2016 WL 676409 (Pa.Com.Pl.) (Trial Order)
Court of Common Pleas of Pennsylvania.
Dauphin County

Jeffrey HIGH, Plaintiff,
v.
PENNSY SUPPLY, INC., Defendant,
v.
Charles W. HIGH, II, Additional Defendant.
Charles W. HIGH, II, Plaintiff,
v.
PENNSY SUPPLY, INC., Defendant,
v.
Jeffrey HIGH, Additional Defendant.

Nos. 2012 CV 06181 CV, 2012 CV 06206 CV.
February 18, 2016.

**Memorandum and Order (Summary Judgment)**

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Andrew H. Dowling, Judge.

***1** Before the Court is the Motion for Summary Judgment on behalf of Defendant Pennsy Supply, a Response filed on behalf of Plaintiff Charles W. High, II, a Response filed on behalf of Plaintiff Jeffery High and oral argument. Plaintiffs' products liability case alleges that concrete is defective, because it has a pH in excess of 11.5, and is capable of causing burns to the skin upon prolonged exposure. (Plaintiffs' Complaint ¶ 8). Defendant moves for summary judgment asserting that Plaintiffs have failed to prove a case that wet concrete, which normally has a pH range of 12-13, is an unreasonably dangerous and defective product.

In reviewing the grant of a motion for summary judgment, we must determine whether there is any material fact in dispute. Summary judgment may be entered if the pleadings, deposition, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Furthermore, this Court must view the record in the light most favorable to the non-moving party. *Amabile v. Auto Kleen Car Wash*, 376 A.2d 247, 249-50 (Pa. Super. 1977); *Bowman v. Sears, Roebuck & Company*, 369 A.2d 754, 756 (Pa. Super. 1976); *Husak v. Berkel*, 341 A.2d 174, 177 (Pa. Super. 1975). Summary judgment is to be entered only in the clearest of cases where there is not the slightest doubt as to the absence of a triable issue of fact. *Granthum v. Textile Machine Works*, 326 A.2d 449, 451 (Pa. Super. 1974).

This action arises out of an incident that occurred on November 9, 2012. Plaintiff Jeffrey High owns and lives at the property at which the events of this case took place. Jeffrey wanted to put a non-load bearing floor into a dirt crawlspace

  

that was part of his basement. (Jeffrey High Deposition at p. 27). The crawlspace was approximately three feet high, and several feet deep and wide.

Viewing the record in the light most favorable to Plaintiffs, as we must, Jeffrey ordered what he believed to be flowable fill from Pennsy Supply Inc., to be delivered at his house. (Jeffrey High Deposition at p. 34). It was not until Jeffrey questioned the driver of the delivery truck about the set time and the dry time of the concrete that he realized that the product he ordered was not the product that was delivered. (Id. pp. 63-64). At that point, there was nothing the brothers could do other than try to level the product with the tools that they had available. (Id. p.66).

At some point, Jeffrey took a break and discovered that the skin was pealing from his hands. (Id. p. 67). Upon becoming aware of Jeffrey's injury, Plaintiff Charles High went to the shower and discovered that this skin was turning black. (Deposition of Charles High at p. 73). As the result of their exposure to the wet concrete both Plaintiffs suffered extensive burns to their body that required skin grafting and resulted in permanent injury. (Reports of Dr. Blome-Eberwein and Dr. Amani, Plaintiffs' Exhibits G and H).

***2** We note that Plaintiffs do not assert an action against Pennsy Supply Inc. on a theory of negligence in connection with the wrong product being delivered. (See Plaintiffs' Brief at pp. 11-12). There has also been no showing that the particular concrete delivered was somehow defective, that it contained a pH outside of the normal range, or that it contained anything unusual. Plaintiffs claim that concrete itself as a product is in a "defective condition" and creates a danger that is "unknowable and unacceptable to the average or ordinary customer." (Plaintiffs' Brief at pp. 11-12).

In *Tincher v. Omega Flex, Inc.*, the Pennsylvania Supreme Court announced a new standard in 402(A) strict liability cases. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). The Supreme Court stated that the non-delegable duty in a strict liability case is "a person or entity engaged in the business of selling a product has a duty to make and/or market the product—which 'is expected to and does reach the user or consumer without substantial change in the condition in which it is sold'—free from 'a defective condition unreasonably dangerous to the consumer or [the. consumer's] property." ' (citing Restatement (2D) of Torts § 402A(1)). *Tincher*, 104 A.3d at 383 "To demonstrate a breach of duty in a strict liability matter, a plaintiff must prove that a seller (manufacturer or distributor) placed on the market a product in a 'defective condition." ' *Tincher*, 104 A.3d at 384. Additionally, "the cause of action in strict products liability requires proof, in the alternative, either of the ordinary consumer's expectations or of the risk-utility of a product." *Id.* at 401. The alternative test standard of proof is a "composite", i.e., a standard of proof which states the consumer expectations test and the risk-utility test in the alternative. *Id.* at 402. "[T]he strict liability cause of action theoretically permits compensation where harm results from risks that are known or foreseeable…and also where harm results from risks unknowable at the time of manufacture or sale...." *Id.* at 404-05.

The consumer expectations test defines a "defective condition" as a condition, upon normal use, dangerous beyond the reasonable consumer's contemplations. *Tincher* at 387. The risk-utility test offers a standard which, in typical common law terms, states that: a product is in a defective condition if a "reasonable person" would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. Id. at 389. The factors that to be considered in the risk-utility test are:
(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

  

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

*Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 389-90 (Pa. 2014). The combined standard, which states consumer expectations and risk-utility tests in the alternative, retains the features of each test, in practice, offering the parties a composite of the most workable features of both tests. Id. at 391.

***3** Accordingly, Plaintiffs here must prove a defective condition by showing that a danger is unknowable and unacceptable to the average or ordinary consumer, or that a reasonable person would conclude that the probability and seriousness of the harm caused by the product outweigh the burden or costs of taking precautions.

Pennsylvania has no recorded decision considering whether concrete is unreasonably dangerous by virtue of its capacity for causing burns while in its liquid state. The question has been considered in cases decided by other jurisdictions, and all concluded that the caustic properties of concrete are common knowledge and not subject to liability. *See Huff v. Elmhurst-Chicago Stone*, 419 N.E.2d 561 (Ill. App. 1981); and *Gray v. Dyson Lumber & Supply* Co., 465 So.2d 172 (La. 1985).

In *Simmons v. Rhodes & Jamieson*, Ltd., 46 Cal.2d 190, 293 P.2d 26 (1956), Simmons, a welder by trade, was constructing his own home and suffered severe burns as a consequence of using ready-mixed cement purchased from defendant. He sued for breach of warranty and for negligence. The trial court granted a nonsuit at the close of Simmon's case, which was affirmed on appeal. The Supreme Court of California observed that the injury occurred in the handling of a standard and common commodity, quicklime, a caustic element that caused the burns. The court recognized that quicklime was a necessary ingredient of concrete and that plaintiff there was familiar with the caustic quality of wet concrete.

The case of *Katz v. Arundel-Brooks Concrete Corp.* 220 Md. 200, 151 A.2d 731 (1959), involved virtually the same facts as those appearing in the instant case. Katz, an unemployed mechanic, sustained third-degree burns to his legs while working with wet concrete that had been mixed and sold by defendant. Katz brought an action for negligence and breach of warranty based upon the proposition that concrete was an excessively dangerous product. Katz, with a helper, spread the concrete with rakes and other tools to a depth of four inches. He had never worked with concrete before and made no inquiries of anyone as to the proper precautions to be taken. Katz spent five hours on his hands and knees in and around the concrete. He wore no gloves, pads or protective clothing except ordinary work trousers. The knees of his trousers were thoroughly saturated with the liquid mixture. When he finished the spreading job, he found that he had sustained third degree burns on his knees. The Maryland Court of Appeals rejected Katz's theory, noting that concrete is a common product that has been in use for many years. Its hazards were well known; yet, it was perfectly safe to use when normal precautions are taken against prolonged application to the skin.

In *Baker v. Stewart Sand & Material Co.*, 353 S.W.2d 108 (Mo. Ct. App. 1961), Baker, a real estate salesman, sought damages for burns and contact dermatitis sustained in the use of ready-mix concrete manufactured by defendant. The facts showed that the concrete was a standard mixture, and that the cement contained therein met all standard specifications. The court there also acknowledged decisions from other states and observed that it was common knowledge that cement contains lime and that lime is caustic. A jury verdict for plaintiff there was set aside by the trial court and affirmed on appeal.

  

***4** In *Dalton v. Pioneer Sand & Gravel Co.*, 37 Wash.2d 946, 227 P.2d 173 (1951), Dalton sustained third-degree chemical burns on both knees necessitating skin grafts while spreading concrete that was poured into his basement by defendant. The court ruled that knowledge of prospective injury from contact with wet concrete was not limited to experts nor beyond the ken of laymen generally, and affirmed a judgment for defendant entered at the close of Dalton's case.

Plaintiffs have failed to produce evidence that wet concrete is in a defective condition, Plaintiffs have failed to show that danger with wet concrete is unknowable and unacceptable to the average or ordinary consumer. To the contrary, we hold that the dangers associated with wet concrete are well known and are acceptable.

Additionally, Plaintiffs have failed to produce evidence that the seriousness of harm caused by concrete outweighs the burden or costs of taking precautions. Concrete is no doubt useful, and provides utility to the public as a whole, When used with the proper precautions and equipment there would seem to be a very low probability of serious injury, and Plaintiffs have failed to present any evidence to the contrary. There has been no evidence presented of the availability of a substitute product that would meet the same need and not be as unsafe. Based on the chemical reactions required to cure concrete, and the lack of evidence presented by Plaintiffs, there does not appear be a way to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. Proper attire and basic safety precautions could have prevented Plaintiffs' injury. It is common knowledge that cement contains lime and that lime is caustic. It does not appear to be feasible, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. Consequently, we find that Plaintiffs' have failed to prove that the seriousness of harm caused by concrete outweighs the burden or costs of taking precautions.

The following Order is appropriate:

***ORDER***

AND NOW, this *18th* day of February, 2016, upon consideration of the Motion for Summary Judgment filed on behalf of Defendant Pennsy Supply,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is Granted. Judgment is hereby entered in favor of Defendant and against Plaintiffs.

BY THE COURT:

<<signature>>

JUDGE ANDREW H. DOWLING

DISTRIBUTION:

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