NO. COA08-498

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

DENNIS W. DEBERRY,
Plaintiff

v.

Guilford County
No. 07 CVS 4583

KELLOGG SALES COMPANY,
Defendant

Appeal by plaintiff from order entered 6 February 2008 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 25 September 2008.

Dennis W. DeBerry, pro se.

SZD Wicker, PA, by Julia R. Wicker, for defendant-appellee.

CALABRIA, Judge.

Dennis W. DeBerry ("plaintiff") appeals the trial court's summary judgment order dismissing plaintiff's negligence claim against Kellogg Sales Company ("defendant"). We affirm.

Plaintiff alleges that in March 2005 he bit into a hard object while eating a bowl of Kellogg's Corn Flakes. Plaintiff spit the object out of his mouth directly into the trash. Plaintiff did not retain the object or the box of cereal. Plaintiff experienced pain in his tooth. On 8 March 2005, plaintiff sought medical treatment from a dentist, Dr. Tanya D. Redd ("Dr. Redd"). Dr. Redd placed a temporary crown on plaintiff's tooth until it could be evaluated by

an oral surgeon. On 1 April 2005, Dr. C. Elaine Brown ("Dr. Brown") performed a crown lengthening procedure on the plaintiff. Dr. Redd completed the treatment on 18 May 2005.

On 30 March 2007, plaintiff filed a complaint alleging negligence against defendant. Plaintiff also alleged he incurred medical expenses in the amount of $1,673.00. On 27 December 2007, defendant moved for summary judgment. Defendant supported its motion with discovery responses and plaintiff's deposition transcript. In response to the summary judgment motion, plaintiff submitted an affidavit restating his allegations in the complaint. The trial court granted defendant's summary judgment motion. Plaintiff appeals.

I. Standard of Review

"Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal quotations omitted) (citations omitted). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Dixon v. Hill*, 174 N.C. App. 252, 261, 620 S.E.2d 715, 721 (2005) (citing *Collingwood v. G.E. Real Estate Equities,* 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery

> that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon, supra (internal citations and quotations omitted). "[S]ummary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995) (citation omitted).

II. Negligence

Plaintiff argues summary judgment was improper because genuine issues of material fact existed. We disagree.

> [T]o establish a *prima facie* case of negligence in a products liability action, a party must show, (1) evidence of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and (4) loss because of the injury.

Holley v. Burroughs Wellcome Co., 318 N.C. 352, 355, 348 S.E.2d 772, 774 (1986) (internal quotations omitted) (citation omitted).

> In order to prevail in an action to recover for personal injuries resulting from the negligence of a processor or manufacturer, the plaintiff must present evidence tending to show that the manufactured product was defective when it left the manufacturer's plant and that the manufacturer "was negligent in its design of the product, in its selection of materials, in its assembly process, or in inspection of the product."

Goodman v. Wenco Foods, Inc., 333 N.C. 1, 26, 423 S.E.2d 444, 457 (1992) (quoting *Sutton v. Major Products Co.*, 91 N.C. App. 610, 612, 372 S.E.2d 897, 898 (1988)).

In the instant case, although it is undisputed defendant owes a duty of care to consumers of its product, plaintiff failed to forecast sufficient evidence showing defendant breached that duty. Defendant's discovery responses supported its motion for summary judgment. In its responses, defendant alleged compliance with all local, state and federal guidelines in the production and manufacture of its products, as well as consistency of its production and manufacturing standards with the current regulations set forth by the Food and Drug Administration. Since defendant showed through discovery that it did not breach the standard of care owed to the plaintiff, the burden shifted to the plaintiff to produce evidence to rebut defendant's showing. *Draughon, supra*.

Specific facts are required to rebut the moving party's showing that plaintiff failed to prove an element of his claim. *Draughon, supra*. In *Hoover v. Hospital, Inc.*, 11 N.C. App. 119, 180 S.E.2d 479 (1971), a patient sued a surgeon and the hospital for an injury to his left arm. The patient alleged the injury occurred while he was under anesthesia for surgery to his right

arm. *Id.* at 119-20, 180 S.E.2d at 480. Plaintiff stated he did not know who caused the injury "how it happened, or when it happened." *Id.* at 121, 180 S.E.2d at 481. Where plaintiff was unable to obtain evidence as to when or how the injury occurred and who or what caused it, summary judgment for defendants was affirmed. *Id.* at 123, 180 S.E.2d at 482.

Here, plaintiff did not forecast evidence showing a genuine issue of material fact existed as to whether defendant breached its duty of care. Plaintiff merely submitted an affidavit restating his allegations in the complaint. A review of the record reveals no additional evidence to rebut defendant's summary judgment motion. Plaintiff's dentist, Dr. Redd, completed a form regarding plaintiff's injury. In the form, Dr. Redd stated, "without benefit of seeing what said patient bit into, it's impossible to confirm or deny this as the cause of the damage." At his deposition, plaintiff testified he did not retain the box of cereal or the receipt proving he purchased the box of cereal. In addition, he was unable to particularly identify the object beyond the fact that it was "hard." Since plaintiff did not rebut defendant's motion with specific facts showing defendant breached the standard of care, he failed to forecast evidence demonstrating he could establish the *prima facie* case at trial. *Draughon, supra.* Accordingly, we affirm summary judgment for defendant.

Affirmed.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).