1994 WL 16777830 (N.M. Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of New Mexico.
Bernalillo County

Stella LIEBECK, Plaintiff,

v.

MCDONALD'S RESTAURANTS, P.T.S., INC. and McDonald's Corporation, Defendants.

No. CV-93-02419.
January 21, 1994.

Motion for Summary Judgment

Rodey, Dickason,Sloan, Akin& Robb,P.A., Tracy E. McGee, Attorney for Defendant McDonalds Corporation, Post Office Box 1888, Albuquerque, New Mexico 87103, (505) 765-5900.

COME NOW the Defendants P.T.S., Inc., and McDonald's Corporation, by and through its counsel of record, Rodey, Dickason, Sloan, Akin & Robb, P.A. (Tracy E. McGee) and, pursuant to SCRA 1- 056, move this Court for its order granting summary judgment to Defendants on all of the Plaintiff's claims set forth in her Complaint for damages filed herein.

In support of this motion, Defendants would submit that the following are undisputed material facts in this case:

1. Plaintiff Stella Liebeck was a passenger in a vehicle which proceeded through the drive-through window of a McDonald's Restaurant (franchisee P.T.S., Inc.) located at 5001 Gibson, S.E., in Albuquerque, New Mexico, on or about February 27, 1992. Complaint for Damages, Paragraph III.

2. At the time in question, Plaintiff was 79 years old. Complaint for Damages, Paragraph VI.

3. Subsequent to purchasing the coffee, Plaintiff spilled it on herself, sustaining second and third degree burns to her upper inner thighs, buttocks, and other areas of her body. Complaint for Damages, Paragraph VI.

4. Plaintiff has alleged that the coffee was "excessively hot" and "defective" because of its high temperature. Plaintiff's Complaint, Paragraph IV.

5. The second and third degree burns which Ms. Liebeck sustained could have been sustained at temperatures as low as 130 Fahrenheit. Aff. of Turner M. Osler, M.D., Para. 17.

6. The fact that the coffee that Ms. Liebeck spilled on herself may have been slightly or even significantly hotter than 130° Fahrenheit does not mean that her injuries were worse or more extended than they would have been otherwise. Aff. of Turner M. Osler, M.D., Para. 18.

7. Ms. Liebeck's age may have caused her injuries to have been worse than they might have been in a younger individual, as the skin of an older person is thinner and heals less easily than the skin of a younger individual; however, even a young adult could have sustained third degree burns after spilling liquid at a temperature of as low as 130° on herself. Aff. of Turner M. Osler, M.D., Para. 19.

8. Unless Ms. Liebeck removed all of her clothing immediately, the clothing may have served to hold in the heat of the spilled liquid, and this may have aggravated the nature and extent of her injury; however, to a reasonable degree of medical probability, she would nevertheless have sustained third degree burns as a result of the coffee spilled. Aff. of Turner M. Osler, M.D., Para. 20.

9. A survey of six (6) fast food or restaurant establishments and two (2) private residences was conducted in September 1993 by Danny Jarrett. Aff. of Danny Jarrett, passim.

10. As part of this survey, Mr. Jarrett used a standard food thermometer and measured the temperature of coffee brewed and maintained at these locations. Aff. of Danny Jarrett, Paras. 3 & 4.

11. Mr. Jarrett's measurements of coffee were taken when it was first served to him, after approximately 15 minutes, and after approximately 30 minutes. Aff. of Danny Jarrett, passim.

12. The coffee was served to Mr. Jarrett in containers ranging from styrofoam cups to ceramic mugs. Aff. of Danny Jarrett, passim.

13. At no location did Mr. Jarrett record the temperature of freshly served coffee below 130°. Aff. of Danny Jarrett, passim.

The legal authority upon which Defendants will rely for this motion is as follows:

1. *Lopez v. Maes,* 81 N.M. 693, 472 P.2d 658, *cert. den'd,* 81 N.M. 721, 471 P.2d 984 (Ct.App. 1970) (In negligence cases, liability requires not only that a defendant be found negligent, but also that his negligence found to be a proximate cause of the injuries and damages of which the plaintiff complains.)

2. *New Mexico State Highway Department v. Van Dyke,* 90 N.M. 357, 563 P.2d 1150 (1977) (The proximate cause of an injury is that which, in a natural and continuous sequence that is unbroken by any new, independent cause, produces injury, and without which the injury would not have occurred.)

3. *Pittard v. Four Seasons Motor Inn, Inc.* 101 N.M. 723, writ quashed 101 N.M. 555, 685 P.2d 963 (Ct.App. 1984) (Proximate cause is that which, in a natural and continuance sequence, unbroken by any new independent causes, produces the injury, and without which the injury would not have occurred.)

Defendants contend that Ms. Liebeck's burns were not the result of serving excessively hot coffee, as other restaurants in this community have been demonstrated to serve coffee at temperatures which, for the sake of argument, might be lower than those served at the McDonald's in question, but which also were high enough temperatures to have still caused the type of injuries and burns that Ms. Liebeck sustained.

Defendants also submit of record, in connection with this motion, the complete sworn affidavits of Turner M. Osler, M.D., and Danny Jarrett for the Court's consideration.

Due to the nature of this motion, concurrence of opposing counsel was not sought.

1994 WL 16777831 (N.M. Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of New Mexico.
Second Judicial District Court
Bernalillo County

Stella LIEBECK, Plaintiff,

v.

MCDONALD'S RESTAURANTS, P.T.S., INC. and McDonald's Corporation, Defendants.

No. CV-93-02419.
July 13, 1994.

Plaintiff's Motion for Partial Summary Judgment Against Mcdonald's Corportion

Kenneth R. Wagner & Associates, Kenneth R. Wagner, P.O. Box 25167, Albuquerque, NM 87125-5167, Phone No. (505) 242-6300.

S. Reed Morgan & Associates, S. Reed Morgan, Jerry R. McKenney, 16626 Sea Lark Road, Houston, Texas 77062, Phone No. (713) 488-9777, Fax No. (713) 488-3880, Attorneys for Plaintiff, Stella Liebeck.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW PLAINTIFF STELLA LIEBECK, by and through her counsel of record and pursuant to SCRA 1-056, moving this Court for an order granting partial summary judgment, on liability and causation as to her claim for failure to warn of the hazard/danger, and on liability and causation as to her claim for breach of the implied warranty of fitness for a particular purpose.

Movant herein requests partial summary judgment on both theories of liability. Should the court so desire, this motion is alternatively brought requesting summary judgment on either theory of liability alone.

In support of this motion, Plaintiff submits the followina:

I. BACKGROUND

This case arises from burns sustained by Ms. Stella Liebeck which were the result of McDonald's Corporation and its franchisee McDonald's Restaurants, P.T.S. selling her excessively hot coffee.

On or about February 27, 1992 Ms. Liebeck, then 79 years old, was riding in her grandson's Ford Probe when they purchased food and coffee at the drive-thru window at the McDonald's location at 5001 Gibson Blvd., Southeast, Albuquerque, New Mexico. Ms. Liebeck was a passenger in the front seat of the automobile. Her grandson, Mr. Chris Tiano, moved the car forward from the window and pulled over to a stop so that Ms. Liebeck could add cream and sugar to her coffee.

Ms. Liebeck encountered difficulty removing the plastic lid from the cup. She placed the cup between her knees to free both hands to remove the plastic lid. While Ms. Liebeck was attempting to remove the lid, coffee spilled onto her legs, groin area, and buttocks.

The coffee caused third degree burns and excruciating pain. Ms. Liebeck was forced to undergo painful skin grafts and debridement procedures. [1]

In addition to the extreme pain and destruction of the affected parts of her body, Ms. Liebeck has suffered a substantial decrease in her energy level and her ability to be self-sustaining and to enjoy the day to day activities of her life. She continues to suffer from discomfort associated with the grafted burns. Her medical bills exceed $10,000.00.

Ms. Liebeck has brought this suit alleging that the coffee purchased by her on February 27, 1992 was unreasonably dangerous because it was excessively hot; that the product in question, coffee, was and is routinely sold and manufactured by the Defendants and reached Ms. Liebeck in the same condition as it was at the time of sale, that the coffee was manufactured defectively and was served in a defective container that lacked a proper warning as to the extent of the danger of the product. Furthermore, the Defendants were aware of the unreasonably dangerous characteristics of the coffee inherent in their serving it at the temperature at which it was sold. They knew the likely consequences of these acts, and they knew the risks involved. They acted with a conscious indifference and willful and wanton disregard for the safety of Stella Liebeck and the other consumers of their product.

Ms. Liebeck has further alleged breach of the implied warranty of fitness for a particular purpose.

Evidence adduced to date, including admissions by the Defendants themselves, has conclusively proved prior knowledge of the Defendant McDonald's Corporation of the hazard, the existence of the hazard, the lack of an adequate warning, the producing causation link between the hot coffee and the injuries to Ms. Liebeck, and the unreasonably dangerous condition of the coffee as sold. The Defendants have admitted being the manufacturer of the coffee. Accordingly, Ms. Liebeck brings this motion requesting the court to issue orders of summary judgment on liability and causation as detailed above.

II. MOVANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE ISSUES EXIST

1. Mr. Christopher D. Appleton testified in his deposition speaking as a corporate representative for McDonald's. (Appleton deposition at 6).[2]

2. Mr. Appleton is the Quality Assurance Group Manager of Administration. (Appleton deposition at 8).

3. Mr. Appleton's job includes being as responsible as anyone at McDonald's for making sure that the products served are safe. (Appleton deposition at 10).

4. McDonald's has admitted that PTS, Inc. was a McDonald's Corporation franchisee at the time and place of Ms. Liebeck's injuries. (Defendant's Response to Request No. 13 of Plaintiffs First Set of Request for Admission).[3]

5. McDonald's, through Mr. Appleton, has admitted that the main hazard with coffee is the potential that it could cause a burn. This is a hazard of which McDonald's is well aware. (Appleton deposition at 14).

6. McDonald's requires that its restaurants and those operated by its franchisees hold the coffee in the pot at between 180 and 190 degrees fahrenheit. (Appleton deposition at 15-19; Defendant's Response to Request No. 2 of Plaintiff's First Set of Requests for Admission).

7. McDonald's, through Appleton, admits knowledge that there is a burn hazard with any food product at above 140 degrees. (Appleton deposition at 20).

8. McDonald's, through Appleton, admits being a manufacturer of coffee. (Appleton deposition at 22-23).

9. McDonald's, through Appleton, admits knowledge of the possibility of coffee spills. (Appleton deposition at 38-39).

10. McDonald's, through Appleton, admits its belief that it could do a better job of protecting its customers from the burn hazard associated with hot coffee. (Appleton deposition at 51).

11. McDonald's, through Appleton, admits that if its coffee is drunk at the temperature at which it is served, the consumer will suffer a burn. (Appleton deposition at 55).

12. McDonald's, through Appleton, admits that Stella Liebeck was burned by the hot coffee, that the coffee was hot, that the potential for danger existed, and that McDonald's knows that the potential for danger existed. (Appleton deposition at 61- 62)

13. McDonald's, through Appleton, admits having no knowledge of whether the consumer appreciates the risk of severe burns that may occur due to the spillage of coffee served by McDonald's. (Appleton deposition at 65-66).

14. McDonald's, through Appleton, admits that it would be unsafe for a consumer to try to drink coffee at a temperature of 180 to 190 degrees in an automobile. (Appleton deposition at 76).

15. McDonald's admits, through Appleton, that 180 to 190 degrees is a hazardous temperature at which to sell coffee. (Appleton deposition at 89-90).

16. McDonald's, through Appleton, admits that the warning it provides on its coffee cup does not warn consumers of the specific hazard to them. (Appleton deposition at 93).

17. McDonald's, through Appleton, admits that if a person is told of the severity of the risk when they buy coffee, that it can cause third degree burns, McDonald's does not know if the consumer would handle it any differently. (Appleton deposition at page 75).

18. McDonald's admits that there was no warning on the lid of the cup which was sold to Stella Liebeck. (Defendant's Response to Request No. 4 of Plaintiff's Third Set of Requests for Admission). [4]

19. McDonald's, through Appleton, admits that the consumer does not have knowledge that spilling coffee at 180 to 190 degrees will cause really serious burns. (Appleton deposition at 94).

20. McDonald's, through Appleton, admits that they do not believe anybody expects to receive third degree burns when they buy the product. (Appleton deposition at 32).

21. McDonald's, through Appleton, admits that it has not been discussed whether or not the consumer has knowledge of the hazard of their extremely hot coffee. (Appleton deposition at 64).

22. McDonald's, through Appleton, admits knowledge of survey results indicating that it is awkward, and potentially hazardous to prepare coffee while driving; he admits that people tend to drink coffee in an automobile. (Appleton deposition at 99).

23. McDonald's, through Appleton, has stated that the number of burns, in proportion to the number of cups of coffee sold, is not high enough to justify their modification of the serving temperature. (Appleton deposition at 110-11).

24. McDonald's has, through Appleton, admitted to having no knowledge of how many people might need to be burned before McDonald's takes measures to decrease the holding temperature of its coffee (Appleton deposition at 112-13).

25. The premises where Ms. Liebeck bought her coffee was being operated at the time of the incident in question by McDonald's Restaurants, P.T.S., Inc. A franchisee of McDonald's Corporation. (Responses 3 and 4 of Defendants' Responses to Plaintiffs First Set of Requests for Admission).

26. McDonald's has been sued previously by customers alleging that they have been burned by coffee that was served in an unreasonably dangerous condition i.e. too hot for safe usage. (Response No. 5 to Plaintiff's First Set of Requests for Admission).

27. Defendants admit that coffee served at the temperature required, had a likelihood of causing third degree burns. (Response No. 8 to Defendants' Responses to Plaintiff's First Set of Requests for Admission).

28. McDonald's admits that, if consumed within the first two minutes of sale, the coffee would burn the user's throat unless modified by adding milk or cream or some other cooling substance. (Response No. 9 to Plaintiff's First Set of Requests for Admissions).

29. Defendants admit issuing an implied warranty that the coffee in question was reasonably fit for consumption as sold when purchased by Stella Liebeck at the time and place in question. (Response No. 14 and 15 in Defendants' Responses to Plaintiff's First Set of Requests for Admissions).

30. Defendants admit, through the testimony of Chris Appleton, that the product was not fit for consumption when sold. (Appleton deposition at 55-56).

31. Between 1988 and 1994 inclusive, field consultants from McDonald's Corporation territories in the United States received complaints by McDonald's customers to the effect that the coffee served at McDonald's was too hot, the coffee served at McDonald's is dangerously hot, the coffee served at McDonald's has caused the complaining customer burns, coffee served at McDonald's restaurants has caused a relative of the complaining customer burns, and that McDonald's should turn down the temperature on the coffee for safety reasons. (Response No. 1 in Defendants' Responses to Plaintiff's Second Set of Requests for Admissions). [5]

32. Dr. Arredondo, the treating physician for Ms. Liebeck testified that within reasonable medical probability the cause of the subject burns was the hot coffee. (Arredondo deposition at 25). [6]

33. Dr. Arredondo has testified that in his opinion serving coffee in a styrofoam cup at a temperature between 175 to 190 degrees creates an unacceptable risk of harm. (Arredondo deposition at 28).

34. Dr. Arredondo has testified, based upon his clinical experience, that the average patient with ordinary knowledge of liquids, does not expect coffee, if spilled, to cause second and third degree burns. (Arredondo deposition at 28).

III. LIST OF AUTHORITIES RELIED UPON

1. New Mexico Statutes Annotated 55-2-314; Implied Warranty: Merchantability; Usage of Trade.

2. New Mexico Statutes Annotated 55-2-315; Implied Warranty: Fitness for Particular Purpose.

3. *Rudisaile vs. Hawk Aviation, Inc.,* 92 N.N.575, 592 P.2d 175 (1979) ("[T]o prove liability under 402A the Plaintiff need only show that the product was dangerous beyond the expectations of the ordinary consumer. The reasonableness of the acts or omissions of the Plaintiff is never considered in determining whether a product is "defective." Conventional contributory negligence is not an affirmative defense to strict liability. The existence of due care on the part of the consumer is irrelevant").

4. *Tenney vs. the Seven-Up Co.,* 92 N.M. 158, 584 P.2d 205 (App. 1978, writ den'd). (The applicable theory is as follows: (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such product, and (b) it is expected to and does reach the user or consumer without substantial change

in the condition in which it is sold. (2) the rule stated in subsection 1 applies although (a) the seller has exercised all possible care in the preparation and sale of its product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. The elements which a Plaintiff has the burden of proving under this doctrine are (1) the product was defective; (2) the product was defective when it left the hands of the defendant and was substantially unchanged when it reached the consumer or user; (3) that because of the defect the product was unreasonably dangerous to the user or consumer; (4) the consumer was injured or was damaged; (5) the defective condition of the product was the proximate cause of the injury or damage).

5. *Jones v. Minnesota Mining and Manufacturing Co.,* 100 N.M. 268, 169 P.2d 744 (App. 1983). ("A warning, to be adequate, must disclose the nature and extent of the danger).

6. *Perfetti v. McGhan Medical,* 99 N.M. 645, 662 P.2d 646 (App. 1983). (An adequate warning must disclose the nature and extent of the danger).

7. *Klopp v. Wackenhut Corp.,* 113 N.M. 153, 824 P.2d 293 (1992). ("A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care." (citing *Fabian v. E. W. Bliss Co.,* 582 F.2d 1257, 1263 (10th Cir. 1978). (Manufacturer has duty to use reasonable care in design of its products, and that duty is not changed because any risk from use of products might be obvious). *Klopp* overrules cases that appeared to have held a duty to avoid unreasonable risk of injury to others would be satisfied by an adequate warning)).

III. ARGUMENT

Plaintiff contends that Defendants have admitted, either through testimony or requests for admission, all elements of products liability and breach of warranty sufficient to prove her case on liability and causation. Moreover, the lack of an adequate warning makes the product defective. The lack of an adequate warning has been admitted by the Defendants. (Appleton deposition at 93). Therefore the product was defective. The defective product caused the burns to Ms. Liebeck's body. There are no material issues of fact remaining for decision on Plaintiff's claims of product defect with injuries caused thereby.

Similarly, the Defendants have admitted that the product, when sold, was not fit for its intended purpose, consumption. (Appleton deposition at 5). Accordingly, there no longer exists any material question of fact on the question of whether Defendants breached the implied warranty of fitness for a particular purpose; Defendants themselves have admitted the breach.

For these reasons partial summary judgment should be granted in favor of Plaintiff on liability and causation both as to her product liability claim and as to her breach of implied warranty claim.

Due to the nature of this motion, concurrence of opposing counsel is not sought.

Footnotes

1 Photographs of Ms. Liebeck's injuries are attached as exhibits to the deposition of Dr. David Arredondo which is attached hereto as exhibit "F". Copies of those photographs are attached as exhibit "A" for the court's ready reference.

2 Deposition of Christopher D. Appleton, taken on March 18, 1994 in this cause. A true and correct copy of the pertinent excerpts from the transcript of said deposition is attached hereto as Exhibit "B" and incorporated herein by reference.

3 A true and correct copy of Defendant's Responses to Plaintiff's First Set of Request for Admissions is attached hereto as Exhibit "C" and incorporated herein by reference.

4 A true and correct copy of Defendant's Responses to Plaintiff's Third Set of Requests for Admission is attached hereto as Exhibit "D" and incorporated herein by reference.

5 A true and correct copy of Defendants' Responses to Plaintiff's Second Set of Requests for Admissions is attached hereto as Exhibit "E" and incorporated by reference.