

[Cite as *Goolsby v. Family Foods, Inc.*, 2004-Ohio-631.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82976

DAWN GOOLSBY

Plaintiff-Appellant

VS.

FAMILY FOODS, INC.

Defendant-Appellee

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JOURNAL ENTRY

and

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

February 12, 2004

CHARACTER OF PROCEEDING:

Civil appeal from
Common Pleas Court
Case No. CV-457433

JUDGMENT :

AFFIRMED

DATE OF JOURNALIZATION:

APPEARANCES :

For Plaintiff-Appellant:

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ANTHONY O. CALABRESE, JR., J.

{¶1} Plaintiff-appellant Dawn Goolsby ("appellant") appeals from the decision of the trial court granting summary judgment in favor of defendant-appellee Family Foods, Inc. ("Family Foods"). Having reviewed the arguments of the parties and the pertinent law, we affirm the lower court.

I

{¶2} On December 22, 1999, appellant's co-worker, Ms. Snipes, gave appellant a disposable cigarette lighter as a Christmas present. The lighter was allegedly purchased at Family Foods, located at 1010 East 152nd Street in Cleveland, Ohio. Appellant claimed that the Pushlite Lighter Company was engaged in the business of selling and/or manufacturing disposable cigarette lighters, and it sold an allegedly defective disposable cigarette lighter to Family Foods who, in turn, sold it to appellant's co-worker. Appellant contends that when she used this lighter it sprayed butane in her face and caused her to sustain an injury. Appellant claimed that the lighter's flame never ignited, nor did the butane, but the liquid allegedly injured the right side of her face.¹ Appellant has incurred medical bills in excess of \$2,500.²

¹Tr. at 23.

²See plaintiff/appellant brief and assignment of errors, exhibit 8.

{¶3} As previously indicated, this lawsuit arises out of an incident occurring on December 22, 1999. The case went on for a period of time with some discovery problems and finally, on May 2, 2003, the trial court stated the following:

"With respect to the remaining defendants, as the case has been pending for over a year without Pltf obtaining service, case is hereby dismissed, without prejudice, for want of commencement."

{¶4} On May 30, 2003, appellant filed her notice of appeal with this court asserting five assignments of error.

II

{¶5} Appellant's first assignment of error states the following: "The trial court erred to the prejudice of the appellant in granting appellee's motion for summary judgment when appellee failed to point to any evidence of the type listed in Civil Rule 56(c) to establish a lack of genuine issue of material fact."

Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: (1) no genuine issues as to any material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come but to one conclusion. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio App.2d 1; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶6} We find that Family Foods satisfied its summary judgment burden. In the case at bar, appellant never provided Family Foods with any specific identifying information regarding the lighter

during the discovery process. Despite numerous requests for information regarding the lighter by appellee, appellant never produced the lighter at issue, nor did appellant produce the sales receipt for the lighter demonstrating that it was indeed purchased at Family Foods.

{¶7} Family Foods was never afforded the opportunity to observe or examine the lighter and appellant failed to produce an expert report suggesting that the cigarette lighter was defective. In addition, the lighter did not come with any packaging or inserts. Appellant stated that the sales receipt was given to her when she received the lighter and that she gave the sales receipt and the lighter to her attorney.³ However, Family Foods was never provided with a copy of the receipt or an opportunity to inspect the lighter.

{¶8} At no time on the date of the incident or after the incident did appellant report this incident to anyone at Family Foods. In addition, appellant never attempted to contact the manufacturer and failed to report any problems to the manufacturer.

After appellant unsuccessfully attempted service upon an entity titled "Pushlite Lighter Company" through Family Foods, she made no further attempts to ascertain who, in fact, manufactured the cigarette lighter. Appellant failed to produce any medical records suggesting that her alleged injuries were proximately caused by a

³Id. at pgs. 15, 30, 55.

defective cigarette lighter. Appellant never produced any information regarding the value of her lost income, despite repeated requests for the information.

{¶9} As previously stated, appellant never produced the allegedly defective lighter or the sales receipt in question. Appellant failed to adequately prosecute the case and the remaining defendants were dismissed after a year without service.

{¶10} Appellant's first assignment of error is overruled.

III

{¶11} Appellant's second, third, and fourth assignments of error are substantially interrelated and will, therefore, be addressed together in the following section.

{¶12} Appellant's second assignment of error states the following: "The trial court committed a reversible and prejudicial error when it stated the plaintiff/appellant failed to establish a prima facie case for product liability as the push-lite lighter was banned and caused previous injury."

{¶13} Appellant's third assignment of error states the following: "The trial court abused its discretion and committed a prejudicial error when it failed to allow the jury to decide if the defendant/appellee Family Foods knew or should have known that there was a defect in the push-lite lighters, as this is a matter for the trier of fact to decide."

{¶14} Appellant's fourth assignment of error states the following: "The trial court committed a prejudicial error when it ruled that the defendant/appellee Family Food [sic] did not have a duty to warn the plaintiff/appellant of the defect in the push-lite lighter which was not open and obvious to the plaintiff/appellant and which the defendant/appellee knew or should have known of."

{¶15} In order to survive a motion for summary judgment in a products liability claim, the plaintiff must establish a prima facie case that there was "(1) *** a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendants; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss." *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988), 37 Ohio St.3d 1, 6. Appellant failed to meet the above elements. As previously stated, appellant failed to demonstrate the existence of a defect in the precise lighter used by the appellant on the date of the incident. Furthermore, appellant failed to prove that the alleged defect existed at the time that the lighter left the Family Foods store. Finally, appellant failed to establish that the defect was the direct and proximate cause of her injuries.

{¶16} A seller of chattel manufactured by a third person who neither knows nor has reason to know that it is, or is likely to be, dangerous is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the

chattel before selling it. *Buchman v. QVC, Inc.*, (Jan. 15, 1998), Cuyahoga App. No. 72967.

{¶17} Appellant never presented evidence, either in the form of a receipt from the Family Foods store or in the form of the allegedly defective lighter. Even if the receipt or lighter would have been produced, it is unlikely that Family Foods, the only remaining defendant, would be liable. It is doubtful, at best, that Family Foods should have had reason to know the lighter was defective or that it may have been banned in another country.

{¶18} In the case sub judice, appellant failed to present evidence establishing a defect in the precise lighter used. The lighter in question and the sales receipt were never produced. Furthermore, appellant never provided an expert report establishing that the precise lighter used by appellant was defective or that appellant's injuries were proximately caused by the defect. Appellant relies on the July 6, 2001 report of Dr. Saffold to establish that her injuries were the result of the defective lighter. However, this report was not provided within the trial court's June 17, 2002 case management order. Even if the report had been filed in the proper time frame, it does not establish that appellant's injuries were proximately caused by the lighter. The report simply states that *appellant told* Dr. Saffold that she sustained "burns over the right side of her face while attempting to ignite a butane lighter." The doctor never stated the lighter was a

direct and proximate cause of her injuries; he only stated his diagnosis.

{¶19} Appellant's second assignment of error is overruled.

{¶20} Appellant states that Family Foods knew or should have known that the lighter was defective and that it had a duty to warn appellant of the alleged defect. Appellant failed to establish liability under R.C. 2307.78.

{¶21} R.C. 2307.78, "Liability of Supplier," provides two circumstances allowing for the recovery of compensatory damages from a supplier and states the following:

"(A) Subject to division (B) of this section, a supplier is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, that either of the following applies:

The supplier in question was negligent and that, negligence was a proximate cause of harm for which the claimant seeks to recover compensatory damages;

The product in question did not conform, when it left the control of the supplier in question, to a representation made by that supplier, and that representation and the failure to conform to it were a proximate cause of harm for which the claimant seeks to recover compensatory damages. A supplier is subject to liability for such a representation and the failure to conform to it even though the supplier did not act fraudulently, recklessly, or negligently in making the representation." (Emphasis added.)

{¶22} In the case sub judice, appellant failed to establish negligence through proper evidence. Appellant did not establish that Family Foods had knowledge of a latent defect rendering the lighter unsafe. Appellant sought to introduce internet information related to the lighter; however, these internet documents were not properly certified as required by Civ.R. 56(E). Civ.R. 56(E) provides that "sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." Appellant attempts to swear to the authenticity of the internet documents; however, she is not able to do so. Only a custodian of records can certify that the documents are true and accurate copies of the original. Evid.R. 902(4); *Aurora v. Lesky* (1992), 79 Ohio App.3d 568.

{¶23} Appellant is not a custodian of records for the Office of the Fire Commissioner in British Columbia; therefore, she cannot properly certify that the internet documents are true and accurate copies of the original documents retained by the Fire Commissioner in Canada. The internet documents are not proper under Civ.R. 56(E) and are, therefore, of no evidentiary value. Moreover, a photocopy of a lighter is not sufficient to establish that it is the precise lighter used by appellant on the day of the incident.

{¶24} Appellant failed to establish that when the lighter left the control of Family Foods, it did not conform to a representation made by Family Foods, nor did appellant establish that representation and the failure to conform were a proximate cause of

harm. As previously stated, appellant failed to provide the lighter for examination or a receipt from Family Foods. In addition, appellant failed to establish that the lighter at issue did not conform when it left the control of Family Foods.

{¶25} Accordingly, appellant's second, third, and fourth assignments of error are overruled.

IV

{¶26} Appellant's fifth assignment of error states the following: "The trial court erred to the prejudice of the plaintiff/appellant when it failed to acknowledge that defendant/appellee Family Foods has breached the implied warranty of fitness, implied warranty of merchantability and breached its contract."

{¶27} As previously indicated, the appellant never produced a store receipt indicating that the lighter was purchased at Family Foods, nor did the appellant ever produce the actual lighter at issue. Appellant failed to present sufficient evidence that the defective lighter was purchased from Family Foods, therefore eliminating the need to further analyze an implied warranty or breach of contract issue.

{¶28} Appellant's fifth assignment of error is overruled.

{¶29} Based upon the above, we find that Family Foods was entitled to judgment in its favor as a matter of law because no genuine issue of material fact existed to create any liability against Family Foods. The trial court properly granted Family

Food's motion for summary judgment, Family Food was entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion.

{¶30} The judgment is affirmed.

Judgment affirmed.

MICHAEL J. CORRIGAN, A.J., and DIANE KARPINSKI, J., concur.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized

and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).