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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ELIZABETH J. BROWN

VERSUS

CIVIL ACTION

STENOGRAPH CORPORATION
SUCCESSOR IN BUSINESS OF
XSCRIBE, INC.

NO. 99-342-B-M3

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the defendant's motion for summary judgment. The Court held oral argument on the motion on May 31, 2001. After reviewing the record, the applicable law and for reasons which follow, the Court grants the defendant's motion for summary judgment.

Subject Matter Jurisdiction

Before considering the merits of this motion, it is necessary for the Court to determine whether it has subject matter jurisdiction herein. The fact that the parties have not questioned the Court's jurisdiction is immaterial. The Court has an affirmative duty to decide whether it does in fact have subject matter jurisdiction.

The plaintiff, Elizabeth J. Brown, originally filed this suit in the 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana,, alleging that the defendant, Stenograph Corporation ("Stenograph"), manufactured a defective stenograph machine. The plaintiff contends that the use of the defective

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machine. The plaintiff contends that the use of the defective machine caused her to suffer from carpal tunnel syndrome and thoracic outlet syndrome.

A petition of intervention was filed by the Louisiana Workers' Compensation Corporation("LWCC") alleging that LWCC has paid workers' compensation benefits and medical expenses due to the plaintiff's injuries. Further, LWCC claimed that it is entitled to legal and contractual subrogation if the defendant is found to be legally responsible for the plaintiff's injuries.

On April 20, 1999, the case was removed to federal court.[1] In its notice of removal, Stenograph alleged that although more than thirty days had passed since the suit was filed,[2] it first obtained notice of the suit when it was served through the Louisiana long-arm statute by mail on March 22, 1999.[3] The Supreme Court has found that the period for removal ordinarily begins to run the date of service of the complaint.[4] The record clearly reveals that the defendant removed the suit within thirty days of being served with the complaint. Furthermore, it is clear that the plaintiff did

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[1]Rec. Doc. No. 1.

[2]28 U.S.C. § 1446(b) requires that a notice of removal must be filed within thirty (30) days of receipt of the initial pleading.

[3]Rec. Doc. No. 1, p. 4.

[4]Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322, 143 L.Ed.2d 448 (1999).

not file a motion to remand based on the ground that the removal was not timely made. Since this is a procedural matter which may be waived by the plaintiff's failure to timely file a motion to remand, the Court finds that Stenograph timely removed this suit to federal court.

Stenograph also alleged in its notice of removal that the 19th Judicial District Court was fraudulently joined as a defendant to destroy diversity.[5] In addition, at the time the case was removed to this Court, the 19th Judicial District Court had not been served with a copy of the complaint. This Court finds that the 19th Judicial District Court was fraudulently joined at the time the case was filed and removed to federal court. Since there is complete diversity between the parties without the presence of the 19th Judicial District Court as a defendant, and the requisite jurisdictional amount is present, the Court finds that it has subject matter jurisdiction under 28 U.S.C. 1332.[6] On August 25, 1999, the plaintiff's claim against the 19th Judicial District Court was properly dismissed.[7]

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[5]Rec. Doc. No. 1, p. 4.

[6]Carriere v. Sears Roebuck, 893 F.2d 98 (5th Cir.), *cert. denied,* 498 U.S. 817, 111 S. Ct. 60, 112 L.Ed.2d 35 (1990).

[7]Rec. Doc. No. 9.

Having found that it has subject matter jurisdiction, the Court now turns to a discussion of the motion for summary judgment filed by Stenograph.

Summary Judgment Standard

Summary judgment should be granted if the record, taken as a whole, "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 judgment as a matter of law."[8] The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[9] A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case."[10] If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response."[11]

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[8]Fed.R.Civ.Proc. 56(c); New York Life Ins. Co. v. Travelers Ins. Co., 92 F.3d 336, 338 (5th Cir. 1996); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 758 (5th Cir. 1996).

[9]Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). *See also* Gunaca v. Texas, 65 F.3d 467, 469 (5th Cir. 1995).

[10]Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323-25, 106 S. Ct. at 2553).

[11]*Little,* 37 F.3d at 1075.

If the moving party does meet this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial.[12] The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence.[13] Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts."[14] The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[15] Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial.[16]

When affidavits are used to support or oppose a motion for summary judgment they "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show

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[12]Wallace v. Texas Tech Univ., 80 F.3d 1042, 1046-47 (5th Cir. 1996).

[13]*Little*, 37 F.3d at 1075; *Wallace*, 80 F.3d at 1047.

[14]*Wallace*, 80 F.3d at 1047. *See also* S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996).

[15]McCallum Highlands v. Washington Capital Dus, Inc., 66 F.3d 89, 92 (5th Cir. 1995), as revised on denial of rehearing, 70 F.3d 26 (5th Cir. 1995).

[16]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

affirmatively that the affiant is competent to testify to the matters stated therein."[17] Affidavits that are not based on personal knowledge or that are based merely on information and belief do not satisfy the requirements of Rule 56(e), and those portions of an affidavit that do not comply with Rule 56(e) are not entitled to any weight and cannot be considered in deciding a motion for summary judgment.[18] Neither shall conclusory affidavits suffice to create or negate a genuine issue of fact.[19]

In order to determine whether or not summary judgment should be granted, an examination of the substantive law is essential. Substantive law will identify which facts are material in that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[20]

The Louisiana Products Liability Act

The plaintiff has filed this suit under the Louisiana Products Liability Act("LPLA"). Plaintiff claims that the Xscribe Steno Ram

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[17]Fed.R.Civ.Proc. 56(e). *See also* Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc., 993 F.2d 1178, 1182 (5th Cir. 1993).

[18]Richardson v. Oldham, 12 F.3d 1373, 1378-79 (5th Cir. 1994).

[19]McCallum Highlands v. Washington Capital Dus, 66 F.3d 89, 92 (5th Cir. 1995); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203, 1207 (5th Cir. 1993); Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992).

[20]Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed. 202 (1986).

III Plus Machine was defective in both design and composition. In addition, plaintiff argues that the manufacturer, Stenograph, is liable for failing to warn her of the alleged defects in the product. In order to withstand the defendant's motion for summary judgment, the plaintiff must present evidence which creates a material issue of fact on whether she has established the essential elements of her claims under the LPLA. The LPLA "establishes the exclusive theories of liability for manufacturers for damage caused by their products."[21] Thus, in order for a claim to be viable under the LPLA, the plaintiff's evidence must support one of the theories of liability set forth in the act.

A manufacturer of a product will be liable under the act only if the product is shown to be "unreasonably dangerous" in one of four ways: (1) construction or composition, (2) design, (3) inadequate warning or (4) failure to conform to an express warranty.[22] In addition, the plaintiff must show that her damages: (1) were proximately caused by the characteristic of the product that renders it unreasonably dangerous, and (2) rose from a reasonably anticipated use of the product.[23]

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[21]La.Rev.Stat. 9:2800.52.

[22]La.Rev.Stat. 9:2800.54.

[23]Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 309 (5th Cir. 1998)(en banc). *See* La.Rev.Stat. 9:2800.54.

1) Construction or Composition

In her complaint and in briefs filed with the court, the plaintiff alleged that the Xscribe Steno Ram III Plus was defective in composition. Under La.Rev.Stat. 9:2800.55, "[a] product is unreasonably dangerous in construction or composition if, at the time the product left the manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer." Inference of a defect in a product is not allowed merely because an injury occurred.[24] The plaintiff offered absolutely no summary judgment evidence that the device in question deviated in any respect from the manufacturer's specifications. In fact, the plaintiff did not present any evidence of the manufacturer's specifications nor any evidence that the machine that the plaintiff was using was tested by an expert in the field. Since the plaintiff has failed to meet her burden on the construction or composition claims, the defendant is entitled to summary judgment on these claims.

Furthermore, during oral argument, counsel for the plaintiff conceded that he had no evidence to support the composition claim and had no objection to the Court's granting a partial summary

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[24] Jaeger v. Automotive Cas. Ins. Co., 682 So.2d 292 (La. App. 4 Cir. 1996), *writ denied*, 688 So.2d 498 (La.), *reconsideration denied*, 691 So.2d 72 (La. 1997).

judgment dismissing the composition claim. Based on the lack of evidence to support the composition claim and plaintiff's concession at oral argument on this claim, the Court grants defendant's motion for summary judgment on the construction or composition claim.

2) Design Defect

Plaintiff also contends the Steno Ram III was not properly designed. In order to show that a product is unreasonably dangerous in design, the plaintiff must show that:

> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
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> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.[25]

To avoid summary judgment on the claim that a design defect exists, the plaintiff must come forward with competent evidence that would allow the trier of fact to conclude both of the above factors

[25]La.Rev.Stat. 9:2800.56. *See also* Morgan v. Gaylord Container Corp., 30 F.3d 586 (5th Cir. 1994).

existed or that there exists a material issue of fact on this claim which would preclude the Court from granting a summary judgment.[26]

In support of her claim that the Steno Ram III Plus has a design defect, the plaintiff points to an alternative design manufactured by Robson Technologies, Inc., known as the Gemini. The plaintiff argues that the design of the Gemini machine is better situated to prevent the type of injuries that she allegedly suffered. In further opposition to the defendant's motion for summary judgment, the plaintiff submits what appears to be an excerpt from the Gemini's instruction manual and a copy of the product's web page. Assuming for purposes of this motion that the evidence submitted by the plaintiff shows that an alternative design does exist, plaintiff failed to present any evidence to show that her injuries would have been prevented by use of the alternative design. Furthermore, plaintiff failed to present any evidence of the second factor required by La.Rev.Stat. 9:2800.56 - that the likelihood that the product's design would cause the damage and the gravity of the damage outweighed the burden on the manufacturer. An unreasonably dangerous design will not be presumed simply because injury occurred. Rather, the plaintiff must come forward with scientifically viable evidence to show that the alternative design would have prevented her injuries.

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[26] *See* McCarthy v. Danek Medical, Inc., 65 F.Supp.2d 410 (E.D.La. 1999).

In support of her contention that the Steno Ram III caused her injuries, the plaintiff relies on the depositions of Dr. Richard Gold, the plaintiff's neurologist, and Lorrain Mackay, a physical therapist. Expert opinion offered in opposition to a motion for summary judgment must meet the admissibility requirements of Fed.R.Civ.Proc. 56(e), as well as Rule 702 of the Federal Rules of Evidence.

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,[27] the Supreme Court stressed the importance of the gatekeeping role of trial courts to ensure that all scientific testimony and evidence is not only relevant, but reliable.[28] Later, the Court, in *Kumho Tire Co. v. Carmichael*,[29] made clear that the standard set forth by *Daubert* applies not only to scientific testimony, but to all expert testimony.[30] The test for admissibility, as set out in *Daubert*, is flexible, but the Court set forth the following factors which should be considered in determining whether or not certain testimony will assist the trier of fact: (1) whether or not the theory or technique has been or can be tested, (2) whether or not the theory has been subjected to peer review or publication,

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[27]509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

[28]*Id.*

[29]526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 238(1999).

[30]For a thorough discussion of *Daubert* and *Kumho*, *see Reference Manual on Scientific Evidence* (2d ed., Federal Judicial Center 2000).

(3) the potential rate of error, and (4) general acceptance.[31] The focus should be on the methodology used, not the result reached.

Both Dr. Gold and Lorrain Mackay testified that they believed that the Steno Ram III caused Ms. Brown's injuries. The issues before the Court are not just whether the device may have caused the injury, but also whether the device was improperly designed. Assuming that Dr. Gold and Ms. Mackay are competent to testify that the machine caused the plaintiff's injuries, the issue remains whether either of these witnesses are competent to testify regarding the design of the machine. Whether or not such evidence may be considered by the Court depends on the qualifications of the witnesses to give such an opinion.[32]

Ms. Mackay testified that she never tested the Steno Ram III that Ms. Brown used, nor any other similar machine.[33] The evidence is clear that Ms. Mackay has no experience in the design of devices of the type involved in this case. In addition, Ms. Mackay admitted that numerous factors could have contributed to the plaintiff's injuries, including posture, chair, and stress.[34] Ms. Mackay also admitted that she is not a certified ergonomist.[35]

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[31]509 U.S. at 593-594, 113 S. Ct. at 2796-2797.

[32]Fed.R.Evid. 702.

[33]Transcript of the Deposition of Lorrain Mackay, p. 42.

[34]*Id.* at pp. 36-51.

[35]*Id.* at p. 33.

Dr. Gold is a neurologist who began treating the plaintiff in June of 1996. Dr. Gold began treating the plaintiff for myofascial pain in her neck and shoulders, which he attributed to slumped shoulders.[36] When questioned by defense attorneys, Dr. Gold admitted that he had never reviewed any literature or done any research regarding court reporting machines.[37] He also does not have any experience in the testing or design of court reporting machines. In 1998, Dr. Gold, after treating the plaintiff for two years, wrote a "prescription for a special kind of steno machine that might put less stress on her upper body."[38] However, Dr. Gold admitted that this suggestion came only at the urging of the plaintiff who informed him that a different machine existed.[39] Finally, when asked if the Steno Ram III machine caused the plaintiff's injury, Dr. Gold replied:

> Only way we have that is, as I said, doctors are not God. I mean the patient tells me that that's what aggravates it, so I've got to say, okay, that's what aggravates it. So I have no reason to doubt her. She always seemed to be a very pleasant person and pretty straightforward.[40]

This testimony does not constitute expert opinion that the

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[36]Transcript of the Deposition of Richard H. Gold, M.D., pp. 19-20.

[37]*Id.* at p. 20.

[38]*Id.* at p. 36.

[39]*Id.* at p. 37.

[40]*Id.* at p. 51.

machine was improperly designed. Based on the testimony and qualifications of the plaintiff's witnesses, the Court finds that their opinion alone is not sufficient to defeat the defendant's motion for summary judgment. Even if the Court were to accept the opinion of Ms. Mackay and Dr. Gold that the Steno Ram caused the plaintiff's injuries, the plaintiff has still not satisfied the burden created by La.Rev.Stat. 9:2800.56. Neither Ms. Mackay nor Dr. Gold testified that the alternative design, the Gemini, would have prevented the plaintiff's injury. In addition, the plaintiff offered absolutely no evidence as to the cost-benefit requirement of 9:2800.56. Although some cases may not require evidence in the form of expert opinion,[41] this case involves complex issues concerning the design of a stenographic machine. This is not a case in which the Court or jurors, using their everyday knowledge, can determine whether or not the machine was defective in design. After a careful review of the record and evidence presented, the Court finds that the plaintiff has not met her burden of showing that there is a genuine issue of material fact on the issue of design defect. Plaintiff's reliance on the defendant's expert, Dr. Richard Rink does not support plaintiff's claim or defeat defendant's motion for summary judgment.

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[41] *See* Morgan v. Gaylord Container Corp., 30 F.3d 586 (5th Cir. 1994).

Therefore, the defendant's motion for summary judgment is granted on the claim that the Steno Ram is defective in design.

3) Failure to Warn

Finally, plaintiff contends that the defendant failed to properly warn her of the dangers involved in using the machine. Plaintiff also contends the defendant should have warned her not to use a second court reporting machine manufactured by the defendant. Instead, the plaintiff argues that the defendant should have told her to use a competitors product which plaintiff contends is a better product.

A product manufacturer is liable for an inadequate warning "if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product."[42] In addition, the plaintiff must show a connection between the manufacturer's failure to warn and the damage suffered.[43] The plaintiff has submitted no such evidence in opposition to the defendant's motion for summary judgment. The plaintiff's only evidence supporting her claim that Stenograph was negligent in failing to warn is the subsequent issuance by the

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[42]La.Rev.Stat. 9:2800.57.

[43]McCarthy v. Danek Medical, Inc., 65 F.Supp.2d 410(E.D.La. 1999).

company of a warning which encourages consumers to consult a doctor if pain or discomfort occurs during the use of the Steno Ram machine. Plaintiff conceded at oral argument that such evidence is inadmissable for the purpose of showing that a product is defective.[44]

To recover under the theory of failure to warn, the plaintiff must show that: (1) the defendant failed to warn of a risk associated with the use of the product otherwise unknown to the plaintiff and (2) the failure to warn was the cause of the plaintiff's injury.[45] This plaintiff has not only failed to show causation between the product and the injury, but has also failed to present any evidence showing that the defendant's failure to warn was the cause of the plaintiff's injury.

Therefore, the Court finds that the plaintiff has not satisfied her burden and summary judgment on the issue of failure to warn is proper.

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[44]Fed.R.Evid. 407.

[45]*See* Hebert v. Miles Pharmaceuticals, 1994 WL 10184 (E.D.La. 1994).

Conclusion

For reasons set forth above, the Court finds that the defendant is entitled to summary judgment as a matter of fact and law. Therefore, the defendant's motion for summary judgment is GRANTED.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, June 6, 2001.

FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA