SIXTH DIVISION
April 26, 2013

No. 1-12-0768

KATHRYN WOLSKI,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 09 L 8177
	)	
WORLD DRYER CORPORATION,	)	Honorable
	)	James N. O'Hara,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

¶ 1 Held: In a negligent product design case, the appellate court affirmed summary judgment in favor of a hand dryer manufacturer where no genuine issue of material fact existed regarding its lack of knowledge of the alleged design defect when the hand dryer was sold.

¶ 2 Plaintiff Kathryn Wolski appeals an order of the circuit court of Cook County granting summary judgment to defendant World Dryer Corporation (WDC) in a personal injury action. On appeal, Wolski argues the circuit court erred in ruling WDC owed no legal duty to warn of dangers associated with the improper installation of a replacement heating element in a hand

dryer manufactured by WDC. For the following reasons, we reject plaintiff's argument and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Wolski initially filed suit against WDC on July 29, 2009, and filed an amended complaint on October 15, 2010.[1] In the amended complaint, Wolski alleged that on December 27, 2008, and for some time prior thereto, the Illinois Department of Transportation (IDOT) owned, managed, maintained and controlled the Railsplitter rest area on southbound Interstate 55 near mile post 104, approximately five miles north of Springfield, Illinois. IDOT had installed a hand dryer manufactured, distributed or processed by WDC in the restroom of the rest stop. On December 27, 2008, Wolski used the hand dryer and received an electrical shock.

¶ 5 Count I of the amended complaint, which is the subject of this appeal, alleged WDC carelessly and negligently: (1) manufactured the hand dryer such that it caused an electrical shock when used for its intended purpose; (2) failed to adequately inspect and test the hand dryer for safety prior to sale; and (3) failed to warn the general public the hand dryer could cause electrical shock in normal use. As a direct and proximate cause, Wolski allegedly suffered a severe electrical shock, as well as bruises, contusions and lacerations to her body. Wolski allegedly became sick and disabled and will continue to suffer great pain and disfigurement.

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[1] The record on appeal shows Wolski and her husband filed an amended complaint on November 4, 2009. However, the operative complaint in this case is Wolski's "first amended complaint at law," filed October 15, 2010.

¶ 6 Count II of the amended complaint sounded in strict products liability. Wolski ultimately conceded in her response to the motion for summary judgment that this claim was barred by the statute of repose. The amended complaint further sought to add respondents in discovery, pursuant to section 2-402 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-402 (West 2010)), but Wolski raises no issue on appeal regarding this aspect of the amended complaint.

¶ 7 On April 7, 2011, WDC filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2010)). In a supporting memorandum, WDC argued in relevant part it designed and manufactured the hand dryer with reasonable care and no act or omission by WDC caused Wolski's injury. WDC relied on affidavits and deposition testimony from Dennis Smith, Patrick Masterson and Sean Stinnett.

¶ 8 The affidavits and deposition testimony disclose the following facts. Dennis Smith, a senior executive engineer for WDC, testified he had investigated injury complaints received by WDC for 20 years. Smith inspected the hand dryer that shocked Wolski. According to Smith, the hand dryer at issue was a surface mounted "A" model, manufactured between 1962 and 1963. Smith also testified WDC manufactures and sells replacement parts to repair old WDC hand dryers.

¶ 9 Smith further testified his inspection showed the hand dryer at issue had a current leakage originating from the heating element inside the machine. According to Smith, the dryer's heating element was broken, as was a ceramic cruciform designed to protect the heating element. Smith determined the heating element was improperly installed, causing the ceramic cruciform to break.

As a result, the heating coil came into contact with the metal housing of the dryer's blower assembly, thereby causing an electrical short.

¶ 10 Moreover, Smith testified the dryer had an improper ground connection. Smith's inspection revealed the dryer's original green grounding screw was replaced by a screw of the wrong size and material, with the wrong threads. According to Smith, the ground connection is supposed to act as a circuit breaker in the event a dryer has an electrical short. Smith testified that without the proper ground, users of the dryer may complete an electrical circuit.

¶ 11 Based on a date code and part number, Smith determined the replacement heating element in the dryer was manufactured by WDC in 1999. WDC sold the heating element as part of an assembly kit, which included assembly instructions. The record on appeal shows WDC produced a page of service instructions for the assembly kit. The service instructions contain no warning that improperly installing the heating element may lead to a short circuit and electrical shock. The service instructions also do not warn about inspecting the grounding screw or warn that improper grounding may result in electrical shock. The service instructions direct that the person installing a replacement heating element should check the wiring diagram on the cover. Moreover, the installation instructions for the dryer indicate the dryer must be grounded. Smith testified IDOT was using the cover of a different model of WDC hand dryer instead of the cover it originally received.

¶ 12 In his affidavit, Smith stated WDC had no contact with the dryer at issue after delivering it. WDC did not install or perform any grounding work on the dryer, although it provided proper

grounding materials. Smith also stated WDC did not perform any repair work on the dryer or install any replacement parts into the dryer.

¶ 13 Smith further stated in his affidavit that the dryer at issue was designed and manufactured in compliance with the existing state of the art, and in conformance with prevailing industry standards, including the National Electrical Code and U.L. standard 499. Smith added WDC had quality control and quality assurance programs in place regarding the dryer at the time of its manufacture. Based on his experience investigating injury complaints received by WDC, Smith stated no other WDC dryers substantially similar to the dryer at issue have caused anyone to receive an electrical shock due to a design or manufacturing defect. Smith testified, however, he investigated a prior incident in which an 8-year-old boy was fatally shocked by an improperly grounded WDC dryer with an improperly installed heating element. The record on appeal includes related documents showing this incident occurred in 1998 and involved a recessed mounted "RA" model manufactured in 1975. A document supplied by WDC indicates the ceramic cruciform on that "RA" dryer was broken, but a photograph list generated by an engineering firm indicates the "board" was broken during testing.

¶ 14 Patrick Masterson, a licensed professional engineer with Packer Engineering, Inc., stated in his affidavit that he also inspected the dryer at issue. Masterson stated he could testify, based on a reasonable degree of engineering certainty: (1) the dryer was designed and manufactured in compliance with the existing state of the art, and in conformance with U.L. standard 499; (2) the dryer was not properly grounded and the grounding screw was not original to the dryer; and (3) the heating element was not original to the dryer and was improperly installed.

¶ 15 Sean Stinnett, an "engineering technician 3" for IDOT, testified in his deposition he was responsible for the proper maintenance of IDOT's highway rest areas, including the Railsplitter rest area. Approximately one year before the alleged incident, Stinnett installed a replacement heating element in the dryer at issue. According to Stinnett, he followed the accompanying page of instructions in installing the replacement heating element, although he could not confirm the page produced by WDC was the same instruction sheet. Stinnett also testified that when he replaced the cover on the dryer, the ceramic cruciform was intact. Stinnett acknowledged that he did not check whether the dryer was properly grounded when he replaced the heating element. Stinnett confirmed that IDOT performed all maintenance and repair of the dryer after purchasing it from WDC.

¶ 16 Wolski responded to the motion for summary judgment,[2] arguing that, based on the 1998 incident (and another incident listed in the investigatory documents), WDC was aware of the potential for injury if repairs were improperly performed and also failed to warn of the dangers of improper grounding. Wolski argued WDC had a postsale duty to warn based on Restatement (Third) of Torts: Products Liability § 10 (1998), which provides:

> "(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning

[2] The copy of plaintiff's response included in the record on appeal is not date-stamped by the circuit court.

after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning."

Wolski maintained a genuine issue of material fact existed regarding how Stinnett would have acted had he received a proper warning.

¶ 17 On June 21, 2011, WDC filed its reply in support of summary judgment, arguing WDC owed no continuing duty to warn under Illinois law. WDC also maintained the prior incidents were hearsay and not substantially similar to Wolski's case. WDC attached a supplemental affidavit from Smith listing differences between the dryer at issue in this case and the "RA" dryer involved in the prior incident.

¶ 18 On October 18, 2011, during the hearing on WDC's motion for summary judgment, WDC cited the Illinois Supreme Court's decision in *Jablonski v. Ford Motor Co.*, 2011 IL 110096,

decided less than a month prior to the hearing. WDC argued *Jablonski* established there was no postsale duty to warn and rejected Restatement (Third) of Torts: Products Liability § 10 (1998). The circuit court denied summary judgment, noting that *Jablonski* acknowledged the growing popularity of Restatement (Third) of Torts: Products Liability § 10 (1998), and genuine issues of material fact existed regarding WDC's liability on that basis.

¶ 19 On November 15, 2011, WDC filed a motion to reconsider the denial of summary judgment, arguing the circuit court erred in its application of *Jablonski*. On March 1, 2012, following briefing and a hearing on the matter, the circuit court agreed it had misapplied *Jablonski* and entered an order granting reconsideration and summary judgment in favor of WDC. On March 20, 2012, Wolski filed a timely notice of appeal to this court.

¶ 20 DISCUSSION

¶ 21 On appeal, Wolski contends the circuit court erred in granting summary judgment to WDC. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of triable fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). In determining whether a question of fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is "a drastic means of disposing of litigation," and thus, should only be awarded when

the moving party's right to judgment as a matter of law is "clear and free from doubt." *Id.* We review grants of summary judgment *de novo*. *Id.*

¶ 22 Wolski's amended complaint alleges negligent product design. "A product liability action asserting a claim based on negligence, such as negligent design, is based upon fundamental concepts of common law negligence." *Jablonski*, 2011 IL 110096, ¶ 82. "As in any negligence action, a plaintiff must establish the existence of a duty, a breach of that duty, an injury that was proximately caused by that breach, and damages." *Id.*

¶ 23 Wolski argues the circuit court erred in ruling WDC had no duty to warn in this case. The determination of whether a defendant owes a duty to a plaintiff is a question of law, which we also review *de novo*. Id. at ¶ 83.

¶ 24 Under established Illinois case law, when a design defect is present at the time of sale, the manufacturer has a duty to take reasonable steps to warn at least the purchaser of the risk if the manufacturer knew or should have known of the danger at the time the product leaves the manufacturer's control. See *id.* at ¶ 111 (and cases cited therein). "Nevertheless, 'a manufacturer is under no duty to issue postsale warnings or to retrofit its products to remedy defects first discovered after a product has left its control.' " *Id.* at ¶ 112 (quoting *Modelski v. Navistar International Transportation Corp.*, 302 Ill. App. 3d 879, 890 (1999)). The *Jablonski* court did not foreclose the possibility that a postsale duty to warn, even where the manufacturer did not know the product was defective at the time of original sale, could be recognized in the future in Illinois, but it declined the invitation to expand the duty under the particular facts and circumstances presented in that case. *Jablonski*, 2011 IL 110096, ¶ 118.

¶ 25 In this appeal, Wolski does not ask this case to recognize a postsale duty to warn based on the Restatement (Third) of Torts: Products Liability § 10 (1998). Wolski expressly argues that *Jablonski* "has no effective application to the facts of the case at bar," thereby forfeiting any argument based on the Restatement on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Sept.1, 2006). Indeed, by expressly arguing the duty our supreme court declined to recognize in *Jablonski* is not at issue in this case, Wolski has not only forfeited the argument, but also waived it. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007).

¶ 26 Wolski instead argues WDC had a duty to warn of the potential dangers of improperly installing a replacement heating element, particularly in improperly grounded dryers. Wolski argues WDC knew of this danger after the 1998 incident, before it sold the 1999 replacement heating element involved in this case. Wolski thus concludes WDC owed the basic duty regarding known dangers recognized in Illinois law.

¶ 27 WDC responds Wolski did not plead this theory in her amended complaint. " 'A plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in her complaint. [Citation.] It is a fundamental rule, with no exceptions, that a party must recover on and according to the case she has made for herself by her pleadings.' " *Catom Trucking, Inc. v. City of Chicago*, 2011 IL App (1st) 101146, ¶ 25 (quoting *Kincaid v. Ames Department Stores, Inc.*, 283 Ill. App. 3d 555, 568 (1996). " 'A party cannot seek summary judgment on a theory that was never pled in the complaint.' " *Id*. (quoting *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 373 Ill. App. 3d 895, 900 (2007).

¶ 28 Wolski replies she did plead this theory by alleging WDC "[c]arelessly and negligently failed to warn the general public, including the Plaintiff, that the aforementioned hand dryer could electrically shock individuals while in use." Wolski relies on the general rule that this court must construe the pleadings strictly against the movant and liberally in favor of the opponent. *Williams*, 228 Ill. 2d at 417.

¶ 29 In this case, Wolski's amended complaint, no matter how liberally construed in her favor, ultimately alleges a hazard of the design of the hand dryer, not of the replacement heating element. The 1998 incident may have made WDC aware of a potential danger, but there is nothing in the pleadings or materials submitted in support of summary judgment suggesting this danger was new, as opposed to newly-discovered. WDC's legal duty regarding any defect in the design of the dryer is based on what WDC knew or should have known at the time of sale in 1962 or 1963. *Jablonski*, 2011 IL 110096, ¶ 111. WDC's manufacture of a replacement part over three decades later in no way changes the fact that the potential danger here relates to the design of the dryer and therefore existed when the dryer was sold. Wolski raises no genuine issue of material fact regarding whether WDC knew or should have known of the danger of improperly installing a replacement heating element, particularly in improperly grounded dryers, when the dryer left WDC's control. Accordingly, following *Jablonski* and *Modelski*, WDC owed no duty to warn in this case. Thus, we conclude the circuit court did not err in entering summary judgment in favor of WDC on Wolski's amended complaint.

¶ 30 CONCLUSION

¶ 31 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 32 Affirmed.