# STATE OF MICHIGAN

# COURT OF APPEALS

HAROLD ADAMS and SUE ADAMS,

Plaintiff-Appellees,

v

MEIJER, INC., a Michigan Corporation,

Defendant-Appellant.

UNPUBLISHED
December 18, 2001

No. 224213
Saginaw Circuit Court
LC No. 98-25185-NP4

Before: K.F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

In this products liability action against a retailer, defendant Meijer, Inc. appeals by leave granted the trial court's order denying defendant's motion for summary disposition. We reverse and remand.

## I. Basic Facts and Procedural History

In November or December of 1993, plaintiff Sue Adams purchased a deer tree stand as a Christmas present for her husband, plaintiff Harold Adams. Mr. Adams is an avid deer hunter. Deer hunters use tree stands as a perch to sit on while they wait for the deer to come within target range.

Although plaintiffs lack a receipt, a cancelled check, or some other form of documentary evidence definitively establishing that the tree stand was purchased from defendant, Ms. Adams nonetheless unequivocally testified that she purchased the tree stand from defendant retailer[1]. She recalled that the item was on the "clearance rack" and that the top of the box was open. At this time, she asked one of defendant's employees if "everything was in the box." According to Ms. Adams, the clerk indicated that he didn't know but advised that if everything was not in the box, Ms. Adams could return the item. Thereafter, Ms. Adams took the box to the cash register

[1] Contrary to plaintiff's recollection, defendant insists that it never carried this product. Defendant thus argues that plaintiffs, as a matter of law, cannot establish that defendant actually supplied the product that allegedly caused plaintiff's injury. Considering the conflicting evidence on this point, we find that at the summary disposition juncture, there is a genuine factual issue for the trier of fact to resolve.

in the sporting goods area. The clerk taped the box shut and sold it to her.

Mr. Adams, however, did not use the tree stand until the following year. Mr. Adams testified that when he opened the box, there wasn't any paperwork included with the product. Mr. Adams testified that he did not recall observing any directions or instructions printed on the front or the back of the box, nor did he recall any warnings. Both plaintiffs testified that they no longer had the box that contained the tree stand but were unclear as to exactly when they discarded it. Despite the lack of instructions, Mr. Adams did not return the product to the store. Instead, he opted to use the tree stand.

The stand itself consists of a platform, a T-screw, a safety chain, and a turnbuckle. Apparently, to get the stand into the tree, the hunter must attach a rope to the stand, climb the tree, use a safety line to tie himself into the tree and select a relatively straight section thereupon to secure the stand. Once the hunter selects an appropriate spot, he must then screw the T-screw into the tree, hang the stand onto the T-screw, and engage the safety chain. Finally, he must then use the turnbuckle to tighten the safety chain and secure the stand. Underneath the platform are teeth so that when the hunter stands on the platform, the teeth engage the tree for further security.

Mr. Adams used the tree stand, without incident, approximately twenty-three times between 1993-1996. Mr. Adams indicated that occasionally the safety chain would come loose requiring him to retighten it, but he never spoke to anyone about the problem, sought to have it repaired, or attempted to return the product. He testified that he just kept on tightening the screw to secure the safety chain and used a safety line.

On or about October 18, 1996, three years after purchasing the stand, Mr. Adams went hunting and did not use a safety line. Mr. Adams testified that after he assembled the tree stand in the tree and stepped on it, the stand collapsed almost immediately and he fell eighteen to twenty feet to the ground. As a result of the accident, Mr. Adams sustained serious injuries.

Plaintiffs filed a two count[2] complaint against defendant retailer, sounding in products liability alleging three separate theories: (1) defendant impliedly warranted that the product was reasonably fit for the purposes and uses intended, and breached the implied warranties because the tree stand was not merchantable and unsafe for its intended use; (2) the tree stand was not safe because of a defect in design and manufacture; and (3) defendant had a duty to warn that the tree stand was dangerous and failed to so warn.

Defendant moved for summary disposition arguing inter alia that: (1) in light of tort-reform legislation, the seller of a product cannot be held responsible for a defect in the product that originates with the manufacturer; (2) plaintiffs could not definitively identify defendant as the seller; and (3) the danger associated with a tree stand falling from a tree are open and obvious thus vitiating any duty that defendant may have had to warn.

The trial court initially denied defendant's motion for summary disposition without prejudice. However, on November 30, 1999, the trial court issued a written Opinion and Order denying defendant's motion for rehearing/reconsideration of its prior ruling denying defendant's

[2] Plaintiff Sue Adams' claim is a derivative claim for loss of consortium.

motion for summary disposition. This Court granted defendant's application for leave to appeal. We reverse.

## II. Standard of Review

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 146; 624 NW2d 197 (2000).

Defendants brought their motion pursuant to MCR 2.116(C)(8) and (C)(10). A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint. *Maiden v Rozwood* 461 Mich 109, 119; 597 NW2d 817 (1999). Accepting as true all well-pleaded factual allegations and construing them in a light most favorable to the nonmovent, the Court must determine, on the pleadings alone, whether "the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (Citation omitted.)

Alternatively, "[a] motion for summary disposition under MCR 2.116(C)(10) tests the factual basis of a claim other than an amount of damages, requiring the court to consider all the evidence, affidavits, pleadings, admissions, and other information available in the record." *Verna's Tavern v Heite*, 243 Mich App 578, 585; 624 NW2d 738 (2000). Summary disposition in accord with this court rule is only appropriate if the moving party is entitled to judgment as a matter of law. *Id*. To defeat a (C)(10) motion, the nonmoving party must produce evidence establishing a genuine factual dispute for resolution by the trier of fact. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

## III. Tort Reform

In the case at bar, plaintiffs did not initially file suit against the manufacturer of the tree stand, but rather elected to bring an action exclusively against defendant retailer[3]. MCL 600.2947(6)(a), a statute arising out of the March 28, 1996 tort reform legislation, governs a seller's legal responsibility in a cause of action sounding in products liability and provides in pertinent part that:

> (6) In a product liability action, *a seller other than an manufacturer* is not liable for harm allegedly caused by the product unless . . . the following is true:
>
> (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

Thus, a plaintiff seeking to recover from a retailer must establish: (1) that the seller failed to exercise reasonable care relative to the product at issue and (2) that the seller's conduct

[3] Although defendant indicates in its Brief on Appeal that while defendant's application for leave to appeal was pending and before the trial court granted defendant's motion for a stay of proceedings, the trial court entered certain orders one of which consolidated the instant matter with a case filed against three entities believed to be the manufacturer.

proximately caused the plaintiff's injuries. Additionally, the statute provides that if a plaintiff can establish a breach of any implied warranty, that will suffice for purposes of showing that the seller failed to "exercise reasonable care" as regards the product. Respecting these fundamental elements, we now turn our attention to the specific issues raised in the case currently presented for our consideration.

A. Breach of Implied Warranties

First, plaintiff alleges that defendant retailer breached the implied warranty of merchantability and fitness for a particular purpose. Indeed, a "defect" may be established by showing that the product is "not reasonably fit for its intended, anticipated, or reasonably foreseeable use." *Callesen v Grand Trunk Western R Co*, 175 Mich App 252, 264; 437 NW2d 372 (1989). A plaintiff may establish the requisite defective product necessary to sustain a products liability cause of action by demonstrating that defendant breached an implied warranty. *Id.* And, a product's seller may be held accountable for breach of an implied warranty thus enabling a plaintiff to perfect a claim sounding in products liability against the seller based on a breach of warranty theory. *Id.*

In *Guaranteed Const Co v Gold Bond Products*, 153 Mich App 385, 392; 395 NW2d 332 (1986) the implied warranties are defined as:

> The warranty of merchantability requires that the good sold be of average quality within the industry. A warranty of fitness for a particular purpose requires that the goods sold be fit for the purpose for which they are intended; in order to take advantage of this type of warranty, *the seller must know, at the time of the sale, the particular purpose for which the goods are required and also that the buyer is relying on the seller to select or furnish suitable goods*. (Emphasis added.)

In the case *sub judice*, plaintiffs did not provide any evidence suggesting that anyone at defendant store knew that Ms. Adams was relying on defendant to furnish suitable goods. In fact, the evidence adduced during Ms. Adams' deposition establishes the contrary. Ms. Adams testified that she discovered the tree stand on the "clearance" table. The extent of the conversation that she had with *any* of defendant's employees was pointing out that the box was open and inquiring whether everything was still in the box. According to Ms. Adams' deposition testimony, defendant's employee merely stated that he did not know whether everything was in the box but further advised that if anything was missing, plaintiff could merely return the item to defendant store. There is absolutely no evidence to suggest that Ms. Adams relied on defendant's employee to "select or furnish suitable goods." *Guaranteed, supra* at 392. Similarly, plaintiffs did not provide any evidence indicating that the tree stand that Ms. Adams purchased was not "of average quality within the industry" *Id.*

Considering all of the evidence in a light most favorable to plaintiffs, the record reveals that plaintiffs failed to sustain their burden and present sufficient evidence to create a genuine, factual issue necessary to survive defendant's motion for summary disposition. *Village of Dimondale, supra* at 566. Accordingly, the trial court erred by denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

B. Plaintiff's Design Defect Claim

A defect in a product's design will suffice to sustain a cause of action sounding in products liability, but it is incumbent upon a plaintiff proceeding under this theory to establish that "there was a defect in a product's design or that *the manufacturer* failed to warn of a risk inherent in the product's design." *Gregory v Cincinnati, Inc*, 202 Mich App 474, 479; 509 NW2d 809 (1993). (Emphasis added.) Indeed, as the court in *Gregory* explained, "the focus of a design-defect case is on the quality of a manufacturer's decision in light of the prevailing standards and state of technology in existence at the time the product was designed." *Id*. As our Supreme Court recognized, the precise issue presented in a design defect case is "whether the manufacturer properly weighed the alternatives and evaluated the trade-offs and thereby developed a reasonably safe product; the focus is unmistakably on the *quality* of the decision and whether the decision conforms to socially acceptable standards." *Prentis v Yale Manufacturing Co*, 421 Mich 670, 687; 365 NW2d 176 (1984). (Emphasis in original.) (Citation omitted.)

In the case at bar, plaintiffs did not initially file suit against the manufacturer. Rather, plaintiffs elected to proceed solely against defendant retailer. Accordingly, plaintiffs do not plead or otherwise establish that defendant was the entity that manufactured the tree stand. As the court in *Gregory* recognized, where a plaintiff states a claim sounding in products liability on a theory of design defect, an inquiry into a *manufacturer's* decision making process as regards the product is thereby required. Such an inquiry is impossible in this case considering that the manufacturer is not a party to the action.

Consequently, accepting as true all well-pleaded factual allegations and construing them in a light most favorable to the nonmovent, we find that on the pleadings, plaintiffs' design defect claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery" rendering summary disposition pursuant to MCR 2.116(C)(8) appropriate. *Cork v Applebee's of Michigan Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000). Accordingly, the trial court committed error requiring reversal by denying defendant's motion for summary disposition for failure to state a claim upon which relief may be granted. *Id*.

C. Plaintiff's Failure to Warn Claim

Finally, plaintiffs allege that defendant retailer breached its duty "as a dealer, retailer and seller of tree stands" to warn plaintiffs that the tree stand was "dangerous" and defendant's failure to warn proximately caused Mr. Adams' injuries.

To recover in products liability on a failure to warn theory, plaintiffs must establish: (1) defendant owed a duty to plaintiff; (2) defendant violated that duty; (3) defendant's breach of duty was a proximate cause of the damages suffered by plaintiff, and (4) plaintiff suffered damages. *Warner v General Motors Corp*, 137 Mich App 340, 348; 357 NW2d 689 (1984). Assuming, without deciding, that defendant owed a duty to plaintiff and breached that duty, a review of the record does not disclose sufficient evidence to establish Mr. Adams' injury was proximately caused by defendant's acts or inactions.

To establish proximate causation, plaintiff must prove two separate elements: (1) cause in fact and (2) legal cause; i.e. "proximate cause." *Helmus v Michigan Dept of Transp*, 238 Mich App 250, 255; 604 NW2d 793 (1999). As we have previously explained:

> Cause in fact, or `but for' causation, means that if the harmful result would not have come about but for the negligent conduct, then there is a direct causal connection between the negligence and the injury . . . . *Adas v Ames Color-File*, 160 Mich App 297, 301; 407 NW2d 640 (1987). (Citation omitted.)

To establish the requisite "but for" causation, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Upon de novo review of the record, we find plaintiffs failed to present sufficient evidence establishing this essential element.

In the instant case, Mr. Adams *himself* testified that he used the tree stand approximately twenty-three times over a two year period without incident and without reading *any* of the allegedly missing instructions or warnings. Considering that plaintiff remained indifferent to the lack of instructions *and* proceeded to successfully use the tree stand over a two-year period, plaintiff failed, as a matter of law, to present "substantial evidence" that his injury flowed from defendant's failure to inspect the box and ensure that all instructions were included.

While we appreciate that courts are liberal in finding genuine factual issues, at the same time, "we cannot permit the jury to guess . . . ." *Skinner, supra* at 166 (citing *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957)). Upon review of the evidence in a light most favorable to plaintiff, we find no genuine factual issue upon which reasonable minds may differ thus entitling defendant's to summary disposition. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2001).

Reversed and remanded for entry of an order consistent with this opinion.[4] We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

[4] Considering our disposition of this matter, we need not address the other issues raised on appeal.