STATE OF MICHIGAN

COURT OF APPEALS

GAIL LUDWIG, as Next Friend of JACQUELINE LUDWIG, a Minor and ROBERT LUDWIG,

Plaintiffs-Appellants,

v

DICK MARTIN SPORTS, INC. and IMLAY COMMUNITY SCHOOLS,

Defendants/Cross-Defendants,

and

DIMMER WARREN ENTERPRISES, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

ALDEN INDUSTRIAL COMPANY, LTD., JESSICA KORTH, and CATHERINE JEWELL,

Defendants,

and

RICHARD G. WILSON and CHERYL A. BEEBE,

Defendants-Appellees.

UNPUBLISHED
November 20, 2003

No. 242758
Lapeer Circuit Court
LC No. 99-027703-NO

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition for defendant Dimmer-Warren Enterprises, Inc, pursuant to MCR 2.116(C)(8) and (C)(10), and defendants Cheryl Beebe and Richard Wilson pursuant to MCR 2.116(C)(7) and (C)(10). We reverse and remand.

I. Facts

This case arose when Jacqueline Ludwig, a middle school student, suffered a serious eye injury while jumping rope with two other students during an open gym period at school.[1] Jacqueline's friends, defendants Jessica Korth and Catherine Jewell, were twirling the jump rope while Jacqueline was preparing to enter the arc of the rope. When Jacqueline turned around to face the rope, Jessica's end of the rope flew loose and the rope struck Jacqueline in the eye.

Jacqueline was transported to the hospital and treated for an ocular laceration and severe ocular trauma, necessitating the removal of the lens of the eye. She has a permanent loss of vision in the eye. Subsequent inspection of the jump rope indicated that it was composed of plastic segments strung on nylon rope that had been knotted together, and numerous segments were cracked or broken. Evidence indicated that the damage to Jacqueline's eye was likely caused by one of the broken pieces on the jump rope.

Plaintiffs filed this action against several companies involved in the manufacture, distribution or sale of the jump rope, the two other students involved, the school, and school personnel. This appeal involves the grant of summary disposition in favor defendant Dimmer-Warren, the seller of the jump rope, and defendants Beebe and Wilson, physical education teachers at Imlay Community School District Middle School, where the injury occurred.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Pusakulich v City of Ironwood*, 247 Mich App 80, 83; 635 NW2d 323 (2001); *Boumelhem v BIC Corp,* 211 Mich App 175, 178; 535 NW2d 574, (1995).

III. Plaintiffs' claim against defendant Dimmer-Warren

A

A summary disposition motion under MCR 2.116(C)(8) tests the legal sufficiency of a plaintiff's claim on the pleadings alone. *Boumelhem, supra* at 178. "The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.*

A summary disposition motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition pursuant to 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other documentary evidence

[1] The jump ropes used at the school were composed of a series of plastic cylinders (also called beads), approximately 1 3/8 inches long and 3/8 inch in diameter, strung on a nylon cord with plastic handles at each end.

submitted by the parties in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Where the trial court grants summary disposition pursuant to both MCR 2.116(C)(8) and (10), and it is clear that motion involved matters beyond the pleadings, we will treat the motion as having been decided under MCR 2.116(C)(10), which tests whether there is factual support for a claim. *Pippin v Atallah*, 245 Mich App 136, 141; 626 NW2d 911 (2001); *Sharp v City of Lansing*, 238 Mich App 515, 518; 606 NW2d 424 (1999), rev'd in part on other grds 464 Mich 792 (2001).

B

In its opinion granting summary disposition for Dimmer-Warren, the trial court framed plaintiffs' claim as a design defect claim "that the ropes were made from breakable plastic segments, which made them dangerous to use when the segments become splintered." The trial court concluded that plaintiffs failed to go beyond the mere allegations in the pleadings to show that a design defect existed in the ropes at the time of sale.[2] However, plaintiffs' claim against Dimmer-Warren was premised on a failure to warn.[3] Considering the affidavits, pleadings, depositions, admissions, and other evidence in a light most favorable to plaintiffs, we conclude that summary disposition of plaintiffs' failure to warn claim was improper.

A prima facie case of product liability requires proof that: 1) the defendant supplied a defective product, and 2) the defect caused injury to the plaintiff. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 249; 492 NW2d 512 (1992). Absent an express warranty, a seller other than a manufacturer is not liable for harm allegedly caused by a product unless "[t]he 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." MCL 600.2947(6).

Plaintiffs based their product liability claim against Dimmer-Warren on theories of negligence and breach of implied warranty. In this case, the difference in theories is insubstantial. *Vincent v Allen Bradley Co*, 95 Mich App 426, 431; 291 NW2d 66 (1980). Negligence and breach of implied warranty may involve the same elements and proofs in certain factual contexts underlying a failure to warn, even though these two theories remain separate causes of action. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). A "negligence theory generally focuses on the defendant's conduct, requiring a

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[2] "'Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.'" *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), quoting *Quinto*, *supra* at 362.

[3] Plaintiffs complaint fails to clearly set forth the alleged theories of liability, e.g., negligence and breach of implied warranty, or to clearly identify the associated legal predicate, e.g. design defect, manufacturing defect, and failure to warn. Plaintiffs' assertion in the lower court that the "design defect" involved in this case is the "failure to warn" further confuses the matter. Nonetheless, it is clear that the claim against Dimmer-Warren was the failure to provide adequate warnings.

showing that it was unreasonable, while warranty generally focuses upon the fitness of the product, irrespective of the defendant's conduct." *Gregory v Cincinnati, Inc*, 450 Mich 1, 12 n 8; 538 NW2d 325 (1995), quoting *Prentis v Yale Mfg Co*, 421 Mich 670, 692; 365 NW2d 176 (1984).

In a prima facie case of negligence on a failure to warn theory, a plaintiff must establish: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach was a proximate cause of the injuries suffered by the plaintiff; and (4) the plaintiff suffered damages. *Warner v General Motors Corp*, 137 Mich App 340, 348; 357 NW2d 689 (1984). Under a traditional negligence analysis, a duty is imposed on a seller to warn if the seller had actual or constructive knowledge of the claimed danger, the danger was not obvious to the users of the product, and the defendant failed to use reasonable care to warn users of the product's dangerous condition or facts likely to make it dangerous. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 389-390; 491 NW2d 208 (1992).

When a products liability action is premised on a breach of implied warranty, the plaintiff must prove that a defect existed at the time the product left the defendant's control, generally by showing that the product was not reasonably fit for its intended, anticipated, or reasonably foreseeable use. *Bouverette, supra* at 396; *Gregory, supra* at 34. Inadequate warnings may constitute a defective product. *Smith v ER Squibb & Sons, Inc*, 405 Mich 79, 89; 273 NW2d 476 (1979). The question is whether the warnings were inadequate, and, thus, the product was defective. *Id*.

Whether the theory is implied warranty or negligence, when liability is premised on inadequate warning, the standard is the same: warnings are examined with regard to their reasonableness under the circumstances. *Id*. at 89-90; *Bouverette, supra* at 395-396.

In the products liability context, a "duty to warn has been described as an exception to the general rule of nonrescue, imposing an obligation on sellers to transmit safety-related information when they know or should know that the buyer or user is unaware of that information." *Glittenberg, supra* at 386. In this case, plaintiffs' evidence was sufficient to establish a prima facie claim based on a failure to warn.

Plaintiffs argued that Dimmer-Warren knew or should have known that the plastic segments in jump ropes were made of materials that would break in the course of their use and that when broken or splintered, they were dangerous. Plaintiffs submitted sixteen jump ropes as exhibits of this dangerous condition.[4] Numerous jump ropes contained broken pieces of the plastic segments. Some of the jump ropes had evidently been restrung, and some had gaps of

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[4] Defendant Dimmer-Warren described the jump rope that allegedly injured Jacqueline: "The rope at issue was a plastic segmented rope containing plastic cylinders. The rope was mainly white and yellow. It has 77 white plastic cylinders and 75 yellow ones. The rope also contained 2 blue plastic cylinders and 2 red plastic cylinders. There were 2 yellow handles at either end of the rope. There were 20 fractured yellow cylinders. There were also 13 fractured white cylinders. **The rope was just over 19 ft. *There was a knot in the middle of the rope, which indicated that the rope represented 2 jump ropes having been tied together***."

bare nylon rope, allowing the plastic pieces to slide freely on the rope. Although when new, the plastic segments were obviously smooth cylinders, the worn, broken segments often had sharp, jagged edges that jutted out. Plaintiffs submitted the deposition testimony of Beebe and three Dimmer-Warren employees, all of whom examined the jump rope that allegedly injured Jacqueline and testified that the rope was not safe for use by children.

It is undisputed that the jump ropes contained no product warning at the time of sale by Dimmer-Warren. Plaintiffs submitted the uncontradicted testimony of an expert witness in Human Factors and Safety, Dr. Lorna Middendorf, Ph.D., who opined that the jump ropes were defective because defendant failed to provide warnings for their safe use. Dr. Middendorf testified that she purchased a similar rope from a different source, which contained a warning in the packaging to inspect "for tears or worn appearance" and discard "if a defect exists." Additionally, plaintiffs submitted the deposition testimony of a former elementary physical education teacher with Clintondale Community Schools, Andrew Delia, who stated that his school discontinued use of the plastic segmented jump ropes in approximately 1994 because the splitting and jagged edges of the broken pieces made the ropes too dangerous.

Plaintiffs also submitted an affidavit and supplemental report from Dr. Middendorf, reiterating that the jump ropes were unsafe and defective because of the lack of adequate warnings and that such safeguards would have prevented the blindness and eye injuries to Jacqueline caused by the jump rope bead fragment cutting her eye. The report contained an exhibit of a warning and instructional label. Dr. Middendorf's report stated that safeguards such as adequate warnings, instructions and training materials would place teachers on notice of potential injury to children so as to actually remove damaged, worn or broken equipment from child access as well as guide children in the safe use to reduce the risk of injury. Finally, as noted above, plaintiffs submitted a letter from the treating physician, stating that Jacqueline's eye injury was more likely than not made by one of the broken pieces of plastic-like material on the jump rope.

Given the legal predicate of plaintiffs' claim—failure to warn, the trial court erred in granting summary disposition on the ground that plaintiffs failed to go beyond the mere pleadings to show that a design defect existed in the ropes at the time of sale. Plaintiffs submitted sufficient evidence to survive Dimmer-Warren's motion for summary disposition.

IV. Gross negligence claim against defendants Beebe and Wilson

A

To survive a summary disposition motion pursuant to MCR 2.116(C)(7), a plaintiff must allege facts in the complaint warranting an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). In deciding this motion, the court must consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Fane, supra*.

B

Under the governmental immunity statute, public employees are immune from liability for conduct that does not amount to "gross negligence." MCL 691.1407(2); *Beaudrie v Henderson*, 465 Mich 124, 138-139; 631 NW2d 308 (2001); *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999). Gross negligence means, "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); *Beaudrie, supra* at 138; *Maiden, supra* at 122.

The trial court granted summary disposition of plaintiffs' claim against defendants Beebe and Wilson, the physical education teachers allegedly responsible for the inspection and maintenance of the sports equipment, including the jump ropes at issue. Plaintiffs assert that these defendants' repetitive pattern of supplying Jacqueline and other students with these worn, unsafe jump ropes demonstrated a substantial lack of concern with respect to whether an injury would result. Plaintiffs argue that the evidence noted above, including the damaged condition of the jump ropes, and the testimony that the ropes were unsafe and that their use was discontinued by the Clintondale Community Schools, was sufficient to create a genuine issue of material fact on the issue of gross negligence. We agree.

A question of material fact concerning gross negligence may be established when a defendant fails to take any steps to avoid a known danger. *Tallman v Markstrom*, 180 Mich App 141; 446 NW2d 618 (1989) (involving a teacher who allowed a student to use a table saw unequipped with guards). Given the testimony and evidence noted above, particularly the deposition testimony of Beebe and three Dimmer-Warren employees that the jump rope at issue was unsafe, and Delia's testimony that he discontinued the use of similar ropes because the splitting of the plastic segments and jagged edges made them dangerous, we conclude that reasonable minds could differ regarding whether defendants' conduct in failing to discard the jump ropes and allowing them to be available for student use constituted gross negligence. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Further, several witnesses testified that because the jump ropes at issue were unsafe, they should have been discarded. The trial court erred in granting summary disposition for defendants Beebe and Wilson on the basis of governmental immunity.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff