

Richard Cappelli, wherein Defendant Officers “repeatedly and unnecessarily sprayed Richard Cappelli’s face, nose, mouth, eyes and throat with pepper spray.” (Compl. ¶ 17.) Plaintiffs allege that the pepper spray attacks “occurred while Richard Cappelli was standing, while he was on the ground, and while he was on the ground in the prone position, with his hands and feet restrained behind his back. The Officers restrained Richard Cappelli by physical force and with handcuffs.” (Compl. ¶¶ 18-19.) Plaintiffs further allege that as a result of said events, Richard Cappelli died on January 9, 1997.

Plaintiffs, as administrators of the Estate of Richard Cappelli, filed a Civil Complaint against Defendants Haverford Township, Haverford Township Police Department, and the Defendant Officers under 42 U.S.C. Section 1983 alleging use of excessive force in violation of Mr. Cappelli’s Fourth Amendment Rights.¹ Plaintiffs also brought strict products liability claims against Defendants Defense Technology Corporation of America (“Defense Technology”) and Armor Holding, Inc. (“Armor”) alleging that the pepper spray used upon Mr. Cappelli was defective and a substantial cause of Mr. Cappelli’s death. Specifically, in Counts IV and V of the Complaint, Plaintiffs allege that Defendant Defense Technology, which is allegedly owned by Defendant Armor, manufactured and supplied the pepper spray used on Mr. Cappelli to Defendant Haverford Township Police Department. (See Complaint ¶¶ 65-66; see also Complaint ¶¶ 75-77.) Plaintiffs allege that the product was defective and inherently dangerous in design at the time the product left the control of Defense Technology in that it “lacked adequate warnings, training, notices, and instructions to inform users of the dangerous characteristics of

¹All claims against Haverford Township Police Department were dismissed as the Police Department was not alleged to be a separate legal entity subject to suit.

the product.” (Complaint ¶¶ 70-71.) Plaintiffs also claim that the product was “designed, manufactured and assembled without adequate testing and safety analysis.” (Complaint ¶ 72.)

On May 5, 2000, Defendants Defense Technology and Armor filed a Motion for Summary Judgment with respect to Counts IV and V. On July 10, 2000, I entered an Order granting Plaintiffs a 10-day extension to respond to Defendants’ Motion. Plaintiff failed to respond.

II. SUMMARY JUDGMENT STANDARD

Summary judgment shall be awarded “if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the non-moving party cannot rely on conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file. Id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed. R. Civ. P. 56(e). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

Defendants assert that they are entitled to summary judgment on Counts IV and V for the

following reasons: (1) Plaintiffs failed to timely produce expert reports in accordance with the court's order and thus Plaintiffs should be precluded from relying on the report, (2) Plaintiffs failed to produce any evidence that the pepper spray used on Mr. Cappelli lacked adequate warnings, and (3) Defendants did not manufacture or distribute the pepper spray used on Mr. Cappelli. (See Defs.' Mem. Supp. Summ. J. at 1-2.) Instead, Defendants suggest that Mr. Cappelli assumed the risk of his injuries, as a matter of law, and was the sole cause of his injuries. (See Defs.' Mem. Supp. Summ. J. at 2.)

III. DISCUSSION

A. Manufacture and/or Distribute

A Federal Court sitting in diversity must apply the substantive law of the state whose law is governing the action. Novak By and Through Nowak v. Faberge, U.S.A., Inc., 32 F.3d 755 (3d Cir. 1994). To maintain a products liability claim under Pennsylvania law, a plaintiff must show that there is a (1) product, (2) sale of that product, (3) to a user or consumer, (4) in a defective condition unreasonably dangerous, and (5) that the product caused physical harm. Riley v. Warren Mfg. Inc., 688 A.2d 221, 226 (Pa. Super. 1997).

Defendants Defense Technology and Armor seek summary judgment on the grounds that they did not manufacture and/or distribute the pepper spray used on Richard Cappelli. The pepper spray used on Mr. Cappelli was allegedly purchased before October, 1996. (See Ex. Y.) Defendants assert that they did not begin making pepper spray until October, 1996. To support their assertion, Defendants offer an Asset Purchase Agreement among Defendant Armor Holdings Inc. (A Delaware Corporation), Defendant Defense Technology Corporation of America (A Wyoming Corporation), Defense Technology Corporation of America (A Delaware

Corporation), and Robert and Sandra Oliver. (See Ex. Z.)

Pursuant to the Agreement, Defendant Armor acquired the assets of Defendant Defense Technology on October 1, 1996.² In the Agreement, Defendant Armor refused to assume liability for future product liability claims involving occurrences prior to October 1, 1996. (See Ex. Z, at 7.) Defendants assert that the pepper spray used by the Haverford Township Police Department was manufactured and purchased prior to October 1, 1996. Defendants present invoices which show that the Haverford Township Police Department purchased Def-Tec First Defense pepper spray on June 12, 1995 and March 13, 1996. (See Ex. Y.)

Based on the evidence presented to the court, Defendant Armor has met its initial burden of showing that there is no genuine issue of material fact regarding their liability for products manufactured and/or distributed by Defendant Defense Technology before October 1, 1996. Thus, the burden shifts to Plaintiffs to introduce evidence to the contrary. Plaintiffs, however, failed to respond to Defendants' Motion for Summary Judgment or produce any evidence to support their products liability claim against Defendant Armor.

Plaintiffs, as the non-moving party, cannot rely on conclusory allegations in the Complaint to establish a genuine issue of material fact. Pastore, 24 F.3d at 511. Plaintiffs must establish the existence of material elements of their claim to survive a motion for summary judgment. Because Plaintiffs have failed to meet their burden, Defendant Armor's Motion for Summary Judgment on Count V will be granted on this ground.

In contrast, on this issue Defendant Defense Technology has not met its initial burden of

²The Agreement states that certain assets were excluded from the transfer. (See Ex. Z, at 6.)

showing that there is no genuine issue of material fact regarding its potential liability to Plaintiffs. The Asset Purchase Agreement shows that Defendant Armor refused to assume liability for products manufactured and/or distributed by Defendant Defense Technology before October 1, 1996. (See Ex. Z, at 7.) Defendant Defense Technology, however, is not afforded the same protection under the terms of the Agreement. Instead, the Agreement assigns liability for future claims to the Seller, which includes Defendant Defense Technology. (See Ex. Z, at 7.) Because Defendant Defense Technology failed to meet its initial burden of showing that no genuine issue of material fact exists on the issue of manufacture and distribution, Defendant Defense Technology's Motion for Summary Judgment will be denied on this ground.

B. Inadequate Warnings

Under Pennsylvania law, a plaintiff asserting a failure to warn claim must establish (1) that the lack of warning rendered the product dangerous, and (2) that the dangerous condition was the cause in fact and proximate cause of plaintiff's injuries. See Davis v. Berwind Corporation, 690 A.2d 186 (Pa. 1997); Phillips v. A-Best Products Co., 665 A.2d 1167 (Pa. 1995). A dangerous product can be considered "defective" for strict liability purposes if it is distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product. See Mackowick v. Westinghouse Electric Corp., 575 A.2d 100, 102 (Pa. 1990) (citing cases).

Defendants seek summary judgment on grounds that Plaintiffs failed to produce any evidence that the pepper spray used on Mr. Cappelli lacked adequate warnings. Defendants offer evidence of the "on box" warning and instructions for Def-Tec First Defense's Pepper Spray to demonstrate that the warnings were adequate. (See Defs.' Ex. U.) By presenting such evidence,

Defendants have met their initial burden of showing there is no genuine issue of material fact concerning the adequacy of the product's warnings. The burden shifts to Plaintiffs to show that Mr. Cappelli's death was actually and proximately caused by inadequate warnings on Defendants' product. Plaintiffs' failed to respond to Defendants' motion or produce any evidence to show that Defendants' product needed additional warnings. Thus, Defendant Defense Technology's Motion for Summary Judgment on Count IV will be granted on this ground.

IV. CONCLUSION

This court concludes that Defendants' unopposed Motion for Summary Judgment on Counts IV and V of the Complaint will be granted on both counts. Summary judgment on Count V will be granted for Defendant Armor on grounds that Plaintiffs failed to produce any evidence that Defendant Armor manufactured and/or distributed the pepper spray used on Mr. Cappelli. Additionally, summary judgment on Count IV will be granted for Defendant Defense Technology on grounds that Plaintiffs failed to produce any evidence that Defendant Defense Technology's product lacked adequate warning.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHERRI CAPPELLI, ROBERT	:	
CAPPELLI AND ANDREW CAPPELLI,	:	
Individually and as the Administrators	:	
And Personal Representatives of the	:	
ESTATE OF RICHARD CAPPELLI	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 98-CV-5983
HAVERFORD TOWNSHIP,	:	
HAVERFORD TOWNSHIP POLICE	:	
DEPT., DENNIS DONNELLEY, KEITH	:	
GILMAN, PETER BOGUTZ, JOHN	:	
VIOLA, MICHAEL FLYNN, ROBERT	:	
MURPHY, And STEVEN FORTOW,	:	
Individually and in their capacity as Police	:	
Officers in the Haverford Township Police	:	
Dept., DEFENSE TECHNOLOGY CORP.	:	
OF AMERICA and ARMOR	:	
HOLDINGS, INC.	:	
Defendants.	:	

JUDGMENT

AND NOW, this day of September, 2000, Judgment is entered in favor of Defendants Defense Technology Corporation of America and Armor Holders, Inc. and against Plaintiffs Sherri Cappelli, Robert Cappelli and Andrew Cappelli, Individually and as the Administrators and Personal Representatives of the Estate of Richard Cappelli.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.