STATE OF MICHIGAN

COURT OF APPEALS

LEONA BLACKBURN, Individually and as Personal Representative of the Estate of ANTHONY MICHAEL BLACKBURN,

Plaintiff-Appellant,

v

EAGLE MANUFACTURING CO.,

Defendant/Cross-Plaintiff/
Third-Party Plaintiff/Appellee,

and

STATE INDUSTRIES, INC., d/b/a RELIANCE WATER HEATER CO.,

Defendant-Appellee,

and

KMART CORPORATION, DAVID KURTZ CO., INC., KNIT SHIRT EXCHANGE, INC., and PAMCO PRODUCTS, INC.,

Defendants,

and

HAROLD HEAGEN,

Defendant/Cross-Defendant,

and

RAYMOND MONROE,

UNPUBLISHED
March 20, 1998

No. 191954
Macomb Circuit Court
LC No. 93-005340-NP

Third-Party Defendant.

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

In this products liability action, plaintiff appeals as of right the trial court's decision granting summary disposition in favor of defendants Eagle Manufacturing Co. (Eagle) and State Industries, Inc. (State Industries). We affirm.

I. UNDERLYING FACTS, PROCEDURAL BACKGROUND, AND STANDARD OF REVIEW

On August 1, 1992, plaintiff was working in her basement with her son Anthony, who was twenty-one months old at the time, when Anthony spilled some gasoline from a 1 ¼ gallon gasoline container, manufactured by Eagle, that had been stored in plaintiff's basement. The gasoline vapors were apparently ignited by either the pilot light or the main burner of plaintiff's natural gas water heater, which was manufactured by State Industries. Anthony was engulfed by fire three or four feet from the water heater and suffered burns over approximately forty percent of his body. Anthony later died from his injuries.

As personal representative of Anthony's estate, plaintiff brought an action against, among others, Eagle and State Industries. Plaintiff alleged that Eagle failed to provide proper warnings and negligently designed the gasoline container because it did not have a safety device to avoid accidental spillage. Plaintiff also alleged negligent design against State Industries on the ground that it failed to either provide adequate warnings or undertake reasonable precautionary measures to prevent injury from flammable vapors being ignited by the water heater's main burner or pilot light. Plaintiff further alleged that both defendants breached implied and expressed warranties. Finally, plaintiff asserted individual claims for negligent infliction of emotional distress and loss of society and companionship. Eagle and State Industries filed separate motions for summary disposition on plaintiff's negligence and breach of warranty claims, which the trial court granted under MCR 2.116(C)(10). The trial court also dismissed plaintiff's individual claims under MCR 2.116(C)(8). On appeal, plaintiff argues that the trial court erred in granting defendants' motions for summary disposition.

We review de novo a trial court's decision granting or denying summary disposition. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Therefore, a court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the party opposing the motion, granting the non-moving party the benefit of any reasonable doubt, and determine whether there is a

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* Circuit judge, sitting on the Court of Appeals by assignment.

genuine issue of disputed material fact. *Id*.; *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 77-78; 433 NW2d 820 (1988).

A motion for summary disposition may be granted under MCR 2.116(C)(8) if the claim is so unenforceable as a matter of law that no factual development would justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). In reviewing a motion for summary disposition brought under MCR 2.116(C)(8), we examine the pleadings alone, and accept as true all factual allegations contained in the pleadings. *Id*.

II. NEGLIGENT DESIGN - STATE INDUSTRIES

Plaintiff first argues that she presented sufficient evidence to create a genuine issue of material fact concerning whether State Industries' design choice rendered the water heater defective. We disagree. Michigan law imposes on manufacturers a duty to design their products "so as to eliminate any unreasonable risk of foreseeable injury." *Prentis v Yale Manufacturing Co*, 421 Mich 670, 692-693; 365 NW2d 176 (1984).

In products liability cases predicated upon defective design, our Supreme Court has adopted a pure negligence, risk-utility test. *Id*. at 691. Contrary to plaintiff's assertion, in order to establish a prima facie case of design defect, a plaintiff must present evidence concerning (1) the magnitude of the risk involved, (2) the reasonableness of the alternative design proposed, or (3) other factors concerning the unreasonableness of the risk of a particular design. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 429-432; 326 NW2d 372 (1982). It is within this framework that we analyze plaintiff's design defect claims in the instant case.

Plaintiff essentially claims that the water heater should have been designed so that the pilot light and main burner were elevated eighteen inches off the floor. We conclude that summary disposition was appropriate because plaintiff failed to present a prima facie case of a design defect. Plaintiff presented no evidence that the design or installation of the water heater in question either deviated from industry standards (including ANSI and Underwriter's Laboratory standards) or that it violated any model or local building, plumbing, or mechanical codes. In fact, one of plaintiff's experts, Adolf Wolf, acknowledged that *water heaters installed in residential basements in Michigan are not typically elevated*.

Wolf and plaintiff's other experts variously opined that it was feasible to design a water heater whose pilot light and main burner are elevated eighteen inches. However, all three experts conceded that they had never built or tested their proposed alternative designs. For example, while Wolf testified that State Industries could merely "widen the cylinder . . . and that would allow you to shorten the tank and put longer legs on the bottom," he admitted that he was unaware of any water heaters in the United States that were designed in that fashion, was uncertain whether he ever installed a natural gas water heater, had never designed a water heater, and had not done a blueprint on his proposed design. Finally, there was almost no testimony given regarding the other potential implications (on the water heater's safety, utility, or otherwise) of employing the alternative designs proposed.

It is clear that the mere assertion by an expert that a proposed alternative design would have been safer is inadequate to create a genuine issue of material fact regarding whether a specific design for a product was defective. See *Gawenda v Werner Co*, 932 F Supp 183, 188 (ED MI, 1996). Rather, the plaintiff is required to provide evidence of the feasibility of the design to allow a trier of fact to determine whether the manufacturer exercised reasonable care in making the design choice it made. *Id*. As explained above, plaintiff has not met this burden. Accordingly, State Industries was entitled to summary disposition of plaintiff's claim alleging that State Industries made a defective design choice.

Plaintiff also argues she is entitled to go to trial on a failure to warn theory. A manufacturer's failure to warn about dangers regarding the intended uses of the product, as well as foreseeable misuses, "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). In the instant case, the trial court ruled that plaintiff had failed to prove proximate cause regarding the adequacy of the water heater's warning label because plaintiff admitted that she had never examined the water heater. We find no error.

In establishing liability in a products liability case, a plaintiff must prove that the manufacturer's alleged negligence was the proximate cause of the injury. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 250; 492 NW2d 512 (1992). Where the claim is that the manufacturer failed to warn, the plaintiff must present evidence that the product would have been used differently had the warnings been given. *Id*. at 251.

Plaintiff gave the following deposition testimony with respect to the water heater's warning label:

> *Q*. Did you ever go down and look at your water heater on Jackson Street and read to find out anything about your water heater?
>
> *A*. No.
>
> *Q*. Did you ever see if there was anything on the water heater, any kind of labels that would tell you about it?
>
> *A*. No. If you went downstairs to look at it, you wouldn't have seen nothing. It's just a big white tank sitting there.
>
> *Q*. Did you ever go and look at the big white tank?
>
> *A*. When I walked past.
>
> *Q*. Did you ever stop and look at it and read anything that it said on the big white tank?
>
> *A*. There was nothing really to look at, to read. It was all white.

Q. So the answer is you never stopped – you never read anything on the water heater?

A. No, I didn't.

Based on this testimony, we conclude that plaintiff failed to create a genuine issue of material fact with respect to causation. Plaintiff has not shown on this record that improved warning labels on the water heater would have caused her to take additional precautions with respect to storing gasoline in the vicinity of the water heater. See *Van Dike v AMF Inc*, 146 Mich App 176, 182; 379 NW2d 412 (1985).[1]

We also conclude that the warning label was adequate for the task of warning even unsophisticated users that gasoline and other sources of combustion must be kept away from the vicinity of the water heater. The warning provided as follows:

FOR YOUR SAFETY

DO NOT STORE OR USE GASOLINE OR OTHER FLAMMABLE VAPORS AND LIQUIDS IN THE VICINITY OF THIS OR ANY OTHER APPLIANCE. FLAMMABLE VAPORS MAY BE DRAWN BY AIR CURRENTS FROM OTHER AREAS OF THE STRUCTURE TO THIS APPLIANCE.

As a matter of law, this warning label, which contains an express warning ("for your safety") concerning the very hazard at issue, was not inadequate. See *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 546; 509 NW2d 520 (1993).

Plaintiff also argues that State Industries had a postmanufacture duty to disseminate updated warnings. We disagree. In *Gregory*, *supra* at 28-29, our Supreme Court declined to impose a duty on manufacturers to update technology. Even assuming, arguendo, that more effective warnings existed at the time of the accident, and that the warning provided was rendered obsolete, we conclude, based on *Gregory*, that State Industries had no duty to disseminate such updated warnings.

III. NEGLIGENT DESIGN - EAGLE

Plaintiff argues that the trial court erred in dismissing her claim against Eagle alleging defective design. We disagree. We conclude that the danger of accidental spillage is fully apparent, widely known, commonly recognized, and anticipated by the ordinary user. See *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 391; 491 NW2d 208 (1992); *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1, 12-14; 497 NW2d 514 (1993). We also conclude that the gas container is a simple product. Therefore, Eagle did not have a duty to design safety features to protect users from injuries sustained from accidental spillages. See *Mallard v Hoffinger Industries, Inc (On Remand)*, 222 Mich App 137, 143; 564 NW2d 74 (1997). Accordingly, we affirm the trial court's decision to dismiss plaintiff 's design defect claim against Eagle.

IV. BREACH OF WARRANTY - STATE INDUSTRIES AND EAGLE

Summary disposition of plaintiff's breach of implied and expressed warranty claims against State Industries and Eagle was also appropriate. The legal elements of negligent design and breach of warranty "converge to the point of identicalness; proofs that suffice for one theory will suffice for the other; *proofs that fail to establish a prima facie case on one theory are equally inadequate for the other*." *Reeves v Cincinnati, Inc*, 176 Mich App 181, 184; 439 NW2d 326 (1989) (emphasis added). Consequently, for the same reasons that the trial court properly dismissed the negligence claims against State Industries and Eagle, the trial court also properly dismissed plaintiff's warranty claims against those defendants.

V. PLAINTIFF'S INDIVIDUAL CLAIMS

We also affirm the trial court's decisions dismissing plaintiff's individual claims for loss of society and companionship and negligent infliction of emotional distress. Both claims were dependent upon the success of the primary wrongful death claim. See MCL 600.2922; MSA 27A.2922; *Daley v LaCroix*, 384 Mich 4, 12; 179 NW2d 390 (1970). Because we have already concluded that plaintiff failed to establish a prima facie case of products liability or breach of warranty, the trial court did not err in dismissing plaintiff's claims for loss of society and companionship and negligent infliction of emotional distress.

VI. DISQUALIFICATION OF TRIAL JUDGE

Finally, we reject plaintiff's claim that Judge Chrzanowski was biased against her counsel, Albert Dib, and should have granted plaintiff's motion to disqualify herself from the case. None of Judge Chrzanowski's comments established that she was actually biased either against plaintiff, plaintiff's counsel, or plaintiff's cause of action. See MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). We find no abuse of discretion in this record. See *Wayne Co Jail Inmates v Wayne Co Chief Executive Officer*, 178 Mich App 634, 664-665; 444 NW2d 549 (1989).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert P. Young, Jr.
/s/ James M. Batzer

[1] We reject as factually unsupported plaintiff's claim that the warning label was not visible. We have reviewed the photographs plaintiff submitted to the trial court, and conclude that the label was readily visible to the ordinary user.