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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000995-MR

CAROLYN SPENCER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 02-CI-00129

PLAYTEX PRODUCTS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Carolyn Spencer appeals from an April 13, 2006 Order of the Perry Circuit Court granting summary judgment to Appellee Playtex Products, Inc., in a product liability action because Spencer had failed to produce sufficient evidence that a pair of rubber gloves manufactured by Playtex caused her alleged injury. Agreeing with the trial court that there is no genuine issue as to any material fact regarding causation and that Playtex was entitled to judgment as a matter of law, we affirm.

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In early 2001, Spencer bought a pair of Playtex gloves at her local Wal-Mart and wore them while cleaning kitchen cabinets. The next morning she had a rash on her arms which eventually spread to other parts of her body. She was treated initially at the local hospital and then referred to a dermatologist, Dr. Laurel Knuckles in Corbin, Kentucky. Dr. Knuckles later referred Spencer to Dr. Joseph F. Fowler, a Louisville dermatologist, who performed patch testing in the summer of 2001 to determine whether Spencer was allergic to latex or other substances. Although the tests established that Spencer was allergic to several substances, she was not allergic to latex.

On March 12, 2002, Spencer brought a product liability action against Playtex alleging the gloves were defective and unreasonably dangerous and that Playtex had failed to warn of dangers associated with their use. Spencer also asserted claims pursuant to the Kentucky Consumer Protection Act and for breach of express and implied warranties. The case proceeded with depositions being taken of Spencer, Dr. Knuckles and Dr. Fowler. Spencer also produced an expert, H. Bradley Hammond, specializing in "human factors," a field which he described as the integration of biological and psychological sciences with the design of products. Following a *Daubert* hearing, the trial court limited Hammond to testimony regarding Spencer's allegations with respect to failure to warn and/or the insufficiency of the warnings on the packaging of the gloves. Hammond was specifically prohibited from giving any testimony regarding design defect or causation. Drs. Knuckles and Fowler were deposed on the issue of causation and neither dermatologist would state that the gloves caused Spencer's skin condition. In fact,

Dr. Fowler deemed it "very unlikely" that the gloves caused Spencer's rash. Dr. Knuckles simply deferred to Dr. Fowler, the "well-known and respected" dermatologist to whom she had referred Spencer.

In May, 2005, Playtex moved for summary judgment, contending that despite having had over three years to obtain proof of causation, Spencer had failed to do so. The trial court allowed Spencer additional time to disclose new experts but she offered no other disclosures. On April 12, 2006, more than four years following initiation of the suit, the trial court granted summary judgment in favor of Playtex. In so ruling, the trial court stated that "the medical evidence produced by the parties establishes within a reasonable degree of medical probability that the product at issue was not the proximate cause of the Plaintiff's injury."

On appeal, Spencer maintains that summary judgment was improper because causation could be established or inferred from circumstantial evidence. She further contends that the summary judgment was contrary to Kentucky law because the trial judge essentially adjudicated the causation issue rather than submitting it to a jury. We conclude that the trial court did not err in granting summary judgment to Playtex.

While product liability actions may contain separate claims based on negligence, breach of warranties and strict liability, "one common denominator" in each of these theories of liability is the need to establish causation. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (1970). In *Holbrook,* Kentucky's highest court stated:

> Whether we view the case as one presenting the problem of negligence in the preparation of the product, negligence in

> failing to adequately warn about the consequences of the use of the product, or improperly warranting the product to be fit for a particular purpose, or whether the problem is viewed as the sale of a product so defective as to be unreasonably dangerous because of an inherent defect or inadequate warning as to use, in every instance recited, the product must be a legal cause of the harm.

Id. Legal causation "may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm." *Id*. Some circumstantial evidence tending to establish causation is not enough; the plaintiff "must introduce sufficient proof to tilt the balance from *possibility* to *probability*." *Briner v. General Motors Corp*., 461 S.W.2d 99, 102 (1970) (citing *Highway Transport Co. v. Daniel Baker Co.,* 398 S.W.2d 501, 502 (1966) (emphasis in original)). The "probability" standard must be met for "otherwise, the jury verdict [will be] based on speculation or surmise." *Midwestern v. V.W. Corp. v. Ringley,* 503 S.W.2d 745, 747 (Ky. 1973).

In this case, Spencer was unable to secure medical evidence that her skin rash was caused by the Playtex gloves. Indeed, her two treating dermatologists were of the opinion that it was "very unlikely" that the gloves caused her skin condition. Confronted with this hurdle, Spencer argues on appeal that there was sufficient circumstantial evidence, noting the timing of the onset of the rash and its initial appearance in the areas of her arms and hands which had been covered by the gloves. If the dermatologists had been uncertain about the etiology of Spencer's skin rash and had left open the possibility that the gloves did cause the condition, their testimony and the

timing and nature of the rash might have been sufficient to allow for presentation of the issue to a jury. However, that was not the state of the record before the trial court. Given the dermatologists' testimony expressly disputing any connection between the gloves and the rash, Spencer did not have sufficient circumstantial proof to tilt the balance from possibility to probability.

Spencer's challenge to the summary judgment is premised on the proposition that the trial court adjudicated causation rather than allowing a jury to consider the evidence. As she correctly states, the trial court is charged with determining whether there is an issue of material fact on the existing record, viewing all of the evidence in the light most favorable to the non-moving party. *Comm. Natural Resources and Environmental Protection Cabinet v. Neace*, 14 S.W.3d 15 (Ky. 2000). However, this evidentiary review must be conducted with due attention to the controlling substantive law which, in this case, required something more than what Spencer had produced on the issue of causation. The trial court properly recognized that, having failed to obtain the necessary proof, Spencer was not entitled to present her product liability claim to a jury.

In sum, the trial court did not err in granting summary judgment to Playtex given Spencer's inability to produce, after three years of discovery, the requisite proof of causation. Consequently, we affirm the April 13, 2006 Order of the Perry Circuit Court.

ALL CONCUR.

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