IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Stacy C. Brown, as parent and next friend of Antoinette D. Brown, a Minor Child,	)	
Plaintiffs,	)	C.A. No. 07C-07-092 RRC
v.	)	
Dollar Tree Stores, Inc. and Premier Supply,	)	
Defendants.	)	

Submitted: December 4, 2009
Decided: December 9, 2009

Upon Defendant's Motion for Summary Judgment.
DENIED.

MEMORANDUM OPINION

James F. Bailey, Jr., Esquire, The Bailey Law Firm, Wilmington, Delaware, Attorney for Plaintiffs

Gary H. Kaplan, Esquire, and Melissa E. Cargnino, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, Attorneys for Defendants

COOCH, J.

I. Introduction

This motion for summary judgment arises out of a negligence claim[1] brought by the minor Plaintiff, Antoinette Brown, for injuries sustained when her right thumb was severed while using a mop purchased from Defendant, Dollar Tree Stores, who had purchased it wholesale from Premier Supply.[2] Plaintiff contends that Defendants were negligent in connection with the sale of a defective mop, that Defendant, Premier Supply, was negligent in connection with the manufacture of the mop (assuming that Premier Supply manufactured the mop),[3] and as a result of Defendants' negligence in connection with the manufacture and sale of the mop, Defendants caused Plaintiff's injury.[4]

Plaintiff has not retained an expert witness to testify at trial that the mop was defective or that the defective mop caused Plaintiff's injury. Defendant asserts that an expert witness is needed to testify as to a design

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[1] Plaintiff had originally attempted to assert other causes of action including breach of warranty claims. However, during the pretrial conference on November 17, 2009, the Court held, in a bench ruling, that Plaintiff could only proceed under a negligence cause of action.

[2] "Premier Supply" is the name used by both parties. The correct name of this business entity is unclear from the record.

[3] It is unclear from the record and from counsel whether Premier Supply manufactured the mop in question or whether the mop was manufactured by another entity.

[4] Originally, "Magic Cleaning Products" (the correct name of this business entity is unclear from the record) was listed as an additional co-defendant. The claim against Magic Cleaning Products has since been voluntary dismissed by Plaintiff.

defect, and that without the testimony of an expert witness, Plaintiff's cause of action is barred as a matter of law.

The issue before the Court then is whether this cause of action requires expert testimony from the plaintiff to establish the existence of a defect in the mop as a prerequisite to proceed with trial or whether the existence of any potential defect in a common household item, such as this mop, is, under the facts of this particular case, within a "layman's scope of knowledge."[5] This Court holds that the existence of any potential defect in this common household mop that has no mechanical parts or sophisticated design is within an average juror's scope of knowledge, and that no expert testimony is required to establish the existence of a defect. Accordingly, Defendant's motion for summary judgment is **DENIED**.

II. Facts

This case stems from an injury suffered on July 12, 2005 by Plaintiff, Antoinette Brown, which occurred when her right thumb was severed by a mop that Plaintiff's mother, Stacy Brown, had purchased at Dollar Tree Stores on June 5, 2005. Antoinette Brown was eleven years old at the time of the accident.

[5] Pl. Res. To Summ. J., at 3 (citing *Reybold Group, Inc. v. Chemprobe Tech.*, 721 A.2d 1267 (Del. 1998)).

According to Plaintiffs, the mop was used by mother on one occasion, prior to its use by daughter. When mother was using the mop, a plastic cap attached to the end of the handle fell off leaving the metal inside of the mop exposed. Daughter then attempted to use the mop by placing her finger inside of the now exposed mop handle.

As daughter was using the mop, she slipped and fell. The finger that daughter had placed inside the mop handle was severed by a jagged edge, which would otherwise have been covered by the plastic cap. Multiple surgeries to reattach the finger have failed, and daughter has completely lost the use of her right thumb (she is right handed).

Plaintiff's original answer to an interrogatory from Defendants stated that she would be designating an expert on the issue of whether the product was defective. Despite this response in the interrogatory, no expert was retained.[6] Defendants' counsel has not retained a separate expert on this issue because Plaintiff had not designated an expert prior to the expiration of Defendants' deadline to designate experts.

III. Contentions of the Parties

Defendants argue in support of their motion that expert testimony is necessary to establish the existence of a defect in the mop. Defendant

[6] Plaintiff's counsel represented at oral argument that the reason he stated that Plaintiff would designate an expert in the interrogatory was out of an excess of caution.

argues that the design of a mop "requires a scope of knowledge beyond that of an average layman."[7] Defendant asserts that without expert testimony, Plaintiff cannot establish a *prima facie* case and summary judgment is appropriate.[8]

In response, Plaintiffs argue that expert testimony is unnecessary because the design and use of a simple mop is within an average juror's scope of knowledge. Plaintiffs argue that there is substantial circumstantial evidence, even without expert testimony, to establish that the existence of a defect in the mop caused Plaintiff's injury. Plaintiffs assert that jurors have experience with mops in their everyday lives, and can readily discern, without expert testimony, that a certain mop is defective.

IV. Legal Standard For Summary Judgment

In a motion for summary judgment, the moving party bears the burden of proving "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[9] Summary judgment is only appropriate when, after viewing all the evidence in a light most favorable to the nonmoving party, the Court finds no genuine issue of

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[7] Def. Mot. for Summ. J. at 2.

[8] Alternatively, Defendant has argued that Plaintiffs' actions were a superseding or intervening cause of the accident because they improperly used the mop. *See* Pretrial Stip. at 1.

[9] Sup. Ct. Civ. R. 56(e); *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

material fact.[10] A genuine issue of material fact arises when "any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence."[11] If a defendant, as the moving party, can establish that there is no genuine issue of material fact, and the defendant is entitled to judgment as a matter of law, the burden will shift to the plaintiff to show the existence of specific facts to support the plaintiff's claim.[12]

Here, there is no genuine issue of material fact insofar as both parties agree that daughter's thumb was severed when she placed it inside of the mop handle and then slipped on the floor.[13] Therefore, this Court is left to decide whether expert testimony is necessary, as a matter of law, to prove the existence of a defect in this mop.

V. Plaintiff Is Not Required to Present Expert Testimony Because the Design of the Mop in Question is Within the Knowledge of the Average Juror

The only issue before the Court is whether the existence of a defect in the household mop in question is within the knowledge of the average juror,

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[10] *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at * 2 (Del. Super.).
[11] *Cerberus Intl. LTD. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)).
[12] *Anderson*, 477 U.S. at 248.
[13] There may be other issues of fact such as whether the mother misused the mop, but the Court does not find those facts "material" for the purposes of this motion.

thus eliminating the need for an expert opinion as to whether the mop was defectively designed.

For Plaintiff to prevail in this negligence action, Plaintiff must establish that there was a defect in the product.[14] If a plaintiff seeks to prove negligence circumstantially, that plaintiff carries the burden of proving that "negligence is the only possible inference."[15] A defendant can only prevail on a motion for summary judgment by showing a "complete failure of proof concerning an essential element of the plaintiff's case, such as the existence of a defect . . ."[16]

Pursuant to D.R.E. 702:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Therefore, expert testimony is only necessary if it will "assist" the trier of fact, and there is no requirement of expert testimony in every case.

One authority in the field of products liability has stated that "expert testimony is required [] only when the subject presented is so distinctly

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[14] *Joseph v. Jamesway Corp.*, 1997 WL 524126, at * 3 (Del. Super.).
[15] *Id.*
[16] *Id*.

related to some science, profession, business or occupation as to be beyond the ken of the average lay person . . . There is no rule requiring expert testimony [] and a plaintiff is not required to present expert testimony in all cases in order to prevail."[17]

Although expert testimony is not required in all cases, Defendant has asserted that, pursuant to *Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, expert testimony is required in this particular case to establish that the mop was defectively designed.[18] In *Reybold*, a case involving an allegedly defective chemical water repellant, the Delaware Supreme Court affirmed the Superior Court's grant of summary judgment in favor of the defendant because "[the plaintiff] could not sustain a cause of action for breach of the implied warranty of merchantability without proving the existence of a defect in the product through expert testimony."[19] Notably, the *Reybold* Court also stated that "[w]hile there may be some [] claims that do not need expert testimony, typically expert testimony is required to prove causation in a claim for breach of the implied warranty of merchantability."[20]

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[17] 63B Am. Jur. 2d *Products Liability* § 1863 (2004).
[18] Although *Reybold* involved an action for breach of the implied warranty of merchantability, this Court finds *Reybold* persuasive on the issue of when expert testimony is required to prove a "product defect" in a negligence action such as is currently before this Court.
[19] *Reybold Group, Inc. v. Chemprobe Tech.*, 721 A.2d 1267, 1267 (Del. 1998).
[20] *Id.* at 1270.

Even though *Reybold* held that summary judgment was appropriate in a case involving chemical water repellant where no expert testimony was offered by the plaintiff, *Reybold* did acknowledge that there are a narrow category of cases where expert testimony is not required to prove a product defect. Thus, *Reybold* held that "[f]or circumstantial evidence to substantiate a *prima facie* case . . . 'it must *tend* to negate other reasonable causes of the injury . . .'"[21]

Reybold also found that, in the absence of expert testimony, an injured party "may submit circumstantial evidence to a jury from which it can infer breach 'in the absence of abnormal use and reasonable secondary causes.'"[22]

Defendant has asserted that, pursuant to *Reybold*, the evidence does not "negate other reasonable causes of the injury" because Plaintiffs' misuse of the product was a superseding cause of the injury. Defendant argues that this other possibility as to the cause of the injury makes it impossible to proceed with a negligence cause of action absent an expert opinion that the product was defective.

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[21] *Id.* (emphasis added) (citing *American Family Mutual Ins. Co. v. Sears, Roebuck & Co.*, 998 F.Supp. 1162, 1164 (D. Kan. 1998)).

[22] *Reybold*, 721 A.2d at 1270 (citing *MacDougall v. Ford Motor Co.*, 257 A.2d 676 (Pa. Super. Ct. 1969), *overruled on other grounds by REM Coal Co., Inc. v. Clark Equipment Co.*, 563 A.2d 128 (Pa. Super. Ct. 1989); *see also Fatovic v. Chrysler Corp.*, 2003 WL 21481012 (Del. Super.) (stating "some breach of warranty claims do not require expert testimony.").

In the present case, Plaintiff has presented sufficient circumstantial and direct evidence to permit a jury to find that the product was defective even without the aid of expert testimony. Pursuant to *Reybold*, what is necessary is that Plaintiff's evidence "*tend* to negate other reasonable causes of the injury . . .'"[23] Plaintiff has met this burden. The Court finds this case to be one of those cases in the "narrow category of cases where expert testimony is not required to prove a product defect." Therefore, it will be the jury's role to determine, based on their collective lay experiences, whether a defect existed in the product at the time of sale or whether the defect was caused by Plaintiff's own misuse of the product.

Despite Delaware cases granting summary judgment where a plaintiff has not produced an expert witness to testify as to a product defect, this Court notes the basic rule does not require expert testimony to proceed with a cause of action. The cases cited by counsel granting summary judgment in the absence of expert testimony involved complex products or sophisticated machinery such that the design or the defect in the product might well be outside the knowledge of a layperson.[24]

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[23] *Reybold*, 721 A.2d at 1270 (emphasis added) (citing *American Family Mutual Ins. Co. v. Sears, Roebuck & Co.*, 998 F.Supp. 1162, 1164 (D. Kan. 1998)).

[24] *See id.* (granting summary judgment in a case involving a chemical water repellant); *see also Brink v. Ethicon, Inc.*, 2003 WL 23277272 (Del. Super.) (granting summary judgment in a case involving medical sutures); *Fatovic v. Chrysler Corp.*, 2003 WL 21481012 (Del. Super.) (granting summary judgment in a case involving a car); *Joseph v.*

This case involves a simple mop, a product that most if not all jurors have undoubtedly either owned or used. The design of a mop is within the scope of common knowledge, and jurors can understand how this mop was designed and used, without the assistance of an expert witness. It is unlikely that a jury will be confused by testimony about how the mop was designed and how the alleged defect in the design led to injury. Plaintiffs still must meet their burden of proof by showing by a preponderance of the evidence that the mop was not misused, that in the sale of the mop to Plaintiff the defendant breached a duty of care, and must present evidence that "tends negate other reasonable causes of the injury" caused by the allegedly defective mop.[25]

Viewing the evidence presented in a light most favorable to Plaintiff as the non-moving party, this Court finds that, in this case, this mop is within the narrow category of products set forth in *Reybold* where expert testimony is unnecessary to establish a defect because the design and manufacture of the mop in this case is so basic that it should be understood by the average juror, and that the average juror should be able to evaluate whether this mop was defective.

Jamesway Corp., 1997 WL 524126 (Del. Super.) (granting summary judgment in a case involving a stationary bike).

[25] *Joseph*, 1997 WL 524126, at *2 (stating Plaintiff bears the burden of proving both "(1) a malfunction and (2) evidence eliminating abnormal use or reasonable secondary causes for the malfunction.").

VI. Conclusion

For all the reasons stated above, Defendants' motion for summary judgment is **DENIED**.

Richard R. Cooch

oc: Prothonotary