NO. COA01-743

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

THERESE KUIPER, Administrator
of the Estate of Henry Kuiper,
Plaintiff

v. Iredell County
No. 00 CVS 551

SHOEI SAFETY HELMET CORP.,
Defendant

Appeal by plaintiff from orders entered 1 November 2000 by Judge Julius Rousseau in Iredell County Superior Court. Heard in the Court of Appeals 13 March 2002.

E. Bedford Cannon for plaintiff.

Homesley, Jones, Gaines, Homesley & Dudley, PLLC, by Edmund L. Gaines, for defendant.

BRYANT, Judge.

Decedent Henry Timothy Kuiper died on 15 October 1995 as a result of injuries sustained in a motorcycle accident. Decedent was wearing a Shoei Snell 90 safety helmet when the accident occurred. Plaintiff Therese Kuiper, administrator of decedent's estate, brought suit against defendant Shoei Safety Helmet Corporation on 17 March 2000, alleging breach of warranty of merchantability and breach of warranty of fitness for a particular purpose.

On 14 April 2000, plaintiff served defendant with

interrogatories in an attempt to obtain information concerning defendant's role in the manufacture, distribution, advertising and sale of the helmet decedent was wearing at the time of the accident. In response to the interrogatories, defendant refused to answer several of the interrogatories claiming that it is a marketing company having no involvement in the design, manufacture, assembly, testing, sale or distribution of the helmet decedent was wearing at the time of the accident. Defendant did state, in response to the interrogatories, that the sole purpose of its business was to advertise, solicit, receive and forward United States orders for Shoei helmets to Shoei's manufacturing unit in Japan.

Although the total sum of United States orders for Shoei helmets are placed with defendant, and defendant generates revenue from the sale of Shoei helmets in the United States, defendant claims that Shoei Kako Co. Ltd. is the manufacturer of the helmet decedent was wearing at the time of his death. Defendant claims it has no liability as a matter of law pursuant to Chapter 99 of the North Carolina General Statues.

On 14 September 2000, defendant filed a motion for summary judgment, and plaintiff filed a motion to compel discovery on 20 October 2000. Both motions were heard at the 23 October 2000 term of Iredell County Superior Court with the Honorable Julius Rousseau presiding. By orders filed on 1 November 2000, defendant's motion for summary judgment was granted and plaintiff's motion to compel discovery was denied. Plaintiff appeals.

I.

On appeal, plaintiff argues that the trial court erred in denying her motion to compel discovery, and that the trial court erred in failing to compel discovery prior to ruling on defendant's motion for summary judgment. As plaintiff has failed to cite any legal authority in support of either argument, we deem these issues to be abandoned. *See* N.C. R. App. P. 28(b)(5).

II.

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary judgment. We disagree.

The granting of summary judgment is proper if the pleadings, discovery, admissions, affidavits and deposition testimony, if any, show that there does not exist a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56.

Plaintiff claims that liability can be assessed against defendant because defendant is either: 1) a manufacturer of the helmet, or 2) an apparent manufacturer of the helmet, or 3) a seller of the helmet, or 4) an advertising affiliate of the manufacturer. Plaintiff argues that defendant breached its warranty of merchantability in that the helmet sold to decedent was improperly designed and that the helmet was not of design quality for a Snell 90 helmet. Plaintiff also argues that defendant breached its warranty of fitness for a particular purpose because the helmet sold to defendant was not manufactured in a manner that

would prevent serious head injury or death resulting from injuries received while riding or racing a motorcycle. Therefore, plaintiff argues the trial court erred in granting summary judgment in favor of defendant. We disagree.

N.C.G.S. § 99B-1 (1995) in pertinent part provides:

> (2) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.
> (3) "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.
> (4) "Seller" includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product.

Although plaintiff argues that defendant may be held liable as either a manufacturer or seller, it is clear from the evidence in the record that defendant did not engage in the activities of either a manufacturer nor seller as those terms are referenced pursuant to N.C.G.S. § 99B-1(2) and (4). N.C.G.S. § 99B-1(3) includes in its definition of a product liability action, any claim

brought for or on account of death caused by or resulting from the advertising of any product. However, plaintiff in the case at bar has neither alleged in her complaint nor argued in her brief that decedent's death was caused by or was the result of defendant's action of advertising the helmet that decedent was wearing when the accident occurred. Therefore, we conclude that defendant cannot be classified as a manufacturer or seller under N.C.G.S. § 99B-1(2) or (4), nor can liability be assessed pursuant to N.C.G.S. § 99B-1(3).

As for plaintiff's remaining argument that defendant can be held liable as an apparent manufacturer, plaintiff cites to *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C. App. 222, 401 S.E.2d 801 (1991) as controlling authority. In *Warzynski*, several homeowners brought a products liability suit against the immediate seller and installer of a certain gas heater. The homeowners also brought suit against the gas heater distributor, the domestic sales company that had an exclusive sales agreement for the domestic sales of the gas heaters, and against the foreign manufacturer. The trial court, *inter alia,* entered summary judgment in favor of the exclusive seller. On appeal, this Court concluded, *inter alia,* that a material issue of fact existed as to whether the exclusive seller was the apparent manufacturer of the gas heaters.

The *Warzynski* Court hinged its conclusion on the following: the seller held itself out to be the manufacturer in that the seller and manufacturer shared advertising expenses for the gas heaters; the seller serviced the gas heaters; the gas heaters came with a warranty provided by the seller; all of the advertising

promotions referenced the seller and not the manufacturer; and moreover, none of the advertisements stated that the seller was not the manufacturer of the gas heaters. The *Warzynski* Court reversed the entry of summary judgment on behalf of the seller based on the existence of a genuine issue of material fact as to whether the seller was also the apparent manufacturer of the gas heaters.

Warzynski is distinguishable from the instant case in that defendant was not the seller of Shoei helmets, but merely advertised, solicited and received orders for the helmets. Plaintiff has not presented any evidence that defendant and the manufacturing company shared the expenses of advertising; that plaintiff serviced repairs for the helmets; that defendant offered its personal warranty for the helmets; that any or all of the advertising materials referenced defendant and not the manufacturer; or that defendant failed to include the manufacturer's information on any of the advertisements. In short, plaintiff has failed to present any evidence that an apparent manufacturer relationship existed in the instant case such as existed in *Warzynski*.

For the reasons stated above, the order of the trial court granting summary judgment in favor of the defendant is affirmed.

AFFIRMED.

Judges WALKER and HUNTER concur.

Report per Rule 30(e).