affixing the banner properly.[2] See *Antcliff v State Employees Credit Union*, 414 Mich 624, 639; 327 NW2d 814 (1982) (concluding that the two plaintiffs who were injured when the scaffolding on which they worked collapsed were charged "with full appreciation of the danger of inadequately supporting the scaffold" given "their knowledge and experience as riggers").

We affirm.

/s/ Richard A. Bandstra
/s/ Bill Schuette

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[1] We do not find dispositive the fact that the FIS rule in issue was not directly applicable to the Schuss Mountain event. Regardless of whether the terrain was large enough and steep enough to set up a giant slalom or Super-G race, the warning regarding the construction of the gates was still applicable. The danger associated with this construction would be present whenever such a gate was constructed for use in a downhill skiing event.

[2] Whether the ultimate user is identified as the actor setting up the course or plaintiff, the strictures of the sophisticated user doctrine still mediate in Reliable's favor.