UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

THOMAS G. FLECK, JR.,

Plaintiff,

v.

Case Number: 98-10257-BC
Honorable David M. Lawson

TITAN TIRE CORPORATION,

Defendant.
_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

In an opinion filed on October 4, 2001, this Court held that the plaintiff's negligent manufacturing, design defect and failure to warn claims were dismissed, but that the implied warranty claim shall proceed to trial, thereby granting in part and denying in part the defendant's motion for summary judgment. The defendant has now filed a motion in which he asks the Court to reconsider the matter, claiming that the Court committed palpable error in permitting the implied warranty claim to go forward in light of the Court's other rulings. Titan bases its motion on three grounds. First, Titan argues that the Court's finding that no manufacturing, design or warning defect existed in the accident tire forecloses the finding of a "defect" for implied warranty purposes. Second, Titan alleges that the Court's finding that the plaintiff was a "sophisticated user" compels dismissal of plaintiff's warranty claim as a matter of law. Finally, Titan claims that plaintiff's misuse of the product was a superceding cause of any injury suffered.

I.

The defendant first alleges that a breach of warranty claim requires (1) a defect *attributable to the manufacturer*, and (2) a causal connection between the alleged defect and the injury to the

plaintiff. Because the Court found no manufacturing, design, or warning defect existed that is attributable to Titan, *see* Opinion and Order at 9, the defendant argues that no implied warranty claim will lie.

Initially, the Court notes that it did *not* find that the plaintiff failed to come forward with *any* evidence of a design defect. Rather, the Court held that there was insufficient evidence of an "obvious" defect so as to invoke the rule stated in *Huff v. Ford Motor Co.*, 127 Mich. App. 287, 338 N.W.2d 387 (1983). However, the materials presented by the plaintiff, particularly the affidavit of his expert, Alan Milner, are sufficient to create a question about which reasonable minds might differ as to whether the tire was defectively designed.

Even were this not the case, however, defendant's first argument must fail. It is true generally that there are at least three acknowledged categories of defects in product liability tort actions: manufacturing defects, defects due to design, and defects due to failure to warn. *Restatement (Third) of Torts: Products Liability* § 2 (1998). If Michigan were to adopt the new Restatement exclusively, it would likely find that there was just one type of products liability action. *Id.* cmt. n. Michigan, however, has steadfastly insisted that implied warranty is a distinct products liability claim with different elements. *Lagalo v. Allied Corp.*, 457 Mich. 278, 287 n.11, 577 N.W.2d 462, 466 n.11 (1998).

When alleging an implied warranty cause of action, the plaintiff need only show that (1) the product in question was defective when the defendant sold or otherwise placed it in the stream of commerce, and (2) that the defect caused her injury. *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 737 (6th Cir. 2000). A product is defective if it is not reasonably fit for its intended, anticipated, or reasonably foreseeable use. *Gregory v. Cincinnati, Inc.*, 450 Mich. 1, 34, 538 N.W.2d

325, 339 (1995). Implied warranty imposes strict liability on the manufacturer and vendors of a product. *Cook v. Darling*, 160 Mich. 475, 481, 125 N.W. 411, 413 (1910); *Dooms v. Stewart Bolling & Co.*, 68 Mich. App. 5, 14-15, 241 N.W.2d 738, 743 (1976). The amount of care used by the manufacturer in designing and producing the product is irrelevant. *Gregory*, 450 Mich. at 12, 538 N.W.2d at 329.

Implied warranty claims do not require the plaintiff to specify the type of defect alleged: the mere showing that *something* went wrong consistent with the existence of a defect is sufficient. *See Caldwell v. Fox*, 394 Mich. 401, 410, 231 N.W.2d 46, 51 (1975); *Severn v. Sperry Corp.*, 212 Mich. App. 406, 413, 538 N.W.2d 50, 54 (1995); *Snider v. Bob Thibodeau Ford, Inc.*, 42 Mich. App. 708, 713, 202 N.W.2d 727, 730 (1972). As a result, the plaintiff need only demonstrate a logical sequence of cause and effect between the alleged defect and the injury. *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 415, 443 N.W.2d 340, 349 (1989). For example, in *Caldwell*, the plaintiff filed suit against a defendant who rear-ended the plaintiff's car, and the defendant, in turn, filed a third-party complaint against General Motors and the dealer who sold him his car. The trial court dismissed the third-party defendants before the case went to the jury, finding there to be "no proof" of a manufacturing defect. 394 Mich. at 406, 231 N.W.2d at 49. Reversing, the Michigan Supreme Court found that the trial court had improperly invaded the province of the jury as fact finder, and that the jury reasonably could have inferred the existence of a defect from the facts stated, and that the defect existed at the time the product left the manufacturer's control. *Id.* at 410, 231 N.W.2d at 51. An actual defect need not be proven. *Id. See also Snider*, 42 Mich. App. at 713, 202 N.W.2d at 730 (holding that there was no need to specify the defect in the braking mechanism where there was not more than one plausible theory for the accident).

Because the defect can remain unspecified, the risk-utility test is inapplicable, and expert testimony is often not required. In fact, circumstantial evidence alone can provide a sufficient link between the presence of a likely defect and an injury caused. *Severn*, 212 Mich. App. at 413, 538 N.W.2d at 54; *Caldwell*, 394 Mich. at 410, 231 N.W.2d at 51; *Snider,*42 Mich. App. at 713, 202 N.W.2d at 730; *Piper v. Tensor Corp.*, 71 Mich. App. 658, 666, 248 N.W.2d 659, 663 (1976) (holding that issues of negligent design and breach of warranty were properly left to the jury where lamp at issue caught fire shortly after being repaired by the defendants, and that expert testimony was not required). The plaintiff has offered an expert's opinion in this case, however.

This point was illustrated recently by the Michigan Court of Appeals in the case of *Bouverette v. Westinghouse Elec. Corp.*, 245 Mich. App. 391, 628 N.W.2d 86 (2001). The plaintiff in that case estate sued when her decedent was electrocuted by a circuit breaker manufactured by one of the defendants. The defendants appealed the jury verdict, claiming that the verdict for the manufacturer on negligence grounds but for the plaintiff on implied warranty grounds was necessarily inconsistent, and that violation of an implied warranty could not occur without negligence. *Id.* at 398, 628 N.W.2d at 92. The Court rejected this view. First, the Court found that the jury following the trial court's instructions plausibly could have limited its negligence analysis to manufacturing and design claims, while treating failure to warn as a separate, implied warranty issue. *Id.* at 398-99, 628 N.W.2d at 92. Second, and more importantly, the Court found that a product could be "defective" without having a traditional "defect" in the product liability sense:

> Moreover, the jury could have found that the breaker itself technically was not defective, but that it was not reasonably fit for the uses intended or foreseeable, i.e., the safety features failed when connected to a linkage handle, which was an intended or foreseeable use.

Id. at 399, 628 N.W.2d at 92.

In this case, the Court finds that Michigan law supports a claim for breach of implied warranty where the manufacturer of a product did not negligently design or manufacture it or failure to issue appropriate warnings, but nonetheless placed the defective product in the stream of commerce. That is because Michigan recognizes a promise implied by law that the product is fit for its foreseeable use. The Court finds no inconsistency in its holdings and no basis to reconsider the question.

II.

The defendant also argues that *Jodway v. Kennametal, Inc.*, 207 Mich. App. 622, 525 N.W.2d 883 (1994), forecloses an implied warranty claim whenever the plaintiff is found to be a sophisticated user. In *Jodway*, the plaintiffs filed products liability actions against various cobalt suppliers, alleging that they had contracted respiratory illnesses from the defendants' products. *Id.* at 625, 525 N.W.2d at 887-88. The Court first dismissed the plaintiffs' failure to warn claim, finding that the plaintiffs' employer was a sophisticated user. *Id.* at 627-28, 525 N.W.2d at 888-89. The Court then ruled that this finding also precluded recovery under an implied warranty theory:

> The same rationale that bars an employee of a sophisticated user from recovering from a supplier *of a dangerous product* on a claim based on a failure to warn theory is also applicable to claims based on an implied warranty theory. A purchaser who has extensive knowledge of a product's inherently dangerous propensities should not be allowed to claim that an implied warranty of merchantability exists as a guaranty against such characteristics.

Id. at 631, 525 N.W.2d at 890 (emphasis added). The court of appeals found convincing an unpublished opinion issued from another court in this district which allegedly cited a leading treatise for this proposition. *See id.* (citing *Schmidt v. GTE Prod. Corp.*, No. 84-CV-73715-DT (E.D. Mich.

filed Oct. 16, 1986) (allegedly citing 3 Anderson, *Uniform Commercial Code*, § 2-314:79, at 186 (3d ed.).

As the Court noted in the original opinion, in federal cases based on diversity jurisdiction, the court must apply state law as pronounced by applicable state's highest court, which in this case is the Michigan Supreme Court, and legislature. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The decisions of the Michigan Court of Appeals are not a binding source of authority, but rather comprise one source of the "relevant data" which this Court uses to ascertain state law. *See Garden City Osteopathic Hosp. v. HBE Corp.,* 55 F.3d 1126, 1130 (6th Cir. 1995). This is especially true if this federal court is convinced that the Michigan Supreme Court would decide the issue differently. *See United of Omaha Life Ins. Co. v. Rex Roto Corp.*, 126 F.3d 785, 789 (6th Cir. 1997). "Relevant data" also includes "restatements of law, law review commentaries, and the 'majority rule' among other states." *Angelotta v. American Broad. Corp.,* 820 F.2d 806, 807 (6th Cir. 1987).

There are two reasons why *Jodway* is not controlling here. The first is the nature of its holding, which was not simply that sophisticated users were barred from implied warranty claims; the holding was limited to sophisticated users "of a dangerous product" who have "extensive knowledge of a product's inherently dangerous propensities." *Id.* The defendant has made no showing here that tires are "inherently dangerous products" in the same vein as cobalt dust.

Second, a careful examination of the *Jodway* decision discloses a lack of scholarly and precedential support for its conclusion. The *Jodway* decision purportedly relies on an excerpt from the well-regarded Anderson Uniform Commercial Code treatise. The portions referenced by the court, however, do not support the propositions for which *Jodway* cites them. Specifically, Section 2-314:79 says only that businesses are not covered by consumer protection statutes. 2 Anderson,

Uniform Commercial Code, § 2-314:79, at 284 (3d ed. 1995). Another section, however, says consumer protection statutes are generally irrelevant to Code remedies. *Id.* § 2-314:151 at 351. Nothing on page 186 supports the court's conclusion, *see id.* at 186, nor does any other portion of the treatise which the Court examined. The treatise does contain general authority to the contrary, however. *See id.* § 2-314:531 at 644 ("The fact that the buyer is a merchant does not exclude the buyer from the protection of any warranty that would otherwise arise. That is, warranties arising under the Code in favor of 'buyers' arise without any distinction as to whether they are merchant buyers, casual buyers, or consumer buyers. The warranty of merchantability arises with respect to goods purchased for resale and is not limited to consumer purchases."). A statement remotely approaching the court of appeals' conclusion was found in the following excerpt:

> The general knowledge of the plaintiff is irrelevant to a suit on the implied warranty of merchantability as that warranty arises solely because of the merchant status of the defendant as to the kind of goods involved, unless it could be concluded that there was a conscious assumption of a known risk in view of the fact that the buyer had the knowledge.

Id. § 2-314:724 at 774. The treatise does not elaborate on this very generalized proposition, nor does it establish the rule which the court of appeals purported to advance.

Another leading treatise states the applicable rules more cogently. *See* White & Summers, *Uniform Commercial Code* (4th ed. 1995). White and Summers do not mention any "merchantability" exception for sophisticated commercial entities, although they note that sophisticated users will rarely be able to take advantage of a related theory, the implied warranty of fitness for a particular purpose. 1 White & Summers, § 9-10.

The Court concludes, therefore, that not only is *Jodway* dubious precedent, but its stated holding does not encompass products that are not inherently dangerous, such as the tire in this case.

III.

The defendant alleges that plaintiff's actions constituted a superceding cause of his injuries as a matter of law. Although the plaintiff's own conduct is a source for a legitimate causation defense, particularly in this case, the significance of an intervening cause is generally left to the jury under Michigan law. *Meek v. Dep't of Transp.*, 240 Mich. App. 105, 118, 610 N.W.2d 250, 257 (2000). Michigan also recognizes that multiple causes can be substantial factors leading to injury. *Terry v. City of Detroit*, 226 Mich. App. 418, 430-31, 573 N.W.2d 348, 355 (1997). A jury must decide that issue in this case.

Defendant also claims that this Court failed to apply Mich. Comp. Laws § 600.2947(2) and hold that plaintiff's misuse barred his warranty claim as a matter of law. That provision does state that the Court is to resolve the issue of misuse. Resolution of that issue cannot occur in the absemce of a factual predicate. The statute does not require a court to conduct a trial on affidavits. After a proper trial, the Court will rule on the issue of misuse.

IV.

Since the motion before the Court is one seeking rehearing, it is governed by E.D. Mich. LR 7.1(g)(1), which requires the moving party to show (1) a "palpable defect," (2) that the defect misled the court and the parties, and (3) that correcting the defect will result in a different disposition of the case. E.D. Mich. LR 7.1(g)(3). A "palpable defect" is a defect which is obvious, clear, unmistakable, manifest, or plain. *Marketing Displays, Inc. v. Traffix Devices, Inc.*, 971 F. Supp. 262, 278 (E.D. Mich. 1997)(citing Webster's *New World Dictionary* 974 (3d ed. 1988)). Further, the Local Rules also provide that any "motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be

granted." E.D. Mich. LR 7.1(g)(3).

The defendant has demonstrated neither a palpable defect in this Court's previous opinion, nor any reason why there should be a different disposition of this case. Accordingly, it is **ORDERED** that the defendant's motion for rehearing [dkt #72] is **DENIED.**

_____/s/_____
DAVID M. LAWSON
United States District Judge

Date: October 31, 2001

Copies sent to:

Daniel W. White, Esq.
Dennis S. Kayes, Esq.