

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

RON BUNTING and FRANCES BUNTING, H/W	:	CIVIL ACTION
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	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
RYDER TRUCK RENTAL, INC., FREIGHTLINER CORPORATION, and BOSTROM SEATING, INC.	:	
	:	
	:	
Defendants.	:	NO. 96-3683

MEMORANDUM

Reed, J.

March 9, 1999

Presently before the Court is the motion of defendant Ryder Truck Rental for partial summary judgment (Document No. 72), and the responses of the parties thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 as the parties are of diverse citizenship and the amount in controversy is in excess of the applicable jurisdictional requirement. For the reasons set forth below, the motion will be denied.

I. Background

This is a products liability action. In February of 1994, plaintiff Ron Bunting was driving a tractor trailer along Route 95 North in Philadelphia County when the vehicle encountered an uneven surface in the roadway. The cab of the truck began to vibrate and Bunting was “catapulted” from the seat into the ceiling of the cab. As a result, he suffered serious injuries. His wife, plaintiff Frances Bunting, has alleged loss of consortium.

Plaintiffs brought this action sounding in strict liability, negligence and breach of

warranty against Bostrom Seating, Inc. (“Bostrom”), the manufacturer of the adjustable air seat, Freightliner Corporation, the manufacturer of the tractor trailer, and Ryder Truck Rental (“Ryder”), the lessor of the tractor truck. Ryder was also responsible for inspecting, maintaining and servicing the truck. Ryder has moved for summary judgment with respect to the failure to warn claim. Bostrom joins in the motion for summary judgment of Ryder asserting that the failure to warn claim should be dismissed as to all defendants but Bostrom opposes Ryder’s motion that the failure to warn claim should only be dismissed as to Ryder.

Bostrom maintains that the air seat was not defective when it left the manufacturing plant because it was then supplied with adequate warnings. On the side of the seat nearest the driver’s door, was a sticker provided by Bostrom stating:

SERIOUS INJURY MAY OCCUR IF HEAD CLEARANCE IS NOT ADEQUATE. BEFORE DRIVING OR RIDING IN VEHICLE, ENSURE THAT THERE IS ADEQUATE HEAD CLEARANCE AT MAXIMUM UPWARD TRAVEL OF SEAT. SEE OPERATOR’S MANUAL.

In addition, page 2 of the operator’s manual Bostrom provided a large warning about the hazard of vehicle occupants striking their head on the roof of the vehicle. The warning tracks the language of the sticker but is preceded by the words “OPERATION WARNING” and “!WARNING.” The manual also informs users how to check for adequate head clearance: “To check for adequate head clearance, sit in the seat and slowly raise it to its maximum upward position by pushing the valve knob in. (see comfort adjustments).” This warning is the first and most prominent warning in the operator’s manual.

Bunting contends, however, that he never saw the sticker because it was obscured by yet another sticker which warned that the vehicle components were permanently marked--

presumably to discourage theft. There is circumstantial evidence that ties the anti-theft sticker to Ryder. All the trucks leased by Ryder to Bunting's employer have similar anti-theft stickers. Ryder's corporate designee was unable to admit or deny whether Ryder concealed the warning, but conceded that it was either Ryder or Freightliner Corporation. In addition, Bunting asserts that he was not provided a copy of the operator's manual prior to the accident. Ryder argues that the failure to warn is not the proximate cause of Bunting's injuries because the warning was inadequate even if Bunting could have seen it and, furthermore, any warning would not have made a difference in how Bunting, a veteran truck driver, would have adjusted the seat.

II. Legal Standard

Ryder has moved pursuant to Federal Rule of Civil Procedure 56 for summary judgment. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law."¹ Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or

¹It is undisputed that the substantive law of Pennsylvania applies.

suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

III. Discussion

The Pennsylvania Supreme Court has adopted § 402A of the Restatement (Second) of Torts, which imposes strict liability on the purveyor of a product in a defective condition “unreasonably dangerous to the user or consumer.” See Webb v. Zern, 220 A.2d 853 (Pa. 1966); Francioni v. Gibsonia Truck Corp., 372 A.2d 736, 740 (Pa. 1977) (extending § 402A to lessors). Success on such a claim requires the plaintiff to prove that the product was defective, that the defect existed while the product was in the control of the manufacturer or retailer, and that the defect was the proximate cause of the harm. Davis v. Berwind Corp., 690 A.2d 186, 190 (Pa. 1997). Bunting alleges that the tractor trailer contained all three types of defect. Bunting’s complaint includes allegations that the seating arrangement did not contain sufficient warning and/or instructions to allow safe operation of the vehicle, the shocks of the air seat were defectively designed and/or manufactured and that there was insufficient clearance in the cab to permit safe operation of the vehicle. (Complaint at ¶ 21). As this motion only concerns allegations regarding a failure to warn, the analysis in this opinion will be limited to Bunting’s failure to warn claims.

Under Pennsylvania law, in a case predicated on a defendant’s failure to warn of latent dangers, “the plaintiff must establish that the failure to warn adequately of such dangers was the cause-in-fact and proximate cause of his or her injuries.” Conti v. Ford Motor Co., 743 F.2d 195, 197 (3d Cir. 1976). With respect to causation, the plaintiff enjoys the benefit of a rebuttable presumption that an adequate warning would have been heeded if it had been provided; however,

the presumption can be rebutted by demonstrating that the plaintiff was previously fully aware of the risk of bodily injury posed by the product. Pavlik v. Lane Ltd./Tobacco Exporters Int'l, 135 F.3d 876, 881-83 (3d Cir. 1998) (holding that the Pennsylvania Supreme Court would adopt a rebuttable heeding presumption). To overcome the presumption at summary judgment, “the record must show that a reasonable fact finder would be bound to find that [Bunting] was fully aware of the risk of bodily injury; otherwise, we are presented with a genuine issue of material fact for the jury.” Id. at 884.

Both Ryder and Bostrom argue that the absence of a warning could not have caused the accident because Bunting was a veteran truck driver who would not have changed how he adjusted his seat even if he had been able to read the warning. The record, however, fails to indicate that Bunting was aware of the risk of bodily injury posed by the manner in which he adjusted the seat. See Books v. Pennsylvania Power & Light Co., 523 A.2d 794, 798 n.3 (Pa. Super. 1987) (summary judgment is inappropriate where there is no record evidence that plaintiff was aware of the danger of operating trailer near power lines). Indeed, Bunting asserts that had he been able to read the warning, he would have been able to adjust the seat so as to avoid the “head clearance danger.”² (Affidavit of Ronald W. Bunting, ¶¶ 4, 5). Furthermore, the danger here is not so obvious as to obviate the need for a warning. See, e.g., Belofsky v. General Elec.

²Although a court may disregard a declaration that contradicts a deponent’s direct testimony, that rule does not apply here. See Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 704-06 (3d Cir. 1988). At the time of his deposition, Bunting testified that he had never seen the warnings. When asked what he would have done differently had he read the warning, Bunting responded: “I don’t know. How would I know? I don’t even know what they said.” (Response In Opposition to Defendant Ryder Truck Rental, Inc.’s Motion For Summary Judgment, Exh. E, Dep. of Robert Bunting at 205). Bunting’s subsequent affidavit does not contradict his earlier testimony. It merely seeks to clarify or explain his earlier answer after having learned what the warning said. See Videon Chevrolet, Inc. v. General Motors Corp., 992 F.2d 482, 488 (3d Cir. 1993) (refusing to ignore nonmovant’s affidavit because Martin applied to “clear and extreme facts” where nonmovant’s deposition testimony was unambiguous and clearly contradicted by a subsequent affidavit).

Co., 1 F. Supp.2d 504, 509 (D.V.I. 1998). Defendants have thus clearly failed to rebut the heeding presumption. See Pavlik, 135 F.3d at 884-86

Ryder, however, argues that it is not liable for covering up the warning sticker or maintaining the truck with the warning obscured because the warning is meaningless and would not have changed Bunting's conduct even if he had read it. In so doing, Ryder challenges the adequacy of the warning. It is on this issue that Bostrom parts company with Ryder and opposes its motion for summary judgment, arguing that the warning was adequate (but unnecessary).³

Ryder's motion fails because of the factual dispute over the adequacy of the Bostrom warning. Implicit in Bunting's allegations is a claim that the warning was inadequate for communicative reasons.⁴ See Pavlik, 135 F.3d at 887-88. According to Steven B. Wilcox, Ph.D., an expert for Ryder, the Bostrom warning was inadequate because it lacked signal work, was not eye catching, contained no signal words, such as "caution," "warning" or "danger," had no attention getting device, did not incorporate any graphic symbols, was placed in a location not likely to attract attention, the text was small and the message was not set off visually.⁵ (Def't. Ryder Truck Rental, Inc.'s Motion For Partial Summary Judgment, Exh. D, at 2-3). P. Robert Knaff, Ph.D. and an expert for Bostrom, however, contends that the instructions and warnings

³Bostrom has asked the Court to defer addressing the question of whether the warning is adequate as a matter of law, i.e., whether as a matter of social policy the seat was "unreasonably dangerous." See Azzarello v. Balck Brothers Co., Inc., 391 A.2d 1020, 1026 (Pa. 1978). Accordingly, the Court will defer deciding that issue until the appropriate time.

⁴Although Bunting's expert opined that the warning was inadequate because it did not state how much head room a user should leave between the top of his or her head and the ceiling of the cab, Bunting stated that he would have been able to avoid the accident if he had been able to read the warning. In so doing, Bunting has abandoned his claim against Bostrom that the warning was substantively deficient and a jury could thus infer that the warning was indeed substantively adequate.

⁵The irony of Ryder's argument--that the warning Ryder is alleged to have covered up was not eye catching--is not lost on the Court.

conformed with customary practices in the industry and were clear, explicit, and adequate for the intended users. (Defendant's, Bostrom Seating, Inc., Brief In Reply To Motion For Partial Summary Judgment of Defendant, Ryder Truck Rental, Inc., Exh. B, at 9). Also, according to Knaff's report, the Bostrom warning contained the header "WARNING." (Id. at 6). Thus, there are genuine issues of material fact which preclude the granting of summary judgment.⁶ See Pavlik, 135 F.3d at 887.

IV. Conclusion

For the foregoing reasons, the motion will be denied. An appropriate Order follows.

⁶For the same reasons and because there are factual issues as to whether Ryder is responsible for covering the warning, Ryder's motion for summary judgment with respect to the negligence claim will be denied.

**IN THE UNITED STATES DISTRICT COURT
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RON BUNTING and FRANCES BUNTING, H/W	:	CIVIL ACTION
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Plaintiffs,	:	
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RYDER TRUCK RENTAL, INC., FREIGHTLINER CORPORATION, and BOSTROM SEATING, INC.	:	
	:	
	:	
Defendants.	:	NO. 96-3683

ORDER

AND NOW this 9th day of March, 1999, upon consideration of the motion for summary judgment of defendant Ryder Truck Rental, Inc. (Document No.72), the various responses of the parties thereto, and the supporting memoranda, pleadings, exhibits and affidavits submitted by the parties, having found that there are genuine issues of material fact and that the defendant is not entitled to judgment as a matter of law, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion is **DENIED**.

IT IS FURTHER ORDERED that the parties shall submit a joint report to the Court no later than **Friday, April 9, 1998** as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report shall so indicate. By said date, plaintiff shall contact the Deputy Clerk to arrange a date for a final scheduling conference.

LOWELL A. REED, JR., J.