INDEX TO APPENDICES

APPENDIX A

NORTH CAROLINA COURT OF APPEALS OPINION

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-896

Filed: 15 May 2018

Lee County, No. 16 CVS 348

EVELYN TALLEY, Plaintiff,

v.

PRIDE MOBILITY PRODUCTS CORPORATION, QUALITY HOME HEALTHCARE, INC., WILLIAM S. CAMERON and BARBARA B. CAMERON, Defendants.

Appeal by Plaintiff from order entered 17 April 2017 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 24 January 2018.

Chris Kremer, for Plaintiff-Appellant.

Cranfill, Sumner & Hartzog LLP, by Todd A. King, for Defendant-Appellee Pride Mobility Products Corporation.

Yates, McLamb & Weyher, LLP, by Rodney E. Pettey and Justin M. Osborn, for Defendants-Appellees Quality Home Healthcare, Inc., William S. Cameron, and Barbara B. Cameron.

HUNTER, JR., Robert N., Judge.

Evelyn Talley ("Plaintiff") appeals from the trial court's 17 April 2017 order granting summary judgment in favor of Defendants Quality Home Healthcare, Inc.

("Defendant Quality Home"), Pride Mobility Products Corporation ("Defendant Pride"), and William S. Cameron and Barbara B. Cameron ("Defendants Cameron"). Plaintiff contends the trial court erred in granting Defendants' motions for summary judgment because there are genuine issues of material fact. Plaintiff also contends the trial court erred in granting summary judgment where Plaintiff's affidavit indicated a need for further discovery. We disagree.

I. Factual and Procedural History

On 2 May 2016, Plaintiff filed an unverified complaint against Defendants Quality Home, Cameron, and Pride. Plaintiff alleged Defendants supplied Plaintiff with a negligently manufactured lift chair and sought monetary damages.

On 1 November 2006, Plaintiff purchased an electric lift chair (the "Chair") from Defendants Quality Home and Cameron. The Chair came with two electric hand controllers for operating the lift. On 11 June 2013, while Plaintiff sat in the Chair, she pushed the buttons on the electric hand controller when suddenly the chair exploded. The explosion "launch[ed] [P]laintiff across the room." As a result, she became unconscious. Employees of Plaintiff's assisted living facility found Plaintiff the following morning on her kitchen floor.

Plaintiff alleged Defendant Pride tortiously (1) designed and inspected the Chair; (2) failed to exercise due care in the manufacture, design, and supply of the lift Chair; (3) negligently advertised lift chairs the same or similar to her Chair as being

safe under ordinary use; and (4) negligently failed to recall the Chair. Their breaches of care, as a direct and proximate result of the Chair explosion, caused Plaintiff severe injuries. Plaintiff also alleged Defendants Quality Home and Cameron supplied her with a used defective hand controller which additionally contributed to the explosion of the lift Chair.

On 13 June 2016, Defendant Pride answered denying all Plaintiff's allegations. In addition, Defendant Pride asserted the following statutory affirmative defenses: (1) the subject product may have been altered or modified after it left Defendant Pride's control; (2) Plaintiff misused the product contrary to any express or adequate instructions or warnings; (3) Defendant Pride gave adequate warning under N.C. Gen. Stat. § 99B-5(a); (4) the product's design was adequate and reasonable; (5) the product conformed to the existing state-of-the-art manufacture and design; (6) any injury occurred as a result of insulating, intervening, and superseding negligence; (7) contractual limitations on Plaintiff's claims; (8) applicable statutes of limitation and repose;[1] and (9) all available affirmative defenses for a claim of products liability under N.C. Gen. Stat. § 99B-1 *et seq.* and under common law.

On 12 July 2016, Defendants Quality Home and Cameron answered Plaintiff's complaint and asserted the following statutory affirmative defenses: (1) Plaintiff may have altered or modified the Chair causing the Plaintiff' injury; (2) Plaintiff misused

[1] This affirmative defense does not appear to have been the basis for summary judgment.

the Chair contrary to express instructions and warnings; (3) Plaintiff knew or discovered the defect of the Chair, and unreasonably exposed herself to that danger; (4) Plaintiff did not use reasonable care in her use of the Chair, which proximately caused her injuries; (5) Plaintiff was contributorily negligent, and her negligence proximately caused her injuries; (6) statutes of limitations and repose; and (7) Plaintiff's negligence claim is barred by doctrines of intervening and/or superseding negligence of third parties.

The record does not indicate the trial court entered a discovery case management order and the only discovery conducted was the following. On 18 August 2016, Plaintiff answered interrogatories and did not designate any expert witnesses. These answers remained unchanged at the time of the summary judgment hearing. Additionally, Plaintiff did not serve any discovery requests on Defendant Pride or Defendants Quality Home and Cameron, until Plaintiff deposed William Cameron on 11 April 2017.

Plaintiff's deposition occurred on 23 August 2016. In her deposition, Plaintiff testified as follows. Between 1 November 2006 and February of 2012 Plaintiff did not have any problems with the Chair. In February 2012, Plaintiff contacted Quality Home and complained the Chair was leaning to the right. Defendant Quality Home employees visited Plaintiff's home and informed her the floor was not leveled, which caused the Chair's leaning. Defendant Cameron also visited Plaintiff with "three

service people" to "find out for himself what was going on." Defendant Cameron loaned another chair to Plaintiff. However, the loaner chair was not comfortable and Plaintiff requested her original Chair returned. To be comfortable in her Chair, Plaintiff "just folded up two beach towels and put them so it would be level and put a pillow here so I wouldn't fall out at night."

In 2013, one of the Chair's hand controllers "died." Plaintiff contacted Defendant Quality Home and requested its employees repair the hand controller. Defendant Quality Home took the Chair and controller to its shop to undertake the repairs.[2] Defendant Quality Home allegedly fixed the hand controller and returned the Chair to Plaintiff's home. Plaintiff alleged the controller stopped working after 28 days, because Defendant Quality Home gave her a "used" controller. Plaintiff again contacted Defendant Quality Home, who on 11 June 2013, sent technicians with an "armful" of hand controllers to replace the broken controller. Defendant Quality Home's technicians took a long time to find a controller which fit the Chair without "pop[ping] off."

Around 10:00 p.m. on 11 June 2013, Plaintiff sat in the Chair and pressed the hand controller button and the Chair did nothing. When Plaintiff pressed the button

[2] We note Plaintiff's testimony contradicts what she alleged in her Affidavit: "In May, 2013 the hand control to the chair stopped working. The Camerons had their employees at Quality bring me used hand controls, one of which died after 28 days, although I was charged the price of a new hand control."

harder, suddenly the Chair exploded and launched Plaintiff through the air. Plaintiff described the explosion as "[t]he most horrendous explosion sound that you'll ever hear[.]" Due to this explosion, Plaintiff lost consciousness and the next thing she remembered was: "I heard voices, and it sounded like they were down in the woods a long ways off somewhere . . . The next thing I remember I was in the bathroom. I don't know how I got there or anything." Plaintiff's legs swelled and she was bleeding and disgorging feces and urine. Plaintiff cleaned herself and did not seek immediate medical attention.

Shortly after the explosion, Plaintiff contacted Defendant Quality Home, informed it about the incident, and asked for a repair quote. Defendant Quality Home employees quoted Plaintiff $465.00 and later picked up the Chair for repair. Plaintiff asked Defendant Quality Home employees to tell her what was wrong with the Chair before repairing it, because she could buy a new chair for a little more than the repair cost. Defendant Quality Home did not tell Plaintiff what was wrong with the Chair, however, and repaired it. When Defendant Quality Home employees returned the Chair to Plaintiff, they said they "straightened up . . . some bent metal[.]" Plaintiff neither contacted Defendant Pride regarding the Chair explosion, nor spoke to Defendants Cameron.

Defendant Pride retained Michael A. Sutton ("Sutton"), an accident reconstructionist for Accident Research Specialists, PLLC. Sutton stated he reviewed

the complaint and the manufacturer's literature from Defendant Pride. On 18 January 2017, Sutton inspected the Chair and the two hand controllers. In his affidavit, Sutton testified:

> One of the hand controls had a broken plastic up/down toggle switch tip. When this control was used to operate the chair, the chair up/down mechanism was successfully cycled through one complete cycle, then the chair ceased to operate. When connected to the chair, the other hand control operated the chair up/down mechanism as designed, over several complete cycles.
>
> The chair was cycled from full down to full up, with and without a person seated in the chair. The chair operated as designed and intended, and was suitable for further use.
>
> Examination of the condition and operation of the chair showed no evidence of defects or malfunctions that could explain the allegation of the incident on June 11, 2013 contained in the Complaint. In addition, it would be physically impossible for the chair to have exploded, launching the plaintiff across the room.

On 21 March 2017, Defendants Quality Home and Cameron filed a motion for summary judgment and notice of hearing. Defendants Quality Home and Cameron argued Plaintiff: (1) "has not and cannot prove a defect in the subject lift chair and offered no expert witness testimony to refute the findings and opinions of Defendants' expert witness," and (2) "failed to allege or prove negligence on the part of Defendants William Cameron or Barbara Cameron in their individual capacities and their inclusion in the suit is solely by virtue of being corporate officers of Defendant Quality, Plaintiff cannot maintain her action against Defendants William Cameron and Barbara Cameron as a matter of law."

On 22 March 2017, Defendant Pride also filed a motion for summary judgment and notice of hearing. Defendant Pride argued it was entitled to summary judgment because (1) there is no genuine issue of fact that plaintiff improperly used the chair in violation of N.C. Gen. Stat. § 99B-4; (2) Plaintiff has not identified the alleged design or manufacturing defect committed by Defendant, and even if she had, there is no evidence supporting the presence of any such design or manufacturing defect; (3) there was no evidence of a proximate cause between any alleged design or manufacturing defect, and Plaintiff's alleged injuries; and (4) "plaintiff has not identified any expert witness to establish or confirm the existence of a design or manufacturing defect, as any design or manufacturing defect alleged by the plaintiff is not within the common knowledge of the jury."

On 17 April 2017, the trial court heard arguments for summary judgment.[3] On 17 April 2017 the trial court entered an order granting all Defendants' motions for summary judgment finding "no genuine issue as to any material fact and that the Defendants are entitled to judgment as a matter of law." The trial court dismissed Plaintiff's complaint with prejudice. Plaintiff appealed.

II. Standard of Review

[3] Plaintiff did not admit transcript of the hearing in the record, and deemed the transcript unnecessary under N.C. R. APP. P. 7 and 9.

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). This court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). To prevail on a motion for summary judgment, "a moving party meets its burden by 'proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.'" *Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 738, 594 S.E.2d 227, 230 (2004) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

III. Analysis

Plaintiff argues the trial court erred in granting Defendants summary judgment because genuine issues of material fact exist, which precluded a grant of summary judgment. We disagree.

This Court defines a genuine issue of material fact "as one in which 'the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action[.]'" *Bird v. Bird*, 193 N.C. App. 123, 125, 668 S.E.2d 39, 41 (2008) (quoting *Smith v. Smith*, 65 N.C. App. 139, 142, 308 S.E.2d 504, 506 (1983)). A material fact "is one which can be maintained by substantial evidence." *Id.* at 125, 668 S.E.2d at 41.

This Court held "[t]he party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Austin Maintenance & Const., Inc. v. Crowder Const. Co.*, 224 N.C. App. 401, 407, 742 S.E.2d 535, 540 (2012) (quoting *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002)). However, "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." *Id.* at 407, 742 S.E.2d at 540 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001)).

Plaintiff's action against Defendants Pride and Quality Home is a products liability action. Under N.C. Gen. Stat. § 99B-1(3) (2017), a products 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 . . . marketing, selling, advertising, packaging, or labeling of any product[,]" namely the Chair. Under N.C. Gen. Stat. § 99B-1(2) (2017), a manufacturer is an "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[.]" *Id.* Defendant Pride is a "manufacturer" under the statute, because it designed, produced, and manufactured the Chair. A seller is "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[.]" N.C. Gen. Stat. 99B-1(4) (2017). Under the statute, Defendant Quality Home is a "seller" because it sold the Chair to Plaintiff in June 2006.

A products liability plaintiff may base her claim on various causes of action, including negligence. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 397, 499 S.E.2d 772, 777 (1998). Ordinarily, a case which supports a negligence claim is rarely susceptible of summary adjudication, and should be resolved by trial of issues. *See generally Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983); *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 164, 336 S.E.2d 699, 700 (1985); *Federal Paper Bd. Co., Inc. v. Kamyr, Inc.*, 101 N.C. App. 329, 332, 399 S.E.2d 411, 413 (1991), *review denied*, 328 N.C. 570, 403 S.E.2d 510, (1991). However, summary judgment is appropriate "where the movant shows that one or

more of the essential elements of the claim do not appear in the pleadings or proof at the discovery stage of the proceedings." *Ziglar v. E. I. Du Pont De Nemours and Co.*, 53 N.C. App. 147, 150, 280 S.E.2d 510, 513 (1981).

To hold Defendant Pride liable for a products liability action based on a theory of negligence, Plaintiff must prove "(1) the product was defective at the time it left the control of the defendant, (2) the defect was the result of defendant's negligence, and (3) the defect proximately caused plaintiff damage." *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 75, 530 S.E.2d 321, 326 (2000). A manufacturer "has the duty to use reasonable care throughout the manufacturing process, including making sure the product is free of any potentially dangerous defect in manufacturing or design." *Id.* at 75, 530 S.E.2d at 326. "An inference of a manufacturer's negligence arises upon proof of an actual defect in the product." *Id.* at 75, 530 S.E.2d at 326.

The plaintiff in *Red Hosiery Mill* alleged its building was damaged by a fire, caused by a malfunctioning ballast within a fluorescent lighting fixture manufactured by the defendant. *Id.* at 71, 530 S.E.2d at 323-24. Plaintiff, a mill owner, based its claim of products liability on the theories of negligence and breach of implied warranty. *Id.* at 71, 530 S.E.2d at 323. The court held "in a products liability action, based on tort or warranty, a product defect may be inferred from evidence of the product's malfunction if there is evidence the product had been put to its ordinary use." *Id.* at 76-77, 530 S.E.2d at 327. The trial court found the evidence

in this case supported an inference the fire originated at the suspect fluorescent light fixture and was caused by the ballast, even though the plaintiff could not point to a specific defect within the ballast. *Id.* at 77, 530 S.E.2d at 327. This Court, however, held the trial court properly granted summary judgment for defendants on the negligence claim. *Id.* at 79, 530 S.E.2d at 328.

This Court reasoned although there was a "genuine issue of fact with respect to the malfunction of the suspect fluorescent light fixture, which malfunction can support an inference the fluorescent light fixture (ballast) was defective, there [was] no evidence of negligent manufacture, design, assembly, or inspection by either of the Defendants." *Id.* at 79, 530 S.E.2d at 328. The court pointed to the lack of specific evidence of a defect in the suspect fluorescent light fixture, which did not support an inference of negligence. *Id.* at 79, 530 S.E.2d at 328.

Similar to *Red Hosiery Mill*, Plaintiff in the instant case does not point to any evidence which supports an inference of negligence in the manufacture or design of the Chair. Plaintiff testified she thought a "bowing out of the scissor mechanism" caused the Chair to explode. This statement is not supported by expert testimony or any other evidence. In addition, the record is devoid of any evidence why a "used" hand controller would cause an explosion.

Plaintiff was required to come forward with specific evidence to raise a question of fact, and could not rely on "the bare allegations" of her complaint. *See*

Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 541, 255 S.E.2d 315, 317 (1979). Plaintiff failed to present any evidence to support her claim. Plaintiff relied on her own Affidavit, which recited the unverified allegations of her complaint. Plaintiff also relied on the affidavit of Michael Brian Johnson ("Johnson"), a North Carolina licensed electrical contractor.

In his affidavit, Johnson testified he visited Plaintiff's home and examined the two hand controllers, the feeder wiring, and the Chair. Johnson also testified the hand controllers had "no physical signs of burning or smell of burnt wiring" and the feeder wiring "was properly sized and fused in the transformer housing." Plaintiff stated Johnson Quality Home repaired the Chair. In response, Johnson testified, he "was not inspecting the original components" of the Chair.

In her deposition, Plaintiff testified Quality Home employees stated they "straightened up some bent mental." However, Plaintiff alleged in her complaint the Chair exploded because of a "used" hand controller. Plaintiff stated she possessed the original controllers. Johnson inspected the original hand controllers which caused the explosion, and opined they showed no signs of electric damage. Additionally, nothing in Johnson's affidavit contradicts Defendants' expert Sutton's testimony the Chair was in good condition, and the hand controllers showed no signs of electrical damage. Accordingly, Johnson's affidavit does not support Plaintiff's claim the Chair exploded because of a used hand controller.

Plaintiff also relied on Johnson's letter. Johnson's letter confirms he inspected the hand controller, the wiring, and the Chair and found no physical signs of burning or electrical damage. Plaintiff did not designate Johnson as an expert witness. However, Johnson's letter and affidavit fail to provide specific evidence to raise a question of fact for the jury.

As to Defendants Quality Home and Cameron, Plaintiff similarly failed to forecast evidence or specific facts to establish why a "used" hand controller caused the Chair to explode. Because the record lacks evidence of negligence, and Plaintiff failed to show facts to support why Defendants Cameron, as corporate officers of Defendant Quality Home, are personally liable for the Chair explosion and Plaintiff's subsequent injuries, the claim against them must be dismissed.

Plaintiff failed to forecast any facts or evidence of negligence of Defendants Pride, Quality Home, or Cameron. Therefore, there is no genuine issue of material fact requiring resolution and the trial court properly granted Defendants summary judgment.

IV. Conclusion

We conclude the trial court properly entered summary judgment, and Defendants are entitled to judgment as a matter of law.

AFFIRMED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).

APPENDIX B

NORTH CAROLINA SUPREME COURT ORDER

No. 186P18 ELEVEN-A DISTRICT

Supreme Court of North Carolina

EVELYN TALLEY

v

PRIDE MOBILITY PRODUCTS CORPORATION, QUALITY HOME HEALTHCARE, INC., WILLIAM S. CAMERON, and BARBARA B. CAMERON

From N.C. Court of Appeals
(17-896)
From Lee
(16CVS348)

ORDER

Upon consideration of the petition filed on the 19th of June 2018 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 20th of September 2018."

s/ Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September 2018.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Chris Kremer, Attorney at Law, For Talley, Evelyn - (By Email)
Mr. Todd A. King, Attorney at Law, For Pride Mobility Products Corporation - (By Email)
Mr. Rodney E. Pettey, Attorney at Law, For Quality Home Healthcare, Inc., et al - (By Email)
Mr. Justin M. Osborn, Attorney at Law, For Quality Home Healthcare, Inc., et al - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

Additional material from this filing is available in the Clerk's Office.