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NO. COA01-1183

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

BILLY CUMMINGS, and  
MARY CUMMINGS,  
Plaintiffs,

v.

Forsyth County  
No. 00 CVS 4110

THE GLIDDEN COMPANY,  
Defendant,  
and

DUROTECH CO., a/k/a AIRLESSCO  
DUROTECH, DUROTECH CO.,  
DUROTECH CORPORATION,  
Defendant and Third-Party  
Plaintiff,

v.

TRIAD PRESSURE SYSTEMS, INC.,  
and MINARIK CORPORATION,  
Third-Party Defendants.

Appeal by plaintiffs from judgment filed 11 May 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 11 June 2002.

*Anderson Korzen & Associates, P.C., by John J. Korzen, for plaintiff appellants.*

*Carruthers & Roth, P.A., by Jack B. Bayliss, Jr., and J. Patrick Haywood, for defendant-appellant Durotech Company.*

GREENE, Judge.

Billy Cummings (Cummings) and Mary Cummings (collectively,

Plaintiffs) appeal an order filed 11 May 2001 granting summary judgment in favor of Durotech Co., a/k/a Airlessco Durotech, Durotech Co., and Durotech Corporation (Defendant).

On 20 April 2000, Plaintiffs filed a complaint against Defendant and The Glidden Company (Glidden) for negligence, breach of express and implied warranties, strict liability, breach of the Magnuson-Moss Act, and loss of consortium due to injuries sustained by Cummings as a result of a defective paint sprayer manufactured by Defendant and sold by Glidden. Plaintiffs' negligence claim related to the design and manufacture of the paint sprayer in question and the failure to warn of its defective and dangerous characteristics. Defendant filed an answer dated 23 August 2000 denying Plaintiffs' allegations. Subsequently, Defendant filed a third-party complaint dated 6 October 2000 against Triad Pressure Systems, Inc. (Triad) and Minarik Corporation. On 22 December 2000, Plaintiffs and Defendant filed a joint motion to extend the discovery deadline. The trial court granted their motion and extended the discovery deadline to 31 May 2001. In a motion dated 6 April 2001, Defendant sought summary judgment on the grounds Plaintiffs failed to establish their claims for negligence, breach of warranty, breach of the Magnuson-Moss Act, and strict liability, and that, based on the failure of these underlying claims, the derivative claim for loss of consortium could not stand.

The deposition testimony obtained between 2 March and 26 April 2001 revealed Cummings was employed by the paint department of the Winston-Salem/Forsyth County School System (the School System). In

1996, Jess Wood (Wood), the supervisor of the paint department, purchased two airless paint sprayers from Glidden that were manufactured by Defendant. Within a year of this purchase, on 22 April 1997, one of these paint sprayers was being operated by Rodney Miller (Miller), who was painting a mobile unit of a school. Cummings was only assisting Miller that day and not operating a paint sprayer himself. After Miller had sprayed about half the ceiling, the tip of the paint sprayer "clog[ged] up." Miller testified he "was going to reverse the tip and the tip would[] [not] reverse. So [he] got [a] wrench and . . . was going to just take off the whole component . . . and then shoot [the paint] in the bucket"; however, "as [he] was taking it off, [he] did[] [not] get it off[,] and [the paint sprayer] just . . . blew up." By using the words "blew up," Miller was merely describing the noise he heard at the time. Miller did not know exactly what happened but explained he felt something hit his stomach and then he and Cummings fell to the floor. When they next looked around the room, there was paint everywhere.

Miller acknowledged he had not turned off the pump, turned the pressure release valve, nor locked the safety on the paint sprayer prior to reaching for the wrench. His testimony, however, is unclear as to whether he turned the wrench at all. At one point in his deposition, he stated he "might have . . . got[ten] [the component he was trying to take off] a little bit loose" before the paint sprayer "blew up"; but at a later point, he indicated he did not remember whether he had turned the wrench at all prior to being

thrown to the ground.

Cummings testified in his deposition that when Miller told him he was having a problem with the tip of the paint sprayer, Cummings finished the job he had been working on and then walked over to Miller to see if he needed any help. As Cummings was standing behind Miller, he heard a "pop," was thrown against the wall, and then fell to the floor. As a result of this incident, Cummings sustained a fractured wrist on his left arm. He also suffered from pain in his arm, elbow, and shoulder and was diagnosed with reflex sympathetic dystrophy.

In an affidavit filed 12 April 2001 in support of Defendant's motion for summary judgment, Anand David Kasbekar (Kasbekar), an engineer who had been retained by Defendant to inspect and test the paint sprayer at issue in this case, concluded the paint sprayer was not defective. Kasbekar had reviewed the operation manual for the paint sprayer, the Underwriters' Laboratory guidelines for airless paint sprayers, and the depositions of Wood and Miller. Also, Kasbekar inspected the paint sprayer unit and the accompanying hose. Prior to testing the paint sprayer, he made some repairs to the machine. He noted that the hose was ruptured and "[t]he spring guard for the end of the hose where the rupture was located [was] permanently deformed." Kasbekar concluded:

A significant bending force must have been applied to the spring guard and the underlying hose in the past in order to cause permanent deformation such that the spring guard remained bent even after the load was removed. The force required to permanently deform the spring guard would be much more than the force normally expected in the proper operation and

use of the hose and the paint sprayer unit and would constitute either severe misuse or abuse. The force necessary to permanently deform the spring guard would most probably have weakened the hose underneath the spring guard, in the area where the failure of the hose occurred on April 22, 1997.

Kasbekar ruled out over-pressurization as a cause of the hose rupture because he had "measured the diameter of the subject hose and found no evidence that the hose had been exposed to excessive pressure." Kasbekar also noted a missing O-ring, which he replaced prior to testing the paint sprayer and without which, according to Kasbekar, the pump would likely operate continuously.

Kasbekar detected "no apparent reason why the control board, pressure sensor and pressure display would not have operated properly on April 22, 1997." "[T]he damaged hose could have ruptured at or below normal operating pressure, at a time when it was being bent by the paint spray operator in an effort to remove the spray nozzle with a wrench." Furthermore, the operation manual for this particular paint sprayer provides specific warnings and instructions directing the operator to learn and follow the pressure relief procedure. This procedure requires the operator to release the pressure on the paint sprayer before performing any maintenance on the unit, "including removing the spray nozzle." According to Kasbekar, "Miller failed to follow the safety precautions included in the [o]peration [m]anual. Clearly, if [Miller] had followed the pressure relief procedure and safety precautions included in the [o]peration [m]anual, this incident would not have occurred."

On 26 April 2001, Jack L. Wright (Wright), the president and co-owner of Triad, was deposed. He testified that, on 23 April 1997, Wood brought him the paint sprayer used by Miller the previous day. Wood told Wright the paint sprayer was over-pressurizing and not working properly and he wanted Wright to take a look at it. Because Wood had not brought the original hose along with the paint sprayer, Wright attached a fifty-foot hose to the unit and tested the paint sprayer with a ten thousand P.S.I. gauge. When Wright operated the paint sprayer, "[t]he gauge quickly went beyond three thousand climbing towards six [thousand P.S.I.]," at which point Wright unplugged the paint sprayer. The maximum operating pressure of this paint sprayer was three thousand P.S.I. Wright concluded the electronic control board of the paint sprayer had failed, allowing the machine to continue to run and build up pressure beyond three thousand P.S.I. Upon further inspection of the paint sprayer as well as the original hose and gun Wood subsequently delivered to Wright, Wright wrote Wood a letter stating the paint sprayer had "an over-pressurization problem." Wright noted he had "found the pressure sensor to be working fine" and isolated "the defect . . . to the electrical power board." Wright found no signs of abuse or alteration on the original hose and the gun assembly. Although Wright noted "the hose [was] busted at the relief, this was caused by the machine" over-pressurizing. "In the situation of over-pressurization, the hose is designed to burst," which Wright described as a safety procedure. Wright also found no signs of abuse or alteration on the paint sprayer itself

and concluded the incident on 22 April 1997 was caused by "electronic failure."

Wright, having reviewed Kasbekar's report and the videotape showing his testing of the paint sprayer, rejected Kasbekar's conclusions. According to Wright, Kasbekar's "whole test [was] flawed" in that "[n]o attempt was made to plug in nor test the machine prior to taking it apart and repairing it." When asked why the paint sprayer operated properly when Kasbekar tested it, Wright replied because he "repaired the machine." Moreover, when Kasbekar disassembled the paint pump, "he could have moved the blockage away from the sensor area which could have been the problem [causing the incident]."

Wright questioned whether the paint sprayer was actually missing an O-ring and explained that if one had indeed been missing, the machine would only have pulled in air and not built up any pressure. As to Kasbekar's observations regarding the spring guard, Wright responded Kasbekar did not "know a lot about airless [paint] sprayers[] because that spring could be deformed many different ways -- from pulling it off so many times like we all have done, from bending the hose in a normal working operation." Furthermore, as the hose was made out of plastic, which would not stretch, just burst, Kasbekar could not have tested for exposure to excessive pressure by measuring the diameter of the hose. Wright did concede that if Miller had attempted to "remov[e] the rac [sic] with a wrench and did not have the gun locked, the machine depressurized[,] and the machine off and unplugged," he would have

been negligent.

Wright remembered between six and eight other paint sprayers brought to Triad for service that had control board failures. Some of these machines would over-pressurize while others would not operate at all. When Wright would contact Defendant regarding these machines, he was routinely told to replace the control board and the pressure sensor. Wright received the same instructions when he notified Defendant about the paint sprayer used by Miller on 22 April 1997. Wright testified this was Defendant's "standard response" because Defendant "had a lot of board and sensor problems with this [paint] sprayer."

In an order filed 11 May 2001, the trial court granted Defendant's motion for summary judgment. Prior to the trial court's ruling, Plaintiffs did not move for a continuance on the grounds discovery was still pending. Subsequently, on 25 May 2001, Plaintiffs filed a voluntary dismissal without prejudice as to Glidden.

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The dispositive issues are whether: (I) Plaintiff has preserved the issue for appeal of whether the trial court erred in ruling on Defendant's motion for summary judgment when discovery was still pending; and (II) there were genuine issues of fact as to Plaintiffs' warranty and negligence claims.<sup>1</sup>

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<sup>1</sup>Plaintiffs also assigned as error the trial court's grant of summary judgment in respect to their strict liability and Magnuson-Moss Act claims but expressly abandoned those assignments of error in their brief to this Court. See N.C.R. App. P. 28(b)(6).



I

"Ordinarily it is error for a [trial] court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). In this case, however, Plaintiffs failed to move for a continuance and thus did not preserve this issue for appellate review. See *Coble Cranes & Equip. Co. v. B&W Utils., Inc.*, 111 N.C. App. 910, 913, 433 S.E.2d 464, 466 (1993); N.C.R. App. P. 10(b)(1).

II

*Warranty Claim*

A products liability claim grounded in warranty requires the plaintiff to show: (1) the defendant warranted the product to the plaintiff; (2) there was a breach of that warranty in that the product was defective at the time it left the defendant's control; and (3) the defect proximately caused the plaintiff damage.<sup>2</sup> *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 75, 530 S.E.2d 321, 326 (2000). The first factor is met by proof of either an express or implied warranty made by the defendant. *Id.*

In this case, Plaintiffs alleged the breach of both express and implied warranties in their complaint. In response to Defendant's argument that Cummings lacked the privity to be covered

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<sup>2</sup>It is undisputed Cummings suffered damage, in the form of physical injuries, as a result of the incident.

by any express warranty, Plaintiffs, in their reply brief to this Court, restricted their warranty claim to the implied warranty of merchantability. The implied warranty of merchantability, which operates even in the absence of privity, applies where the defendant is a merchant<sup>3</sup> and provides that the product is fit for the ordinary purpose for which such products are used. N.C.G.S. § 25-2-314(1), (2)(c) (2001). Plaintiffs argue the paint sprayer was defective in that it was not fit for the ordinary purpose for which such products are used. Defendant, on the other hand, contends the paint sprayer was fit for the ordinary purpose for which such products are used, and thus not defective, but was misused and abused within the meaning of N.C. Gen. Stat. §§ 99B-3 and 99B-4(1), thus causing the incident on 22 April 1997.

In this case, Wright testified the paint sprayer malfunctioned due to a defective control board, a problem he had observed in a number of paint sprayers manufactured by Defendant.<sup>4</sup> Wright found no evidence of abuse or alteration of the paint sprayer, hose, or gun assembly. While Wright testified it would have amounted to negligence if Miller had turned the wrench as intended, the evidence is not clear whether Miller had even begun to turn the

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<sup>3</sup>Defendant does not dispute that it is a merchant in respect to the sale of paint sprayers.

<sup>4</sup>In its brief to this Court, Defendant, relying on *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), questions Wright's qualifications as an expert in regard to paint sprayers as well as his testing methodology. As no such objection was raised at the trial court and an argument cannot be raised for the first time on appeal, see N.C.R. App. P. 10(b)(1), we do not address this issue.

wrench before the paint sprayer "blew up." Kasbekar, on the other hand, ruled out any product defect and instead concluded the paint sprayer had not only been misused or abused, causing damage to the spring guard and hose, but Miller had been negligent in operating the machine by not following the pressure relief procedure described in the operation manual prior to turning the wrench. Accordingly, there are genuine issues of material fact as to whether the paint sprayer was fit for the ordinary purpose for which a paint sprayer is to be used. See N.C.G.S. § 1A-1, Rule 56(c) (2001) (summary judgment only proper if there are no genuine issues of material fact and any party is entitled to judgment as a matter of law). Furthermore, Wright's testimony regarding problems with the control boards of other paint sprayers manufactured by Defendant raises genuine issues as to whether the defect existed at the time the paint sprayer left Defendant's control.<sup>5</sup> Thus, the trial court erred in granting Defendant summary judgment as to the implied warranty claim.<sup>6</sup>

*Negligence Claim*

A products liability claim grounded in negligence requires a

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<sup>5</sup>Defendant argues the fact the paint sprayer was used by the School System without incident for a period of nearly a year speaks against the existence of a defect at the time the paint sprayer left Defendant's control; however, in light of Wright's testimony, this remains a jury question.

<sup>6</sup>The affirmative defenses pursuant to sections 99B-3 and 99B-4(1) relied on by Defendant in its brief to this Court assume factual questions that have not yet been resolved, i.e. whether Miller did turn the wrench and whether the paint sprayer had been misused or abused. Accordingly, they are not pertinent to this appeal.

plaintiff to prove: (1) the product was defective at the time it left the defendant's control; (2) the defect was the result of the defendant's negligence; and (3) the defect proximately caused the plaintiff damage. *Red Hill*, 138 N.C. App. at 75, 530 S.E.2d at 326.

In this case, Wright's testimony as to the cause of the incident on 22 April 1997 and his experience with other paint sprayers manufactured by Defendant having problems with the control board and pressure sensors raises genuine issues of fact as to factors (1) and (3). There is, however, no sufficient forecast of the evidence relating to how Defendant was negligent in its manufacture or design of the paint sprayer or in giving instructions and warnings regarding its use. See N.C.G.S. § 1A-1, Rule 56(e) (2001) (if a motion for summary judgment is made and supported as provided under Rule 56, "an adverse party may not rest upon the mere allegations . . . of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial"). "'Proof of defect does not, without more, prove negligence, as even the most careful manufacturer may produce a defective product.'" *Red Hill*, 138 N.C. App. at 75 n.5, 530 S.E.2d at 326 n.5 (citation omitted). As such, the trial court properly granted Defendant's motion for summary judgment in respect to Plaintiffs' negligence claim.

Because the trial court entered summary judgment as to Plaintiffs' loss of consortium claim based on its derivative nature and because we have determined summary judgment was improperly

granted as to Plaintiffs' implied warranty claim, summary judgment as it relates to the loss of consortium claim must be reversed.

Reversed in part, affirmed in part, and remanded.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).