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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000298-MR

JUANITA TURPIN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CI-008902

STANLEY SCHULZE AND COMPANY, INC;
INTERNATIONAL DOOR CLOSERS, INC. OF
TENNESSEE; AND THE COURIER JOURNAL,
INC.

APPELLEES

AND

2008-CA-000385-MR

INTERNATIONAL DOOR CLOSERS, INC
OF TENNESSEE

CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
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JUANITA TURPIN

CROSS-APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KELLER, AND WINE, JUDGES.

WINE, JUDGE: Juanita Turpin (“Turpin”) appeals from a summary judgment of the Jefferson Circuit Court dismissing her strict product liability claims against Stanley Shulze & Co. Inc. (“Shultze”) and International Door Closers, Inc. of Tennessee (“International”). Shultze and International cross-appeal from the trial court’s order denying their motions for summary judgment on Turpin’s product-liability claims based on negligence and breach of warranty. We agree with the trial court that Shultze and International are not entitled to the protection of the middleman statute because the manufacturer of the product is not subject to personal jurisdiction in Kentucky. Furthermore, we agree with the trial court that Turpin presented sufficient evidence of causation to establish a jury issue on whether the product was defective and whether the defect caused Turpin’s injuries.

But we also agree with the trial court that Turpin failed to show that the defective condition of the product was unreasonably dangerous. Hence, we affirm the trial court's ruling on both the direct and the cross-appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out a slip-and-fall accident that occurred on January 5, 2005. Turpin was walking through the lobby of the Courier-Journal Building, where she worked as an editor. As she was passing by the interior glass doors, she slipped and fell, injuring her left knee. Turpin alleges that she fell because hydraulic fluid had leaked from a door closer on one of the glass doors. Turpin states that she did not notice that the fluid had pooled on the floor since it was odorless and colorless.

The door closers were manufactured by Heng Kuo Company, Limited ("Heng Kuo"), a Taiwanese corporation. Heng Kuo distributes the door closers in the United States through International Door Closers, Inc. of California. The door closers are distributed in the eastern United States through International, an affiliated company. International sold the door closers to Shultze, the subcontractor hired to install the glass doors and door closers in June of 2004.

Turpin filed this action against Shultze on October 14, 2005. She subsequently filed an amended complaint naming International and C.R. Laurence Co. as additional defendants. Shultze and International then filed third-party complaints against the Courier Journal. The claims against C.R. Laurence and the Courier Journal were eventually dismissed.

Following an extended period of discovery, Shultze and International filed motions for summary judgment on all of Turpin's claims. They both argued that Turpin's product liability claims were barred under the middleman statute, Kentucky Revised Statutes ("KRS") 411.340. In the alternative, they sought dismissal of the strict liability, warranty and negligence claims on substantive grounds.

On October 26, 2007, the trial court entered an order granting the motions in part and denying the motions in part. The court found that Shultze and International were entitled to dismissal of the strict liability claims because defective door closers are not "unreasonably dangerous." However, the court found that Shultze and International were not entitled to the protection of the middleman statute because the manufacturer is not subject to the jurisdiction of the Kentucky courts. Finally, the trial court found that Turpin had presented sufficient evidence to support a jury question on the issue of causation. On January 28, 2008, the trial court entered an order denying Turpin's motion to reconsider dismissal of the strict liability claim. The court also designated its prior order to be final and appealable.¹ This appeal and cross-appeals followed.

CROSS APPEAL

¹ It is becoming a common practice for trial courts to include finality language pursuant to Kentucky Rules of Civil Procedure ("CR") 54.02 as an alternative to denying a party's motion for reconsideration under CR 59.05. While we recognize there are limited occasions when such an order may be appropriate, a trial court should not grant CR 54.02 requests routinely or as a courtesy to counsel. Each case must be evaluated on a case by case basis. *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722 (Ky. 2008), citing *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10, 100 S.Ct. 1460, 1466 (1980). Mere recitation of the "final and appealable" provision of CR 54.02 is not determinative of the matter. *Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co.*, 872 S.W.2d 469, 470 (Ky. 1994).

Since the issues raised by Shultze and International are potentially dispositive of the entire action, we shall address their cross-appeals first.

Middleman Defense

Shultze and International primarily argue that they are exempt from liability under the “middleman statute”, KRS 411.340. That statute relieves a wholesaler, distributor or retailer from liability in any product liability action where: 1) the manufacturer is identified and subject to the court’s jurisdiction; (2) the product is sold in its original condition or in the same condition in which it was received by the middleman; (3) the middleman did not provide a separate express warranty; and (4) the middleman did not know or have reason to know that the product was in a defective condition unreasonably dangerous to the user or consumer.

For purposes of this appeal, the only disputed issue is whether the manufacturer, Heng Kuo, is subject to personal jurisdiction by a Kentucky court. As the parties asserting jurisdiction, Shultze and International have the burden of proving that Heng Kuo is subject to personal jurisdiction in Kentucky. *See Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980). Shultze and International argue that Heng Kuo has sufficient contacts with Kentucky to support an exercise of personal jurisdiction over it.

Kentucky's long arm statute, KRS 454.210, extends Kentucky personal jurisdiction to the limits of due process. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 168 (Ky. App. 1991). “[D]ue process requires ... that in

order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ” *International Shoe Co. v. State of Wash., Office of Unemployment*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 2d 95 (1945). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985). By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. *Id.* at 472, 105 S. Ct. at 2182. To the extent that Heng Kuo has exercised the privilege of conducting activities within Kentucky and has enjoyed the benefit and protection of its laws, it is subject to those obligations which arise out of or are connected with its activities here. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958).

The substantial connection between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state. Furthermore, the cause of action must arise from the defendant activities in the forum state. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92 (1987). In *Asahi*, eight justices agreed

that the exercise of personal jurisdiction over the foreign defendant would be unreasonable. However, the Court split into two plurality opinions concerning the proper scope of the "stream of commerce" theory for the determination of whether a foreign defendant has purposefully availed himself of the benefits of a particular forum.

In her plurality opinion, Justice O'Connor states that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* Likewise, a defendant's mere awareness that the product would be swept into the forum state by the stream of commerce would not be an act purposely directed toward the forum state. *Id.* Instead, Justice O'Connor held that some additional conduct by the defendant is necessary, such as designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *Id.*

On the other hand Justice Brennan, in his *Asahi* concurrence, disagreed with O'Connor's stream of commerce theory. Rather, he stated that "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no

corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity". *Id.* at 117, 107 S. Ct. 1034-35. (Brennan J., *concurring in part and concurring in the judgment*). Consequently, the plurality of the Court joining in Justice Brennan's opinion concluded that a defendant's "mere awareness" that a product is being marketed in a particular state would be a sufficient basis for the constitutional assertion of personal jurisdiction.

Shultze and International point out that Justice O'Conner's "stream of commerce plus" analysis did not represent a majority of the Supreme Court in *Asahi*, and therefore is not binding on this Court. Nevertheless, Justice O'Conner's approach has been followed by this Court in *Halderman v. Sanderson Forklifts Co., Ltd.*, 818 S.W.2d 270 (Ky. App. 1991), and by the Sixth Circuit Court of Appeals in *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472 (6th Cir. 2003). Furthermore, the facts of those cases are directly analogous to the facts presented in the current case.

In *Halderman*, the plaintiff sought to bring an action against Sanderson Forklifts, the English manufacturer of an allegedly defective dumper. Sanderson Forklifts had no presence in Kentucky, and the dumper had been purchased from a distributor in Ohio. This Court declined to adopt the "foreseeability" test espoused in Justice Brennan's *Asahi* concurrence. Rather, this

Court found that Sanderson Forklifts had no substantial connections to Kentucky to make reasonable the exercise of jurisdiction over it. *Halderman, supra* at 274.

Similarly, in *Bridgeport Music*, a music publisher sought to bring copyright infringement claims in Tennessee against two recording companies, NTW Publishing and DM Records, which were not located in Tennessee. In determining the existence of personal jurisdiction, the Sixth Circuit first looked to the three part test set out in *Southern Mach. Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).² In looking at the first element, whether the defendant purposefully availed itself of the privilege of doing business in Tennessee, the Sixth Circuit adopted the “stream of commerce plus additional conduct” test set out in Justice O’Conner’s *Asahi* concurrence.

Applying these factors, the court found that NTW Publishing had no activities which were specifically directed toward Tennessee. *Bridgeport Music, supra* at 480-83. However, the court found that DM Records’ activities were sufficient to show that it had purposefully availed itself of a Tennessee forum. As with NTW Publishing, DM Records had entered into a nationwide distribution contract with a third party. The court noted that, as a general rule, a defendant may not be subject to personal jurisdiction merely because it distributes its product

² The *Mohasco* test was first adopted in Kentucky by this Court in *Tube Turns Div. of Chemetron Corp. v. Patterson Co., Inc.*, 562 S.W.2d 99 (Ky. App. 1978). The application of this test was later endorsed by the Kentucky Supreme Court in *Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002). The first element of the test asks whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state. The second element considers whether the cause of action arises from the alleged in-state activities. And the final element requires such connections to the state as to make jurisdiction reasonable.

nationwide. But unlike NTW Publishing, DM Records' contract required the distributor to market its records in all of its territory, including Tennessee. *Id.* at 483-84.

In addition, the court pointed out that DM Records conducted direct sales through its website. The operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state under the first *Mohasco* factor "if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Id.* at 484. Based on the volume of sales which DM Records conducted through its website, the court found that an issue of fact existed to support a *prima facie* finding of purposeful availment.

In the present case, Heng Kuo does not own any property, employ any agents, conduct any direct advertising, or have an agent for service of process in Kentucky. As was the situation in *Halderman*, Heng Kuo's products came into Kentucky through third-party distributors which are located in other states. It is not clear from the record whether International has a distribution agreement directly with Heng Kuo, or its distribution agreement is only with International California. But in either case, International has made no showing that it is required to market Heng Kuo products throughout its geographic territory. Under the circumstances, we agree with the trial court that Shultze and International have failed to show that Heng Kuo is subject to personal jurisdiction by a Kentucky court. Therefore, they are not entitled to the protection of the middleman statute.

Causation

Shultze and International also argue that they were entitled to summary judgment on two issues related to causation. In particular, they contend that Turpin has failed to present sufficient evidence to establish with any certainty either that the door closer was defective or that it caused her injury. We agree with the trial court that Turpin presented sufficient evidence to avoid summary judgment.

In reviewing an order granting summary judgment, “[t]he standard of review on appeal ... is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996), citing Kentucky Rules of Civil Procedure (“CR”) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, 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.” CR 56.03. In making this determination, the trial court must consider all evidence of record, including depositions, answers to interrogatories, stipulations and admissions on file. “[S]ummary judgment . . . is only proper where the movant shows that the

adverse party could not prevail under any circumstances.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). Furthermore, “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest*, 807 S.W.2d at 480.

Shultze and International concede that there was evidence that the door closer was leaking shortly after the accident. However, they maintain that Turpin cannot show with any certainty whether the door closer was leaking prior to her fall, or that the leak was caused by a manufacturing defect. Furthermore, Shultze and International contend that Turpin has not presented any definitive evidence that she actually slipped on the hydraulic fluid. They also point out that it was snowing on the day of the accident and Turpin could have slipped on water which had been tracked in from outside the lobby.

In response, Turpin concedes that her evidence of causation is circumstantial, but she argues that such evidence is sufficient to prove causation. Legal causation “may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm.” *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). However, “[a] mere possibility of such causation is not enough and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced it becomes the duty of the court to direct a verdict for the defendant.” *Texaco, Inc. v.*

Standard, 536 S.W.2d 136, 138 (Ky. 1976). The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of a defendant was a substantial factor in bringing about the result. *Id.*

In this case, Turpin presented sufficient evidence to tilt the balance on all of the factual issues related to causation. Shortly after Turpin's fall, employees at the Courier Journal discovered a slick, oily residue on the floor near the doors. Shortly thereafter, they found evidence that hydraulic fluid was leaking from the door closer on the glass door. The Courier Journal then notified Shultze of the problem.

Shultze sent two of its employees, John Brewer and David Krider, to investigate and repair the problem. In his deposition, Brewer states that he confirmed that the hydraulic fluid had leaked from the door closer. However, he states that the majority of the fluid had traveled down the hinge of the door and collected in a small puddle on the floor near the pivot joint. Brewer replaced the door closer and cleaned up the fluid leak. He also made several additional trips to clean up fluid which remained trapped in the door's crevices.

Since Brewer threw out the old door closer, it is not available for inspection. However, Brewer admitted that the door closer was leaking hydraulic fluid at the time he replaced it. And both Brewer and International's General Manager, David Minton, agreed that it is extremely unusual for a new door closer to leak. Minton added that a door closer would leak only for certain reasons: a

manufacturing defect, improper installation, or abuse of the door. Turpin's engineering expert, James Berkeley, made a similar analysis, but stated that the leak was most likely caused by a manufacturing defect.

Although there was no direct evidence that the door closer was leaking hydraulic fluid at the time of the accident, the leak was discovered shortly after Turpin's fall. Furthermore, there was evidence that the leak had existed for long enough to allow hydraulic fluid to collect on the floor around the pivot joint. Shultze and International point out that Turpin's expert could not say with certainty that the leak was caused by a manufacturing defect. However, there was no evidence to show that the door had been improperly installed or had been abused. Under the circumstances, we conclude that Turpin presented sufficient evidence on this issue "to tilt balance from possibility to probability." *Briner v. General Motors Corp.*, 461 S.W.2d 99, 102 (Ky. 1970), *citing Highway Transport Co. v. Daniel Baker Co.*, 398 S.W.2d 501, 502 (Ky. 1966). Whether that circumstantial evidence is a sufficient quantum from which a jury may infer causation remains to be seen.

Likewise, we agree with the trial court that Turpin has presented sufficient circumstantial evidence to create a jury issue on whether the hydraulic fluid caused her fall. Shultze and International emphasize that the door closer contains only a few ounces of hydraulic fluid. And since the door closer was not visibly malfunctioning, they argue that only a small amount of fluid could have leaked out. Furthermore, the fluid pooled only around the door pivot, and away

from the normal areas of foot traffic in the lobby. Given the snowy conditions outside that day, Shultze and International maintain it is equally likely that Turpin slipped on water which had been tracked in the lobby from outside.

However, employees at the Courier Journal had noticed a “slippery film” on the areas of the lobby floor earlier that day. In fact, several other persons slipped and fell in the same general area that day. Turpin also states that she noticed the slippery substance on the floor and on her shoe after the fall. Finally, there was no evidence that any water had collected on the lobby floor. Rather, Courier Journal employees discovered the slick film on the floor, which led them to discover the leaking door closer a short time later. Further, because the defective closer had been disposed of, there is no way to determine how much hydraulic fluid remained in the closer.

Although this evidence is by no means definitive on the issue of causation, we agree with the trial court that it was sufficient to preclude a summary judgment on Turpin’s claim. It is not necessary for Turpin to exclude all other possible causes of her fall. She need only present evidence showing a reasonable probability that she slipped and fell on hydraulic fluid which had leaked from the door closer. We conclude that Turpin met her burden, and consequently the trial court properly denied the motion for summary judgment.

Warranty

Finally, Shultze argues that it was entitled to summary judgment on Turpin’s warranty claim because there was no evidence that it had issued any

warranty covering the door closer. Rather, Shultze points out that only International had issued a warranty, and it replaced the defective door closer pursuant to that warranty. Given the absence of any other express or implied warranty, Shultze maintains that it cannot be liable to Turpin on any warranty claim.

In denying the motion for summary judgment, the trial court noted that there was conflicting evidence whether Shultze had issued a warranty on the work which it performed. Turpin also claims that Shultze's sale of the door closer was subject to implied warranties of merchantability and fitness for a particular purpose under KRS 355.2-314 and 2-315, respectively. However, the trial court found that the record was insufficiently developed to determine whether any express or implied warranties are applicable. We likewise agree that these issues were not yet ripe for summary judgment.³

TURPIN'S DIRECT APPEAL

Finally, we reach the issue presented in Turpin's direct appeal. Turpin argues that the trial court erred by dismissing its strict liability claims against International and Shultze. In *Dealers Transport Co. v. Battery Distributing Co.*, 402 S.W.2d 441 (Ky. 1966), the former Court of Appeals

³ Recently, in *Compex Intern. Co., Ltd. v. Taylor*, 209 S.W.3d 462 (Ky. 2006), the Kentucky Supreme Court held that privity of contract is a prerequisite to a product liability action involving breach of warranty under the UCC. *Id.* at 464, citing *Williams v. Fulmer*, 695 S.W.2d 411, 413-14 (Ky. 1985). Since Turpin clearly has no privity of contract with Shultze, International or Heng Kuo, she is not entitled to raise these implied warranty claims. However, neither Shultze nor International has raised this issue on appeal.

adopted the doctrine of strict products liability as set out in the Restatement (Second) of Torts § 402A (1964). As a condition precedent to strict liability becoming operative in a particular case, the product sold must be in a “defective condition” “unreasonably dangerous” to the user or consumer or to his property. *Nichols v. Union Underwear Co. Inc.*, 602 S.W.2d 429, 431 (Ky. 1980).

Courts have distinguished three types of product defect: (1) manufacturing defects or deviations from the product's design that create unreasonable risks of harm; (2) design defects or unreasonable risks of harm inherent in the product's design; and (3) warning defects or unreasonable risks of harm that could have been reduced or avoided by the provision of reasonable instructions or warnings. *Edwards v. Hop Sin, Inc.*, 140 S.W.3d 13, 15 (Ky. App. 2003). The parties concede this case involves an alleged manufacturing defect. We have previously found that there is a factual issue whether the door closer was defective.

But the more difficult question in this case is whether the defective condition of the door closer was “unreasonably dangerous” to the user or consumer of the product. Turpin essentially argues that the fact she slipped and fell on hydraulic fluid which had leaked from the door closer is sufficient to show that the door closer was “unreasonably dangerous.” However, the focus in a strict liability case is on the condition of the product itself. “The product either is or is not unreasonably dangerous to a person who should be expected to use or be exposed to it. ... [T]he important factor is how safe or dangerous the product is when used

as it was intended to be used' (or should reasonably have been anticipated to be used).” *Ulrich v. Kasco Abrasives Co.*, 532 S.W.2d 197, 200 (Ky. 1976) (citations and internal quotations omitted).

In this case, the trial court focused on the nature of the risk created by the alleged defect. First, the hazard created by the leaking door closer is not directly related to the use of the door closer. Rather, it is secondary risk posed to pedestrians who may or may not be using the door. In addition, the door closer contains only a small quantity of hydraulic fluid, and the normal placement of the door closer would confine any leaks to the hinge area of the door – away from normal traffic areas. As a result, the trial court concluded that a prudent manufacturer would not have anticipated a substantial likelihood of this type of injury to a person as a result of the manufacturing defect.

We agree. For negligence purposes, it may be foreseeable that leaked hydraulic fluid could create a hazardous condition on the floor near the area where it spilled. But in this case, that possibility is so remote and attenuated from the use of the product that a reasonably prudent manufacturer would not have anticipated a substantial likelihood of this type of injury.

Furthermore, the Kentucky cases examining strict liability claims have all involved risks of severe injury or death caused by the defective condition of the product.⁴ We do not seek to minimize the injuries which Turpin suffered as

⁴ In *Worldwide Equipment, Inc. v. Mullins*, 11 S.W.3d 50 (Ky. App. 1999), the design of a coal truck cab posed a high risk of serious injury to the occupants of any vehicle which may collide with the truck. In *Edwards v. Hop Sin, Inc.*, *supra*, the presence of naturally occurring bacteria in raw oysters posed little danger to healthy persons, but a high risk of serious illness to persons

a result of this fall. However, we conclude that the risk posed from slipping on a small amount leaked hydraulic fluid does not rise to the level of “unreasonably dangerous.” Rather, this type of hazard would be more appropriately addressed through a product liability claim based on negligence principles. Therefore, the trial court properly dismissed Turpin’s strict liability claim.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed in all respects. This matter is remanded for further proceedings on the merits of Turpin’s remaining claims.

KELLER, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

with compromised immune systems. In *Leslie v. Cincinnati Sub-Zero Products, Inc.*, 961 S.W.2d 799 (Ky. App. 1998), the design of a medical heating blanket allowed the unit to operate without the use of a temperature probe. As a result, the safety switches failed to prevent the unit from reaching unsafe temperatures and the patient suffered severe burns. In *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), a defect in a wheel assembly of a vehicle caused it to separate and the driver losing control of the vehicle. In *Montgomery Elevator, supra*, the escalator had a design defect which tended to catch tennis shoes between the escalator steps and the skirt panel. *Nichols v. Union Underwear, supra*, involved children’s clothing which was made from highly inflammable materials. And in *Dealers Transport Co. v. Battery Distributing Co*, *supra*, the safety valves on acetylene tanks were defective, allowing gas to escape and causing an explosion.

BRIEFS AND ORAL ARGUMENT
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