

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

GEORGE SWEETSIR,
a/k/a GEORGE COOPER,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-541-S

BLUEDOT MEDICAL, INC.,

Defendant.

Plaintiff George Sweetsir commenced this diversity action claiming that a wheelchair he bought from defendant BlueDot Medical, Inc. was defective and negligently designed. Defendant Merits Health Products, Inc. has been dismissed as a defendant because it could not be located for service.

On January 3, 2007 defendant BlueDot Medical, Inc. moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter

of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Plaintiff argues that defendant's motion for summary judgment was not timely filed. The motion was to be filed not later than January 2, 2007. That date, however, was a federal holiday so the motion which was filed on January 3, 2007 was timely filed.

Defendant moves to strike plaintiff's affidavit because the exhibits are hearsay. This motion will be denied but the Court will not consider the exhibits which are hearsay.

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff George Sweetsir is an adult resident of Wisconsin. Defendant BlueDot Medical, Inc. is a business located in Charlotte, North Carolina.

Plaintiff was involved in an accident in 1990 that resulted in above knee amputations of both legs. As a result plaintiff has used wheelchairs with a chest strap to ambulate for the past 16 years.

When plaintiff lived in Charlotte North Carolina, he secured a Medicare Certificate of Medical Necessity (CMN) from his treating physician, Dr. William Bullock, for a motorized wheelchair. The CMN indicated that plaintiff required a motorized wheelchair for lifetime use. Equipment ordered for plaintiff's use included standard weight power wheelchair, adjustable height armrests, seat belt, sealed battery, adjustable footplate and rear zero pressure tire tube. Dr. Bullock referred plaintiff to BlueDot to obtain the chair.

The first wheelchair that BlueDot ordered for plaintiff was unsatisfactory and BlueDot honored plaintiff's request for a replacement chair. BlueDot delivered the Merits wheelchair to plaintiff in September 2005. When Stefan Moberg delivered the wheelchair to plaintiff he removed the seat belt at plaintiff's request.

The same day that the Merits chair was delivered plaintiff attempted to attach a chest restraint to the seat back as he had

in the past. Plaintiff realized that because the seat back did not lock in place it was not possible to attach the chest restraint to the seat back.

Plaintiff decided not to drill a hole into the frame of the chair for the purpose of stabilizing the seat hinge because the warranty might be affected. Although plaintiff recognized the risks of using the chair without a chest restraint, nonetheless, he used the chair on a daily basis without a chest restraint and intended to add the chest restraint when the one-year warranty period expired.

Plaintiff fell from the wheelchair several times due to the lack of a chest strap.

MEMORANDUM

To establish a strict liability claim plaintiff must establish the following elements that: a) the product was in a defective condition when it left the possession or control of the seller; b) the product was unreasonably dangerous to the user or consumer; c) the defect was a cause... of the plaintiff's injuries or damages; d) the seller engaged in the business of selling such product and e) the product was one which the seller expected to and did reach the user or consumer without the substantial change in the condition it was sold. Dippel v. Sciano, 27 Wis. 2d 443, 460, 155 N.W.2d 55 (1967).

The wheelchair that Dr. Bullock ordered for plaintiff was as follows: a standard weight power wheelchair, adjustable height

armrests, seat belt, sealed battery, adjustable footplate and rear zero pressure tire tube. The doctor did not order a chest strap and plaintiff did not advise BlueDot Medical that he needed a chest strap. The product that BlueDot Medical sold plaintiff was what the doctor ordered. It may not have been the right chair for plaintiff because it did not have a chest strap but the product itself was not defective.

BlueDot Medical did not provide plaintiff a wheelchair with a chest strap because the doctor prescribed a chair for plaintiff with a seat belt. BlueDot Medical relied on the doctors's assessment of plaintiff's needs and had no duty to independently assess plaintiff's needs or to provide a different chair than the one prescribed. Accordingly, defendant cannot be held strictly liable for any injuries plaintiff sustained by using the wheelchair because the product itself was not defective.

Plaintiff also claims that the defendant Merits Health Products, Inc. negligently designed the wheelchair. This claim must be dismissed because Merits Health Products, Inc. has been dismissed.

Plaintiff's third claim is that BlueDot's conduct in recommending the chair constituted an abnormally dangerous activity which exposed plaintiff to an unreasonable risk of harm. This claim is the same as plaintiff's strict liability claim who states that BlueDot's sale of the chair to plaintiff constituted abnormally dangerous activity which exposed him to unreasonable harm. BlueDot provided plaintiff the chair that his doctor

prescribed. It had no reasonable duty to act otherwise. Plaintiff has not shown that BlueDot Medical's sale of the chair to plaintiff was an abnormally dangerous activity.

As a matter of law defendant BlueDot Medical is not liable for injuries sustained by plaintiff for his use of the wheelchair provided by BlueDot. Defendant BlueDot Medical Inc.'s motion for summary judgment will be granted.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that defendant's motion to strike plaintiff's affidavit is DENIED.

IT IS FURTHER ORDERED that defendant BlueDot Medical Inc.'s motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendant BlueDot Medical Inc. against plaintiff dismissing his complaint and all claims contain therein with prejudice and costs and that defendant Merits Health Products, Inc. be dismissed without prejudice.

Entered this 5th day of February, 2007

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge