[Cite as *Carroll v. Alliant Techsystems, Inc.*, 2006-Ohio-5521.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Crystal Carroll,	:	
Plaintiff-Appellant,	:	
		No. 06AP-519
v.	:	(C.P.C. No. 05CV-1865)
Alliant Techsystems, Inc., et al,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on October 24, 2006

Twyford & Donahey, Rebekah B. Weiss and *Mark E. Defossez,* for appellant.

Porter, Wright, Morris & Arthur and *Terrance Miller*; *Swanson, Martin & Bell* and *Dale G. Wills*, for appellee, Remington Arms Company.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiff-appellant, Crystal Carroll ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Remington Arms Company ("appellee").

{¶2} The facts underlying this matter are as follows. On November 10, 2004, appellant was in her home and reached up to retrieve some items from a closet shelf. In the process, appellant accidentally knocked a box of Smith & Wesson 40 caliber gun ammunition off the shelf. The box fell to the floor and one of the ammunition cartridges (the "cartridge" or the "ammunition") exploded. It is undisputed that as a result of the

exploding cartridge, appellant suffered injury when shrapnel hit appellant's legs. After the incident, the Columbus Division of Police investigated the matter and determined that the cartridge's discharge was accidental. During the investigation, the investigating officers took photographs of the cartridge, and the cartridge itself was sent to the Columbus Police crime lab.

{¶3} Upon further investigation, Mark Hardy, a criminalist with the Columbus Division of Police, examined the photographs and the cartridge and determined that the cartridge involved performed as it was intended, and in his opinion, did not have a manufacturing defect. Mr. Hardy explained in his deposition that firearm ammunition is designed and intended to discharge when its primer is impacted. Mr. Hardy described that the primer of the cartridge at issue was indented, which caused the cartridge to discharge, and therefore, this cartridge performed as designed and intended.

{¶4} On June 15, 2005, appellant filed an amended complaint in the Franklin County Court of Common Pleas naming appellee, the manufacturer of the ammunition, and others as defendants. Thereafter, appellee voluntarily dismissed her claims against all named defendants, except appellee. Appellee filed a motion for summary judgment on February 24, 2006, and on April 19, 2006, the trial court granted said motion. Appellant timely appealed to this court, and brings the following two assignments of error for our review[1]:

[1] We note that appellant's amended complaint alleged (1) the ammunition was more dangerous than an ordinary consumer would expect; (2) her injuries were proximately caused by defects in the design or manufacture of the ammunition; (3) appellee failed to warn; and (4) the ammunition failed to conform to representations made by appellee. The trial court entered judgment as a matter of law in favor of appellee on all claims. On appeal, appellant does not raise any error related to the failure to warn or failure to conform to representation claims; therefore, we do not consider those issues. See *State v. Winn* (Feb. 19, 1999), Montgomery App. No. 17194.

Assignment of Error No. 1:

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING APPELLEE REMINGTON ARMS COMPANY'S MOTION FOR SUMMARY JUDGMENT WHEN REASONABLE MINDS COULD CONCLUDE THE AMMUNITION WAS MORE DANGEROUS THAN A REASONABLE CONSUMER WOULD EXPECT.

Assignment of Error No. 2:

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING APPELLEE REMINGTON ARMS COMPANY'S MOTION FOR SUMMARY JUDGMENT WHEN MATERIAL FACTS REMAIN TO DETERMINE WHAT CAUSED THE AMMUNITION TO EXPLODE.

{¶5} Summary judgment standards are well-established. Civ.R. 56(C) states that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

{¶6} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66.

{¶7} The party moving for summary judgment bears the burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact regarding the essential elements of the claims presented. *Dresher v. Burt*, (1996), 75 Ohio St.3d 280, 292-293. Conclusory assertions that the nonmoving party cannot prove its case are not sufficient to discharge this initial burden. Id. at 293. Similarly, once the burden is satisfied, one cannot prevent summary judgment by merely restating unsubstantiated allegations contained within the original pleadings. Instead, the nonmoving party must demonstrate the continued existence of a genuine issue of material fact by directing the court's attention to relevant, affirmative evidence of the type listed in Civ.R. 56(C). Id., citing Civ.R. 56(E).

{¶8} Appellant suggests in her two assignments of error that the trial court abused its discretion in granting appellee's motion for summary judgment. Appellate review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶9} Appellant's claims are brought pursuant to the Ohio Products Liability Act, codified in R.C. 2307.71, et seq.[2] To survive a motion for summary judgment in a products liability action, a plaintiff must establish (1) there was a defect in the product

[2] Ohio's Product Liability statutes were amended in April 2005; however, because appellant's cause of action arose before the amendments, we apply the former versions of the statutes.

manufactured by the defendant; (2) the defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries. *Hickey v. Otis Elevator Co.*, 163 Ohio App.3d 765, 769-770, 2005-Ohio-4279, citing *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 6.

{¶10} R.C. 2307.75 provides, in part:

> (A) Subject to divisions (D), (E), and (F) of this section, a product is defective in design or formulation if either of the following applies:
>
> (1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation as determined pursuant to division (B) of this section exceeded the benefits associated with that design or formulation as determined pursuant to division (C) of this section;
>
> (2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

{¶11} Thus, Ohio law provides product liability plaintiffs with two theories upon which to recover: (1) the consumer expectation standard; and (2) the risk-benefit standard. See *Perkins v. Wilkinson Sword, Inc.* (1998), 83 Ohio St.3d 507, 508. In *Perkins*, the Supreme Court of Ohio explained that these standards are not mutually exclusive, but instead constitute a single, two-pronged test for determining whether a product is defectively designed. Id., citing *Cremeans v. Internl. Harvester Co.* (1983), 6 Ohio St.3d 232, syllabus. Plaintiffs can decide under which theory they will proceed. Appellant has not asserted the risk-benefit theory[3] as a basis for recovery, nor has she provided any evidence of a feasible, alternative design to the product; therefore, we need

[3] "[U]nder the risk-benefit standard prong, a defendant will be subject to liability if the plaintiff proves, by using relevant criteria, that the product design is in a defective condition because the benefits of the challenged design do not outweigh the risks inherent in such design." *Cremeans*, supra, at syllabus. The risk-benefit analysis is proper " 'when the product [can] be made safer through an alternative design, and

not consider it further. *State Farm*, supra, at 7. Rather, appellant contends that she was proceeding under a consumer expectation theory.

{¶12} Under the consumer expectation test, "a defendant will be subject to liability if the plaintiff proves that the product design is in a defective condition because the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." *Cremeans*, at syllabus. When utilizing the consumer expectation test, a product may be proven to be in a defective condition if: (1) it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; (2) the claimed defect was present when the product left the manufacturer; and (3) the claimed defect proximately caused the claimed injuries. *State Farm*, supra, at 7.

{¶13} Evidence of unsafe, unexpected product performance is sufficient to infer the existence of a product defect under the first prong of the consumer expectation test. Id. We are cognizant that the determination of whether a product is more dangerous than an ordinary person would expect is generally a question of fact, and does not require expert testimony. See, e.g., *Falls v. Cent. Mut. Ins. Co.* (Dec. 21, 1995), Franklin App. No. 95APE06-757. In *Falls*, the plaintiff was injured when the seat belt in her automobile failed to restrain her during an automobile accident. The car's manufacturer moved for summary judgment and supported its motion with expert testimony that the seat belt was not defective. The car's manufacturer argued that the plaintiff did not have any evidence of a defect, did not obtain or disclose expert testimony, and would not be able to present evidence at trial establishing a product defect. The plaintiff, however, testified at her

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not when the product is by its nature dangerous.' " *Perkins*, supra, at 510, quoting *Caveny v. Raven Arms Co.* (S.D.Ohio 1987), 665 F.Supp. 530, 532-533.

deposition that although she properly fastened her seat belt, the seat belt came unfastened during the collision. This court stated:

> Appellant, in responding to the motion for summary judgment, attached her deposition testimony which set forth facts demonstrating that the seat belt came unfastened during the collision and that her body was thrown back between the front bucket seats. This testimony created a reasonable inference that the seat belt *failed to perform its intended purpose*, that of restraining passengers in the event of an accident.

Id. (emphasis added).

{¶14} Appellant contends that, like the plaintiff in *Falls*, appellant has presented circumstantial evidence via her deposition testimony that the ammunition performed in an unexpected and unsafe manner. Appellant's reliance of *Falls* is misplaced. Unlike the plaintiff in *Falls*, appellant has not provided any evidence that the product failed to perform as intended. In fact, we only have evidence to the contrary, that the ammunition discharged because its primer was struck, which is precisely how the product is intended and designed to perform. The ammunition did nothing unusual or unexpected. Appellant readily admits that she knocked over the box of ammunition causing it to fall. That an accident occurred does not mean that the ammunition failed to function as expected.

{¶15} Appellant cites *Perkins*, supra, for the proposition that a plaintiff need not establish that a product malfunctioned in order to be defective. However, we find that the holding in *Perkins* has no application to the facts before us. *Perkins* explicitly concerned whether or not *the risk-benefit test* of the Ohio Products Liability Act may be used in attempting to prove a design defect in a properly functioning disposable cigarette lighter. The court in *Perkins* answered in the affirmative, explaining that there was "no basis* * * for creating a dichotomy between properly and improperly functioning products when applying *the risk-benefit test*." Id. at 509. (Emphasis added.) The court also noted that

the very existence of the risk-benefit analysis in the Ohio cause of action for design defect helps those plaintiffs who would otherwise lose in a consumer expectation case. Id. The logical extrapolation from the Supreme Court of Ohio's rationale is that while evidence of a malfunction or unintended performance is not required under the risk-benefit standard, such is required under the consumer-expectation standard.

{¶16} For the foregoing reasons, we overrule appellant's first assignment of error.

{¶17} In her second assignment of error, appellant contends that there is an issue of fact regarding what caused the indentation in the ammunition's primer. Yet, appellant provides no evidence to support this assertion. Instead, appellant provides only the speculation that "it is just as likely the primer was indented before the ammunition was dropped, giving it a higher propensity to detonate when dropped." (Appellant's brief at 13.) Speculation and conjecture, however, are not sufficient to overcome appellant's burden of offering specific facts showing that there is a genuine issue for trial. *Dresher*, supra. After a proper motion for summary judgment is made, "the nonmoving party must do more than supply evidence of a possible inference that a material issue of fact exists; it must produce evidence of specific facts which establish the existence of an issue of material fact." *Carrier v. Weisheimer Cos., Inc.* (Feb. 22, 1996), Franklin App. No. 95AP-488, citing *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108. "It is the nonmoving party's responsibility to produce evidence on any issue for which it bears the burden of production at trial." Id., citing *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. The mere possibility, that the ammunition's primer was indented prior to the fall, based only on appellant's suggestion of the same, does not create a genuine issue of material fact, but rather requires a trier of fact to render a decision based upon mere speculation. It is well-settled that "a jury verdict may not be based upon mere speculation or

conjecture." *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Co*. (1975), 42 Ohio St.2d 122, 126. To allow this case to proceed would not only invite a trier of fact to speculate, but would require such. Appellant must do more than supply evidence of a possible inference that a material issue of fact exists. Accordingly, we overrule appellant's second assignment of error.

{¶18} For the foregoing reasons, we overrule appellant's two assignments of error, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and TRAVIS, JJ., concur.

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