STATE OF ILLINOIS

3-09-0980

Suzanne Schaefer v. Texor Petroleum Company, Inc., et al.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord Two thousand ten, within and for the Third District of Illinois:

Present -

HONORABLE WILLIAM E. HOLDRIDGE, Presiding Justice X

HONORABLE ROBERT L. CARTER, Justice

HONORABLE DANIEL L. SCHMIDT, Justice X

HONORABLE VICKI R. WRIGHT, Justice

HONORABLE TOM M. LYTTON, Justice X

HONORABLE MARY W. McDADE, Justice

HONORABLE MARY K. O'BRIEN, Justice

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on July 27, 2010 the order of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 3-09-0980

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2010

SUZANNE SCHAEFER, Individually, and as Special Administrator of the Estate of RICHARD D. SCHAEFER, Deceased,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellant,	)	
v.	)	No. 06--L--578
TEXOR PETROLEUM COMPANY, INC., ILLINOIS PETROLEUM COMPANY, INC., PARENT PETROLEUM COMPANY, INC., and THE PREMCOR REFINING GROUP, INC.,	)	Honorable Michael J. Powers, Judge, Presiding
Defendants-Appellees.	)	

ORDER

Plaintiff, Suzanne Schaefer, brought an action under the Illinois Wrongful Death Act (740 ILCS 180/1 et seq. (West 2004)) alleging that her late husband, Richard Schaefer (Richard or decedent), died as a result of illness brought on by exposure to benzene in gasoline. Richard worked as a service station attendant at a gasoline filling station located at 555 East Cass Street in Joliet, Illinois (the Cass Street station), from 1967 to 1994. Plaintiff's complaint names four defendants, including one manufacturer of gasoline sold at the Cass Street station and three alleged distributors of gasoline sold at that location. The manufacturer defendant is Premcor Refining Corporation, formerly

known as Clark Oil (Premcor or Clark)[1]. The three distributor defendants (referred to collectively as the distributor defendants) are Illinois Petroleum Company (IPC), Texor Petroleum Company (Texor), and Parent Petroleum Company (Parent).

Count I of plaintiff's complaint alleged negligent manufacture against Premcor only. Count II alleged negligent failure to warn against all defendants. Counts III and IV alleged strict liability claims against all defendants for defective product and inadequate warnings respectively.

On January 24, 2008, the trial court granted the distributor defendants' motions to dismiss counts III and IV for strict liability, pursuant to section 2-621 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-621 (West 2004)) (Section 2-621 of the Code is commonly referred to as "the distributor statute" or "the seller's exception"). The trial court found that each of the distributor defendants had identified manufacturers of the gasoline it had distributed at the Cass Street station and, thus, each distributor defendant could not be liable in a strict product liability action.

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[1] Premcor is not a party to this appeal. The counts against Premcor were dismissed with prejudice pursuant to a settlement agreement between plaintiff and Premcor, entered sometime after the distributor defendants' motions for summary judgment were granted.

On November 9, 2009, the trial court entered summary judgment in favor of each of the distributor defendants on the remaining count (count II) which alleged negligent failure to warn. The trial court held that the distributor defendants had no legal duty to warn the decedent concerning the condition of the gasoline distributed at the Cass Street station.

Plaintiff appealed the trial court's rulings on both the strict liability and the negligence counts.

FACTS

Richard was employed as a gas station attendant at the Cass Street station from June 1967 through April 1994. Richard's work duties consisted primarily of pumping gas for customers approximately 40 hours per week for approximately 27 years.

From 1972 through 1994, the Cass Street station was owned and operated by Larry Pluth (Pluth). Pluth testified in a deposition that the Cass Street station was a full-service station with four gasoline pumps. He ran the station as a Clark Oil franchise from 1972 to 1983. While it was a Clark Oil franchise, he ordered the gasoline exclusively from Clark. After 1983, Pluth purchased the station from Clark Oil and ran it as an independent full-service station named Larry's Service. After taking over ownership of the station, Pluth purchased gasoline from several jobbers. Pluth described a jobber as a distributor or a company that sold gasoline to him that was refined by a different company. Pluth sold the station in 2000 or 2001.

When asked to identify the distributors from which he purchased gasoline, Pluth remembered buying gasoline from the three distributor defendants throughout the 1980s and 1990s. However, he could not state with any specificity the first or last date he purchased gasoline from each of the distributor defendants, nor the number of times or the number of gallons he purchased from each distributor.

Pluth testified that he typically ordered gasoline from a distributor who would locate a refiner and hire a common carrier to pick up gasoline from a refinery or terminal for delivery to the station. With each delivery of gasoline, Pluth received a delivery manifest and freight bill to verify receipt of the gasoline. Pluth paid the distributor defendants directly for the gasoline. Other than the manifest and the freight bill, no other paperwork relating to the gasoline was given to Pluth at the time of delivery. Pluth had no contact with the manufacturers of the gasoline. Pluth testified that he relied upon the distributor defendants to provide any relevant information regarding the gasoline.

Pluth could not remember when Richard began working for him, but he believed it was sometime between 1972 and 1983. Pluth also could not remember when Richard stopped working for him, but he believed it was in the early 1990s. Pluth remembered that Richard's job duties included pumping gas, checking oil, and doing other typical gas station activities. Pluth also testified that during the time Richard was employed at the Cass Street

station, neither he nor Richard ever received any information from the distributor defendants regarding health hazards associated with benzene exposure.

The plaintiff alleged in her complaint that the gasoline sold by the distributor defendants to Pluth contained benzene. Exposure to benzene has been linked to a type of cancer of the blood known as acute myelogenous leukemia ("AML"). In 2005, Richard was diagnosed with AML. He died of the disease on February 11, 2006.

The plaintiff further alleged that the gasoline sold by the distributor defendants to Pluth was defective and unreasonably dangerous due to the levels of benzene contained in the gasoline, and that the gasoline was defective and unreasonably dangerous because the gasoline was not accompanied by adequate warnings of the presence of benzene in the gasoline or adequate warnings of the risk of harm associated with benzene exposure. In addition, the complaint alleged that the distributor defendants were negligent in failing to warn of the risk of benzene exposure.

Tom Gleitsman, the chairman and CEO of Texor, provided an affidavit in which he stated that Texor had no information that it distributed gasoline to the Cass Street station. Texor's record retention policy was to retain records only for 7 years. (The relevant period of time covered by the complaint spanned a period of time from 12 to 39 years before the date the cause of action was filed). Neither the allegations of the complaint, nor any subsequent discovery, provided the specific day, month, or

year of any alleged sale by Texor to Pluth or any owner of the Cass Street station. Gleitsman testified that he could not remember when he first learned that gasoline contained benzene. He further testified that he was not aware that benzene caused cancer.

Michael J. Lins, executive vice president of Texor, also supplied an affidavit in which he stated that, due to the vagueness of the complaint as to dates of sale, he could not confirm if Texor sold gasoline to Pluth or made any deliveries of gasoline to the Cass Street station. Lins did, however, state in his affidavit that during the period of time covered by the complaint, Texor purchased gasoline for distribution from Premcor and non-party manufacturers, Unoven, Koch, Phillips Petroleum, and Marathon Petroleum. Only Premcor had been named a party to the proceedings. The record indicates that the plaintiff took no action to add the non-party manufacturers identified by Lins to this action.

Peter Mancini, co-founder and operations manager of Parent, gave a deposition in which he testified that business records established that Parent sold gasoline to Larry's Service from February 1985 through December 1987 and January, March, and June of 1988. Mancini provided company records from Parent which showed the amount of sales to Larry's Service and where the delivered gasoline was manufactured.[2] Mancini testified that he

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[2] The record contains answers to interrogatories wherein

was aware that gasoline contained benzene, but he was not aware that benzene caused cancer. It was his understanding that the manufacturer was responsible for delivering all information and warnings about gasoline.

Steve Stavropoulos was sales manager for IPC from sometime in the early 1980s until 2002. He testified by deposition that IPC distributed gasoline to the Cass Street station in the early 1990s. Stavropoulos attested that all the gasoline distributed to the Cass Street station by IPC was manufactured by Clark Oil, Martin Marketing, Inc., Marathon Oil Unbranded, and Ashland Oil Company. The record established that the plaintiff took no steps to add any of these manufacturers to this action. Stavropoulos also testified that he did not know that benzene was a carcinogen until sometime in 2006. He also testified that he had no knowledge at the time of whether any gasoline IPC distributed did or did not contain benzene.

The trial court dismissed the strict liability counts against the distributor defendants pursuant to section 2-621 of the Code (735 ILCS 5/2-621 (West 2004)). The trial court later

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Parent states that during the relevant period of time it distributed gasoline manufactured by Phillips Petroleum, Torco, Inc., Koch, Carson, US Oil, Martin Oil Co. and Ashland Oil Co. Parent could not tell from its records which company manufactured the gasoline delivered to the Cass Street station.

dismissed the negligence counts. Plaintiff now appeals to this court.

ANALYSIS

Plaintiff raises two issues on appeal: (1) whether the trial court erred in dismissing her strict liability counts; and (2) whether the trial court erred in dismissing her negligence counts. The orders at issue each granted defendants' motion for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party's right to judgment is clear and free from doubt. Espinoza v. Elgin, Joliet and Eastern Ry. Co., 165 Ill. 2d 107 (1995). Although summary judgment is a drastic means of disposing of litigation, it is an appropriate measure in cases where there are no genuine issues of material fact, such as where the plaintiff fails to establish any element of his claim. Morris v. Margulis, 197 Ill. 2d 28 (2001). An appellate court reviews a trial court's entry of summary judgment de novo. Morris, 197 Ill. 2d at 33.

1. Strict Liability

The plaintiff maintains this cause of action in strict liability against a product distributor. Such actions are subject to the so-called "sellers exception" found in section 2-621 of the Code, which provides:

> "(a) In any product liability action based on any theory or doctrine commenced or maintained against a defendant or defendants other than the manufacturer, that party shall

upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage. The commencement of a product liability action based on any theory or doctrine against such defendant shall toll the applicable statute of limitations and statute of repose relative to the defendant or defendants for purposes of asserting a strict liability in tort cause of action.

(b) Once the plaintiff has filed a complaint against the manufacturer or manufacturers, and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded, the court shall order the dismissal of a product liability action based on any theory or doctrine against the certifying defendant or defendants, provided the certifying defendant or defendants are not within the categories set forth in subsection (c) of this Section. Due diligence shall be exercised by the certifying defendant or defendants in providing the plaintiff with the correct identity of the manufacturer or manufacturers, and due diligence shall be

exercised by the plaintiff in filing an action and obtaining jurisdiction over the manufacturer or manufacturers.

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(c) A court shall not enter a dismissal order relative to any certifying defendant or defendants other than the manufacturer even though full compliance with subsection (a) of this Section has been made where the plaintiff can show one or more of the following:

(1) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or

(2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or

(3) That the defendant created the defect in the product which caused the injury, death or damage." 735 ILCS 5/2-621(a),(b),(c) (West 2004).

The purpose of the sellers exception is to provide a non-manufacturing defendant, who has not been shown to have created

or contributed to the alleged defect, a way to defer liability for any defect in the product to the manufacturer. Logan v. West Coast Cycle Supply Co., 197 Ill. App. 3d 185 (1990). Once a non-manufacturing defendant files an affidavit under section 2-621 certifying the identity of the manufacturer or manufacturers of the product at issue, the plaintiff has an affirmative duty to file suit and obtain jurisdiction over the manufacturing defendant or defendants. Cherry v. Siemans Medical Systems, Inc., 206 Ill. App. 3d 1055, 1061 (1990). At that time, the non-manufacturer defendant must be dismissed. 735 ILCS 5/2-621(b) (West 2004). When a non-manufacturer defendant complies with the requirements of section 2-621, dismissal of the non-manufacturer defendant is mandatory. Lamkin v. Towner, 138 Ill. 2d 510, 518 (1990). In order to defeat a dismissal under section 2-621, the plaintiff must show that the distributor exercised some control over the manufacture of the product or had actual knowledge of the defect or created the defect which caused the injury, death or damage. 735 ILCS 5/2-621(a),(b),(c) (West 2004).

Here, the record is clear that each of the distributor defendants complied with the requirement of section 2-621 that it provide an "affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage." 735 ILCS 5/2-621(a) (West 2004). Texor provided an affidavit stating that all the gasoline it distributed during the relevant period identified in the complaint was manufactured by Premcor/Clark Oil, Unoven, Koch, Phillips Petroleum, and Marathon

Petroleum. IPC provided an affidavit by Stavropoulos, its sales manager, certifying that "[a]ll of the gasoline distributed to the Cass Street station was manufactured by Clark Refining & Marketing, Inc., Martin Marketing, Inc., Marathon Oil Unbranded, or Ashland Oil Company, together with their respective predecessors and successors. No other entities manufactured gasoline that IPC distributed to the Cass Street station." Parent provided certification by verified answers to interrogatories identifying Phillips Petroleum Co., Marathon, Torco, Koch, Carson, US Oil, Martin Oil, and Ashland Oil as the manufacturer of any gasoline it distributed to the Cass Street station.

The plaintiff maintains that each of the distributor defendants has failed to adequately identify the manufacturer of the gasoline that each distributed to the Cass Street station. She maintains that the distributor defendants have merely identified "possible manufacturers" of the gasoline and left to her the impossible task of determining which possible manufacturer is responsible for the gasoline which allegedly exposed her deceased husband to benzene. She observes that she would have to bring a claim against each of the manufacturers identified by the distributor defendants knowing that she could not, in good faith, identify the proper product manufacturer. She points out that such claims would not survive a motion to dismiss since she would have no way to establish which

manufacturer's gasoline was actually delivered to the Cass Street station.

The distributor defendants responded by asserting that their inability to be more specific as to which manufacturer supplied the gasoline that was distributed to the Cass Street station is the result of the plaintiff's inability to specify the dates of delivery of the gasoline alleged to have exposed Richard to benzene. They also point out that, pursuant to section 2-621 of the Code, the plaintiff should have initiated a cause of action against the identified manufacturers, but chose not to do so. Citing Cherry, the distributor defendants noted:

> "Furthermore, although it is true that all entities in the distributive chain or an allegedly defective product are subject to liability in a strict liability in tort action (citations ommitted), this does not necessarily give a plaintiff the right to elect whom he/she will sue. *** We believe that this provision places upon a plaintiff an affirmative duty to file suit and obtain jurisdiction over a manufacturing defendant once the identity is known, especially in instances where the plaintiff does not allege that the non-manufacturing defendant had any independent responsibility for the allegedly defective product and the only basis for

liability is founded upon his role as a member of the distributive chain." Cherry, 206 Ill. App. 3d at 1059.

The distributor defendants point out that more than 13 months passed between their certifying the identification of the manufacturers of the product they sold to the Cass Street station and the court's granting of their summary judgment motions based upon their compliance with section 2-621. They note that the plaintiff took no steps to bring an action against any of the identified manufacturers other than Premcor, which had already been named as the only manufacturer in the original lawsuit. The distributor defendants point out, with merit, that plaintiff did not comply with the due diligence requirement of section 2-621.

Moreover, assuming, arguendo, that the identity of the manufacturers certified to the plaintiff were later determined to be incorrect, the statute provides that the plaintiff could move to vacate the dismissal and reinstate the action against the certifying defendants pursuant to section 2-621(b)(2). 735 ILCS 5/2-621(b)(2) (West 2004). However, the plaintiff, in electing not to pursue action against any of the manufacturers identified by the distributor defendants, waived any protections available under the statute.

Here, the record clearly established that the distributor defendants complied with the requirement that they identify the manufacturer of the product each distributed. There is nothing in the record to establish a factual dispute as to whether the

distributor defendants exercised control over the design of the product or created the alleged defect in the product or had actual knowledge of the defect in the product which caused Richard's death. Moreover, any lack of precision in identifying the manufacturer of the gasoline sold at the Cass Street Station was caused, not by these defendants, but by plaintiff's inability to provide specificity in its complaint as to dates of exposure. Further, to the extent that these defendants might have provided incorrect information as to the actual manufacturers, the Act provides a mechanism to vacate an order dismissing the strict liability counts against them.

We find that the trial court did not err in dismissing the strict liability counts against the distributor defendants.

2. Negligence

In order to state a claim for negligence, the plaintiff must set out sufficient facts to allege the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from the breach. MacDonald v. Hinton, 361 Ill. App. 3d 378, 382 (2005). While the plaintiff need not prove her entire cause during summary judgment, she must present sufficient facts to support the necessary elements of her cause of action. Gregory v. Beazer East, 384 Ill. App. 3d 178, 185 (2008).

Duty is an essential element of a negligence claim, and whether a duty of care exists is a question of law, appropriately determined by the court on a motion for summary judgment.

Gregory, 384 Ill. App. 3d at 186. A duty to warn exists only where there is unequal knowledge, actual or constructive, of a dangerous condition, and the defendant, possessed of such knowledge, knows or should have known that harm might or could occur if no warning was given. Happel v. Wal-Mart Stores, Inc., 199 Ill. 2d 179, 186 (2002). The duty to warn arises only "where the parties do not share the same knowledge and where the defendant's knowledge relates to the potential for harm." Dearing v. Baumgardner, 358 Ill. App. 3d 540, 543 (2005).

At issue here is whether a warning is required where a distributor of a product has no proven knowledge of a danger attributed to the product. In Gray v. National Restoration Systems, Inc., 354 Ill. App. 3d 345 (2004), the decedent was killed when he attempted to saw open a drum of concrete waterproofing product. The plaintiff sued the distributor for negligence on the theory that the distributor had failed to warn of the potential for explosion when the product was exposed to sparks. In support of her allegation, the plaintiff asserted that the distributor had received a material safety data sheet (MSDS) for the product and therefore had a duty to disclose the MSDS and to warn about the dangers of the product. Gray, 354 Ill. App. 3d at 351. The appellate court upheld the dismissal of the negligence claim, noting that the mere existence of a MSDS, or any other indicator of product dangerousness, does not establish unequal knowledge on the part of a distributor and,

thus, does not establish a duty to warn. Gray, 354 Ill. App. 3d at 352.

Here, there is nothing in the record to establish that any of the distributor defendants possessed superior knowledge of the allegedly dangerous nature of benzene in gasoline at the time Richard was exposed to that hazard. We find nothing in the record to establish that the distributor defendants had any knowledge of the allegedly dangerous nature of benzene at the time Richard was exposed to it. The record shows that any documentation that was available from the manufacturer during that time would have gone directly to Pluth, not to the distributors. Moreover, to the extent that it may have been common knowledge that gasoline contained benzene, and benzene was potentially cancer causing, there was no duty to warn of dangers that are commonly known. Garrizales v. Rheem Mfg. Co. Inc., 226 Ill. App. 3d 20, 25 (1991).

Plaintiff maintains, however, that the distributor defendants' duty to warn Richard included a duty to warn of hazards which they should have known existed. As we noted above, the duty to warn exists only where there is unequal knowledge, actual or constructive, of a dangerous condition, and the defendant, possessed of such knowledge, knows or should have known that harm might or could occur if no warning was given." (Emphasis added.) Happel, 199 Ill. 2d at 186. Here, plaintiff maintains that the distributor defendants should have known of the dangers of benzene exposure and the harm that might occur if

Richard was exposed to benzene. However, plaintiff is mistaken in her belief that defendants are negligent if they should have known that the product was hazardous. The law imposes liability in negligence, where there is unequal knowledge, actual or constructive, of the hazard of a product and, "possessed of such knowledge," the defendant either knew or "should have known" that harm might or could occur "if no warning was given." Happel, 199 Ill. 2d at 186. Negligent failure to warn is predicated upon a failure to communicate knowledge of a hazard, not failure to investigate whether a hazard exists. Otherwise, distributors would be strictly liable for all hazards attributable to the products they distribute. See generally Gray, 354 Ill. App. 3d at 360.

In order to survive summary judgment on this issue, plaintiff needed to provide some evidence to establish that the distributor defendants knew that exposure to benzene could cause the cancer which harmed Richard, and possessed of that knowledge, knew or should have known that harm might or could occur if no warning was given. In an attempt to meet this burden, plaintiff filed an affidavit provided by Stephen E. Petty, a purported expert on benzene exposure. Petty attempted to give an opinion that "Texor, Parent, and Illinois Petroleum should have provided health and safety information to the customers they sold bulk gasoline to." Petty also opined that "it was unreasonable for Texor, Parent and Illinois Petroleum to rely upon common carriers to provide [hazardous material] information." Petty then

concludes that the distributor defendants "had the obligation and were in the best position to provide health and safety information regarding the gasoline they sold."

Plaintiff maintains that it was error for the trial court to grant the defendant's motion for summary judgment in light of Petty's affidavit. She maintains that Petty's affidavit established a genuine issue of material fact as to the distributor defendants' duty to warn Richard of the dangers of benzene.

The distributor defendants maintain that the trial court was correct in ignoring Petty's affidavit. While they concede that expert opinions are admissible, they point out that unsupported assertions, opinions, and self-serving or conclusory statements do not comply with the requirements for affidavits. Geary v. Telular Corp., 341 Ill. App. 3d 694, 699 (2003).

Here, Petty's statements and conclusions are not supported by fact. For example, Petty refers to standards established by the American National Standards Institute (ANSI) regarding hazardous exposure to support his conclusion that the distributor defendants were responsible for communicating hazardous warnings regarding gasoline. These standards, however, are voluntary and do not establish the existence of a legal duty to warn. Gray, 354 Ill. App. 3d at 355. Further, Petty's reliance upon OSHA regulations (29 CFR 1910.100 and 29 CFR 1910.1200) is likewise misplaced. Gray, 354 Ill. App. 3d at 356 (distributor cannot violate OSHA regulations without first having a duty to warn).

Given that Petty's affidavit failed to establish a genuine issue of material fact concerning the distributor defendants' duty to warn Richard of the hazards of benzene exposure, we find no error in the trial court's grant of summary judgment on the negligence counts.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Will County granting summary judgment to the defendants on the strict liability and negligence counts is affirmed.

Affirmed.

HOLDRIDGE, P. J., with LYTTON and SCHMIDT, JJ., concurring.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 27th day of July in the year of our Lord two thousand ten.

Nick Fleckman

Clerk of the Appellate Court