

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BARRY LEE SMALLEY,

Plaintiff,

OPINION AND ORDER

v.

06-C-0295-C

THE PROCTER & GAMBLE
DISTRIBUTING COMPANY,
n/k/a PROCTER & GAMBLE
DISTRIBUTING LLC,

Defendant.

In an order dated June 30, 2006, I granted plaintiff leave to proceed in forma pauperis on his state law claim that defendant The Procter & Gamble Company was negligent when it failed to warn that its “Joy Dish Soap” could cause skin injuries. (Since plaintiff was granted leave to proceed, defendant has advised the court that defendant’s correct name is Procter & Gamble Distributing LLC, the entity that assumed the assets of The Procter & Gamble Distributing Company in October 2006.)

Defendant believes that plaintiff would be unable to prove his negligence claim at trial and has moved for summary judgment. Because plaintiff has not shown that he could

produce any evidence from which a jury could conclude reasonably that he suffered an injury from the use of Joy dish soap or that defendant had any duty to warn of the possibility of injuries of the kind plaintiff allegedly suffered, defendant's motion will be granted.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Barry Lee Smalley is a patient at the Wisconsin Resource Center in Winnebago, Wisconsin. At the time of the events giving rise to this action, he was a patient at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin. He is a citizen of Wisconsin.

Defendant Procter & Gamble Distributing LLC is a limited liability company organized under the laws of Delaware with its principal place of business in Cincinnati, Ohio. As of about October 1, 2006, defendant assumed the assets and liabilities of the Procter and Gamble Distributing Company, an Ohio corporation.

On or about March 1, 2006, plaintiff used Joy dish soap on two occasions. On the first occasion, he mixed the soap with water in a sink in order to wash a dish, a pair of underpants and a pair of socks. Soapy water splashed on the jeans plaintiff was wearing and soaked through to his underwear. After about ten minutes, plaintiff noticed some mild

irritation and changed his clothes. At the time he changed his clothes, plaintiff did not notice any redness, rashes, peeling skin or burns. Later that day, plaintiff took a shower and used the Joy dish soap to wash himself. He never used Joy again for any purpose.

On March 2, 2006, plaintiff complained to the nurse on his unit that his scrotum was “dry red and peeling.” That same day, he visited the Health Services Unit, complaining of irritation in and around his groin. The medical notes for the March 2 visit do not mention Joy or any other soap. Instead, the notes indicate that plaintiff “denies any new shampoos or soaps” and that he reported “symptoms similar to this one time previously many years ago.” The notes indicate also that plaintiff’s genitalia were red and mildly swollen and that the skin on his scrotum and the base of his penis was peeling.

Dr. Ness first examined plaintiff for his skin irritation on March 9, 2006. In his notes, Ness wrote that plaintiff’s penis was “somewhat irritated/lichenified” and that his scrotum was “chronically irritated/lichenified.” Ness diagnosed the problem as “chemical dermatitis of penis & scrotum - prob secondary to using soap/baby oil during frequent attempts to masturbate.”

A March 15, 2006 medical report notes that plaintiff “had been using Lever 2000 and Dial soap.” On May 16, 2006, Ness noted that plaintiff’s groin rash had “flared again after working with chemical cleaners.” He ordered plaintiff to avoid chemicals during his work detail. At some point, Ness issued an order denying plaintiff access to his soaps.

Although plaintiff made repeated trips to the Health Services Unit between March 2 and mid-May 2006, his medical progress notes contain no mention of exposure to Joy dish soap until May 23, 2006. On that day, Ness wrote that plaintiff “has been washing his clothes, particularly his underpants, in Joy dishwashing soap.”

Despite the May 23, 2006 notation in plaintiff’s medical progress notes, plaintiff was not washing his underwear in Joy at that time and did not tell Dr. Ness that he was. Plaintiff did not use any soap at all to wash his underwear between March 1 and May 23, 2006, except, perhaps, Neutrogena soap.

Dr. Ness’s progress notes in plaintiff’s medical record for May 30, 2006 read:

Rash has almost completely resolved. [Plaintiff] has no access to any of his soaps etc. in his room. Since enforcing that his rash has progressively resolved. He wants his soaps etc. back or he states he will refuse all his meds. I informed him that the Medrol needs to be tapered slowly. I rec[ommend]: 3 mg bid x 7 dy; 2 mg bid x 7d; 1 mg bid x 7d; then 1 mg a d x 7d; then [discontinue]. Once off the Medrol we can reintroduce his soaps etc. one at a time. He is not willing to follow these instructions. I stressed the medical risks to him and he understands. [Return visit 1 week].

Dr. Ness has no opinion whether Joy caused plaintiff’s injuries.

OPINION

In his complaint, plaintiff alleged that Joy dish soap caused him to suffer burns and blisters to his genitalia and inner thighs, that defendant knew that its Joy dish soap could

cause burns to the skin and that it was negligent in failing to label its product to warn consumers of this potential hazard. These allegations were sufficient to state a claim. To prevail on the claim, however, plaintiff would have to prove that defendant had a duty to warn him arising out of its knowledge that its dish soap could cause burns and blisters to skin if used for bathing or washing underwear, that defendant failed to give adequate warnings to consumers such as plaintiff and that had it given a proper warning, plaintiff would have altered his behavior and avoided injury. Schreiner v. Wieser Concrete Products, Inc., 2006 WI App 138 ¶¶ 3-4, 294 Wis. 2d 832, 720 N.W.2d 525 (“A plaintiff who has established both a duty and a failure to warn must also establish causation by showing that, if properly warned, he or she would have altered [his or her] behavior and avoided injury.”) (quoting Kurer v. Parke, Davis, & Co., 2004 WI App 74, ¶ 25, 272 Wis. 2d 390, 679 N.W.2d 867)).

Plaintiff’s case founders at the first of the requiring showings. He has not proved that his use of Joy dish soap for washing his clothes and dishes caused him any injury, let alone that it caused him the sort of injury defendant would have had reason to anticipate. He has no expert testimony to support an allegation that Joy could cause an injury of the sort he claims to have suffered.

In general, a plaintiff must provide expert testimony to prove causation in a products liability case. This rule does not prevail if the circumstances are such that it would be

obvious to the factfinder that the accident is one that would not have happened had the manufacturer not been negligent or its product unreasonably dangerous. Smoot v. Mazda Motors of America, Inc., 469 F.3d 675, 680-81 (7th Cir. 2006) (holding that plaintiffs could not rely on theory of res ipsa loquitur in case in which inference of negligence from accident itself would not be obvious to factfinder; in such circumstances, expert testimony was necessary to defeat defendant's motion for summary judgment under Wisconsin law). In plaintiff's situation, however, it is not obvious that he would have suffered irritation and rash to his genitalia from using Joy on only two occasions.

In response to defendant's proposed findings of fact no. 24, plaintiff asserted that Dr. Ness told plaintiff he would "give testimony that would support other evidence that would establish that Joy soap more likely caused the plaintiff's injuries." However, plaintiff has not provided the court with any evidence to support this assertion. The undisputed fact is that Dr. Ness has no opinion whether Joy caused plaintiff's injuries. Plaintiff argues that at his deposition, Ness told him he would be willing to testify in this case. Even if that is true, nothing in the deposition testimony supplied by the parties suggests that Ness agreed to testify for plaintiff to matters beyond his observations of plaintiff's symptoms during his examinations of plaintiff and the treatment regimens he ordered.

Plaintiff was aware of the importance of obtaining expert testimony because the topic was discussed at length at the preliminary pretrial conference. Trans. of PPTC, dkt. #19,

at pp. 8-10. Plaintiff complains that he could not list Dr. Ness as an expert or obtain a report from him because the court's pro se case analyst did not send him subpoena forms in response to his letter of October 5, 2006, asking for "the proper forms" for calling witnesses to trial. His complaint is unconvincing. Plaintiff did not need subpoena forms in order to name Ness as an expert by the required deadline or to secure his report.

The Court of Appeals for the Seventh Circuit has stated repeatedly that if, on a motion for summary judgment, the plaintiff fails to produce evidence sufficient to convince a trier of fact to accept his version of the facts, the court may enter summary judgment for the opposing party. Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Fed. R. Civ. P. 56(e). Granting defendant's motion for summary judgment in this case is proper in light of plaintiff's failure to produce any evidence that his use of Joy dish soap caused him any injury. Without any evidence that Joy caused his own injury, without evidence that anyone else suffered a similar injury and without evidence that defendant had reason to know that the produce could cause such an injury, no jury could find that defendant knew its product was dangerous and that it had a duty to provide an adequate warning of potential injury. Therefore, it is not necessary to reach the final causation question, which is whether the failure of a proper warning caused plaintiff's injury.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Procter & Gamble Distributing LLC is GRANTED. The clerk of court is directed to enter judgment in defendant's favor and close this case.

Entered this 3rd day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge