STATE OF MICHIGAN

COURT OF APPEALS

JONATHAN JOHNSON, Plaintiff-Appellant, v JON JENKINS and TINA JENKINS, doing business as THE ARCHERY SPOT, and BOWTECH, INC., Defendants-Appellees.	UNPUBLISHED October 19, 2017 No. 334452 Hillsdale Circuit Court LC No. 15-000554-NP

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motions for summary disposition in this product liability action. For the reasons stated herein, we affirm.

I. FACTS AND PROCEEDINGS

On September 15, 2012, plaintiff made his final layaway payment to purchase a Stryker crossbow from retailer The Archery Spot.[1] The crossbow was manufactured by defendant Bowtech. Immediately after plaintiff made the payment, the employee behind the counter ushered him into the back room of the store to test the crossbow. At the time, plaintiff had significant experience hunting with recurve and compound bows, but had never shot a crossbow. Plaintiff was not given the box or the manual generally included with the crossbow before heading to the makeshift shooting range.

With no instruction, according to plaintiff, The Archery Spot employee loaded the crossbow, handed it to plaintiff, and told him to take a shot. After the first shot, the employee made an adjustment, reloaded the crossbow, and said he would be right back but that plaintiff could take another shot. When he took this second shot, plaintiff instantly felt severe pain, and realized that a portion of his thumb had been severed by the bowstring.

[1] Defendants Jon and Tina Jenkins own and operate The Archery Spot.

At his deposition, plaintiff was shown a picture of the Stryker crossbow and testified that it had permanent warnings affixed to both sides which read, "Personal injury will result if you place fingers on or above the rail." He said, however, that the employee never directed him to read the warnings before loading and handing him the crossbow. And when plaintiff took the second shot, he held his thumb above the rail.

Plaintiff was also shown, at his deposition, a copy of the manual Bowtech includes with each Stryker crossbow, and agreed that had he seen the warning in the manual, he probably would not have been injured. Specifically, he testified, "I would have been a lot more cautious of what I was doing if I seen this, because it shows exactly the grip I was holding on there, looks like."

On September 14, 2015, plaintiff filed this products liability action. In Count I, he alleged negligence against the Jenkins defendants, asserting that they breached their duty to exercise reasonable care by selling a crossbow they knew to be defective or unreasonably dangerous, failing to operate the backroom shooting range in a safe manner, failing to provide proper instruction, failing to properly train or supervise employees, and failing to warn customers of the risks associated with using crossbows. In Count II, plaintiff alleged a product liability claim asserting that Bowtech negligently designed and manufactured a defective crossbow they knew to be unsafe, negligently failed to warn plaintiff of the hazards associated with use of the product, and breached express and implied warranties that the crossbow was fit for its intended purpose.

The Jenkins defendants and Bowtech filed separate motions for summary disposition pursuant to MCR 2.116(C)(10). The Jenkins defendants argued first that "[w]hile Plaintiff . . . couched his claim against Archery Spot as one for ordinary negligence, it is without question that this claim is one for product liability," and thus controlled by the product liability statutes enacted as part of Michigan's 1995 tort reform. Referencing the statutes, the Jenkins defendants asserted that plaintiff's claims for failure to warn should be dismissed under: MCL 600.2948(2), because they had no duty to warn of a risk that should have been obvious; MCL 600.2947(6), because they exercised reasonable care in selling the crossbow by providing the product with clearly readable warning labels; MCL 600.2947(5), because plaintiff was harmed by an inherent risk of crossbows that cannot be eliminated; and MCL 600.2947(4), because a seller is not liable in a product liability action for failure to adequately warn if the product is provided for use by a sophisticated user.

Plaintiff filed a brief in opposition to the Jenkins defendants' motion, arguing that the risks associated with use of the crossbow were not open and obvious because the Jenkins defendants prevented him from becoming familiar with the warnings, and that losing fingers was not an inherent characteristic of crossbows. Thus, he asserted, genuine issues of material fact existed. Bowtech also filed a brief in partial opposition to the Jenkins defendants' motion for summary disposition, arguing that they failed to establish entitlement to dismissal of plaintiff's common law negligence claims, and had a duty to provide plaintiff with the warning materials that came with the crossbow.

In support of its own motion for summary disposition pursuant to MCR 2.116(C)(10), Bowtech argued that plaintiff's claims against it should be dismissed because he could not

establish proximate cause as a matter of law, sufficient warnings were provided, and the crossbow was not defectively designed. In so doing, it cited MCL 600.2948(2), MCL 600.2947(5), MCL 600.2946(2), and MCL 440.2313.

In opposition to the motion, plaintiff first asserted that Bowtech should not "be free from liability by simply placing some warnings in a manual or on the crossbow, when [Bowtech's] retail business agent and their authorized dealer affirmatively defeated the purpose and usefulness of the warnings, and interfered with a consumer's ability to avail themselves of those warnings." Additionally, plaintiff argued that the risks associated with the crossbow were not open and obvious, and that being injured by a crossbow string is not an inherent characteristic of a crossbow, because alternative designs that had previously been used by Bowtech would have prevented anyone shooting the crossbow from placing their fingers in the path of the string.

On July 6, 2016, the trial court held a hearing on both summary disposition motions, and the parties made arguments consistent with those made in their briefs. On the record, the trial court reasoned that plaintiff's action was one for product liability, and cited MCL 600.2948(2), MCL 600.2946(2), and MCL 600.2947(5), in support of its decision. Specifically, the court found that the material risks associated with the crossbow's use should be a matter of common knowledge to a person in a similar position as plaintiff, that plaintiff failed to show that the crossbow's design was defective, and that defendants were entitled to dismissal of all of plaintiff's claims and theories of liability. The trial court entered an order on July 6, 2016, granting both motions and dismissing all claims against both the Jenkins defendants and Bowtech.

Subsequently, plaintiff filed a motion for reconsideration, asserting that the trial court erred when it dismissed his entire complaint because he alleged theories of liability beyond failure to warn, and the trial court overlooked the evidence he presented with regard to alternative design. On July 29, 2016, the trial court entered an order denying the motion for reconsideration.

II. ANALYSIS

Plaintiff argues that the trial court erred when it granted defendants' motions for summary disposition because genuine issues of material fact existed with regard to defendants' duty to warn and the allegedly defective design of the crossbow, and because it dismissed the "entire complaint on all theories of liability, even those not resting on the failure to warn, or defective product." We address each argument separately.

The trial court granted defendants' motions pursuant to MCR 2.116(C)(10). We review de novo a trial court's decision on a motion for summary disposition. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). "A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if "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." MCR 2.116(C)(10). "[A] genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the 'record which might be developed . . . would leave open an issue upon

which reasonable minds might differ.' " *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013), quoting *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (citations and quotation marks omitted). To make the determination, we must consider " 'the pleadings, admissions, affidavits, and other relevant documentary evidence of record . . . .' " *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206-207; 828 NW2d 459 (2012), quoting *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Further, "[i]ssues of statutory interpretation are reviewed de novo." *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

A. FAILURE TO WARN

Plaintiff appears to argue that the trial court erred by dismissing his failure to warn claims against both the Jenkins defendants and Bowtech.[2] For example, he states:

> At the very least, under the circumstances of this case, it is a question of fact whether warnings in this case were adequate, and/or whether the Defendant/Appellee Jenkins/Archery Spot acted in a manner to interfere with Plaintiff/Appellant's ability to become familiar with the warnings.

We first note that plaintiff's case is a product liability action. A product liability action is one "based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL 600.2945(h). "Production" includes the "manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling." MCL 600.2945(i). Thus, his claims against Bowtech, the manufacturer of the Stryker crossbow, and the Jenkins defendants, the sellers of the crossbow, are governed by Chapter 29 of the Revised Judicature Act. See *Greene v AP Products, Ltd*, 475 Mich 502, 507-508; 717 NW2d 855 (2006) (stating that a defendant's duty to warn in a products-liability action is governed by Chapter 29 of the Revised Judicature Act). Although he may allege negligence as part of his product liability action, such an assertion serves as a theory of liability, rather than a separate claim. See *Heaton v Benton Constr Co*, 286 Mich App 528, 534-535; 780 NW2d 618 (2009) ("[T]he fact that [the] plaintiffs' theory of liability was one of negligence does not preclude its

[2] We acknowledge that this issue may be unpreserved with respect to Bowtech. Although plaintiff alleged in his complaint that Bowtech negligently failed to warn of the hazards posed by the crossbow, in his brief in opposition to Bowtech's motion for summary disposition, he asserted only that the Jenkins defendants, acting as Bowtech's authorized sales agent, defeated his ability to familiarize himself with the warnings. Further, at the motion hearing, when the trial court referenced Bowtech's lack of responsibility for any failure by the Jenkins defendants to allow plaintiff to read the warnings, plaintiff's counsel responded: "Well, that's true, to that extent we agree with that. We conceded the point that the manufacturer had nothing to do with that, but when the Court said there were warnings and so forth, I'm just pointing out to the Judge that the crossbow had never actually transferred into his possession." Regardless, preservation does not affect our analysis of, or determination regarding, this issue.

action from coming within the statutory definition of a products liability action because negligence is 'a legal . . . theory of liability brought for . . . damage to property.' ").

In its ruling on the record, the trial court applied MCL 600.2948(2) to dismiss those of plaintiff's claims based on the failure to warn. Under MCL 600.2948(2), "[a] defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action." MCL 600.2948(2). A " 'material risk' is an important or significant exposure to the chance of injury or loss." *Greene*, 475 Mich at 510.

Based on plaintiff's deposition testimony and the other exhibits attached to the parties' summary disposition briefs, we conclude that the trial court did not err when it ruled that defendants owed plaintiff no duty to warn. It is common knowledge that a crossbow is a weapon that uses a string to propel a bolt, or arrow, at high speeds. It follows, then, that one in a position similar to that of plaintiff should recognize that shooting a crossbow when fingers are placed *in front of* the string, could lead to injury.[3]

Plaintiff further asserts that the trial court erred by granting defendants' motion for summary disposition because "the case law demonstrates that Defendant/Appellee Jenkins/Archery Spot may also be liable for Plaintiff's injury under a negligence theory, as the issue of failure to warn (as well as other theories of the case) must be assessed under the circumstances of the case itself." First, to the extent plaintiff argues his negligence claims must be considered separately from any product liability claims, we reassert that this is a product liability action, and that a product liability action may be based on a theory of negligence. *Heaton*, 286 Mich App at 534-535. Moreover, plaintiff fails to explain why the Jenkins defendants would have a duty to warn him of the dangers of using the crossbow, or could be liable for allegedly preventing him from reading the manual or other warnings provided with the crossbow, when under MCL 600.2948(2), Bowtech had no duty to warn of the material risks associated with using the crossbow.[4] Based on the foregoing, then, the trial court did not err when it dismissed plaintiff's failure to warn claims against both defendants.

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[3] Although MCL 600.2948(2) establishes an objective standard, *Greene*, 475 Mich at 509, this conclusion is supported by the fact that the crossbow contained clear warnings, and by plaintiff's admission, at his deposition, that he understood injury could occur if a body part got in the way of a moving bowstring.

[4] We also note that plaintiff fails to develop his argument, through references to the record or by citing precedential caselaw, and fails to address MCL 600.2947(6), which provides that a seller, who is not also a manufacturer, may only be liable in a product liability action if the seller failed to exercise reasonable care, including breach of an implied warranty, or failed to conform to an express warranty. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kubicki v Mtg Electronic Registration Sys*, 292

B. DESIGN DEFECT

The trial court also properly granted summary disposition of plaintiff's design defect claims. Plaintiff failed to produce sufficient evidence to create a genuine issue of material fact with regard to the crossbow's design or allegedly safer alternative designs.

"In Michigan, there are two theories that will support a finding of negligent design." *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). The first involves the failure to warn. *Id*. "The other, more traditional means of proving negligent design questions whether the design chosen renders the product defective, i.e., whether a risk-utility analysis favored an available safer alternative." *Id*. Such an analysis "considers alternative safer designs and the accompanying risk pared against the risk and utility of the design chosen 'to determine whether . . . the manufacturer exercised reasonable care in making the design choices it made.' " *Id*. at 13 (citation omitted); *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). Plaintiff must prove both "that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others." MCL 600.2946(2).

The only evidence plaintiff produced in support of his design defect claim was a printout about an item called a "GripGuard" designed to "prevent a shooter's fore-grip fingers or thumb from dangerously migrating above the flight deck while shooting [a] crossbow," and the manual for a previous type of crossbow manufactured by Bowtech that plaintiff asserted was designed to prevent the type of injury he sustained. He provided no evidence or expert testimony that such an alternative design would have actually prevented the injury he suffered without impairing the usefulness or desirability of the crossbow, or that it would have been technically feasible at the time the crossbow he purchased was produced. The manual and GripGuard printout demonstrated only that an alternative design may have existed. Thus, plaintiff failed to produce sufficient evidence to create a genuine issue of material fact regarding his design defect claims, and the trial court properly dismissed those claims.

C. SUMMARY DISPOSITION OF ENTIRE COMPLAINT

Plaintiff's final argument is that the trial court erred when it granted defendants' motions for summary disposition because it dismissed the "entire complaint on all theories of liability, even those not resting on failure to warn, or defective product." Initially, we find plaintiff's briefing of this issue to be severely deficient. He fails to identify those claims or theories of liability the court did not address in its ruling, explain why they should not have been dismissed, or cite any caselaw of precedential value in support of his argument. He only cursorily asserts

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Mich App 287, 291; 807 NW2d 433 (2011) (citation and quotation marks omitted). Thus, he has essentially abandoned this issue for appellate review.

that Michigan courts have recognized product liability claims based on negligence, and states: "[T]he trial Court did not explain in its decision from the bench, how or why warning labels in this case should result in the entire complaint being dismissed. Nor did the Court explain how or why its finding of irrelevancy of Plaintiff/Appellant's evidence of known, alternate and safer designs, justified dismissal of all other theories." Thus, plaintiff abandons this argument. *Kubicki*, 292 Mich App at 291.

Nevertheless, plaintiff's argument fails. We first note that plaintiff's claims against Bowtech were based on negligent design and failure to warn, which we have already concluded the trial court properly dismissed, and plaintiff abandoned his claim for breach of express warranty in his brief in opposition to Bowtech's motion for summary disposition.

Further, in addition to MCL 600.2948(2) and MCL 600.2946(2), the trial court dismissed plaintiff's complaint pursuant to MCL 600.2947(5), which provides that "[a] manufacturer or seller is not liable in a product liability action if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is recognized by a person with the ordinary knowledge common to the community." Plaintiff fails to address MCL 600.2947(5) on appeal, and argued below only that losing fingers is not an inherent characteristic of crossbows, and that the injury could have been prevented with an alternative design that would not have compromised the crossbow's usefulness. However, as stated above, plaintiff failed to introduce sufficient evidence to create a genuine issue of material fact with regard to any alleged deficiency in the crossbow's design. Thus, the trial court did not err when it dismissed all of plaintiff's claims against Bowtech, and we need not address Bowtech's argument that it was also entitled to summary disposition because plaintiff could not prove proximate cause as a matter of law.

With regard to the Jenkins defendants, plaintiff alleged negligence, asserting that they breached their duty to exercise reasonable care by selling a defective crossbow, and failing to operate the back room range in a reasonable manner, provide proper instruction, train employees, or warn plaintiff of the risks involved in using crossbows. To the extent that plaintiff argues his negligence claims should have been evaluated separately from his product liability claims, we again conclude that this argument lacks merit. Plaintiff's case is one for product liability, and a product liability action may be based on a theory of negligence. *Heaton*, 286 Mich App at 534-535. And, as provided above, the trial court properly dismissed plaintiff's failure to warn and defective design claims.

To the extent plaintiff is arguing that any of the aforementioned claims against the Jenkins defendants were not properly dismissed pursuant to MCL 600.2948(2), MCL 600.2946(2), and MCL 600.2947(5), we note that plaintiff fails to explain why they should not be considered failure to warn or defective design claims, or why they should not have been dismissed pursuant to MCL 600.2947(6).[5] MCL 600.2947(6) governs product liability actions

[5] We note that the trial court did not cite or rely on this provision to dismiss plaintiff's complaint, but that it could have been an alternative ground for relief.

against nonmanufacturing sellers, and provides that such sellers are not liable for the harm caused by a product unless they fail to exercise reasonable care, including breach of any implied warranty, or they fail to conform to an express warranty. Again, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Kubicki*, 292 Mich App at 291 (citation and quotation marks omitted). Thus, we cannot conclude that the trial court erred when it dismissed all of plaintiff's claims against the Jenkins defendants.

Affirmed. Having prevailed in full, defendants may tax costs. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Jane E. Markey