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**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT**
**CIVIL ACTION**
**NO. 2000-02953**
3953

**JOHN CASEY,**
**Plaintiff**

**vs.**

**PACTIV CORPORATION and STAR MARKETS COMPANY INC.,**
**Defendants**

Notice sent 6/17/04 J.H.R. R+R. W.L.K. Jr. A.A.S. Jr. M.P+S R.S. Jr. R.L. J+R (mm)

**MEMORANDUM AND ORDERS ON THE DEFENDANT, PACTIV CORPORATION'S MOTION FOR SUMMARY JUDGMENT AND THE DEFENDANT, STAR MARKET COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT**

## FACTS

On Christmas day, December 25, 1997, the plaintiff John Casey ("the plaintiff"), was cooking a turkey for his family dinner and celebration. He roasted the turkey in a pan designed by defendant Pactiv ("Pactiv"); the E-Z Foil Brand Large Pack N' Roast Roaster, model no. K1916 ("the pan"). It is a large rectangular roaster pan with no handles. This pan was purchased a few weeks prior to Christmas 1997 from a store of defendant Star Market Company, Inc. ("Star Market").[1] It had not been used prior to Christmas 1997. The plaintiff's turkey weighed 18 pounds, and the label on the pan represented that it was able to handle up to 20 pounds. He

[1] Hereinafter, defendants Pactiv and Star Market will be collectively referred to as "the defendants."

placed the turkey, without stuffing, in the pan, added a cup of water in the pan, and then placed the pan into the oven for baking. After the turkey finished cooking, the plaintiff took the turkey out of the pan and put it on a platter. He then lifted the pan containing the turkey juices out of the oven. As he got the pan out of the oven, it collapsed, causing the hot juices to pour out of the pan onto his legs and feet, causing severe second and third degree burns. As a result, the plaintiff underwent numerous surgical proceedings and skin grafting.

Pactiv also manufactures and markets a roasting pan which is called a "Large Rack 'N Roast Roaster with E-Z Handles." This model has metal handles at the two ends of the pan which are attached together by strong metal supports underneath the pan and also attached to both sides of the pan. This device, for all practical purposes, was designed to address the dangers associated with the pan that is the subject of this case. Likewise, there have been numerous patents granted by the U.S. Patent office that address the concern for collapsing aluminum pans. Examples are U.S. Patent # 5,503,062, dated 4/2/96 and U.S. Patent #6, 293, 458, dated 9/25/01.

Patent #5,503,062, entitled "Wire Support and Inner Rack For Thin Aluminum Pan" intends to address the problem with collapsing pans like the pan involved in this case. This invention includes a reinforced support structure for a pan adapted to contain a turkey, ham or roast. Specifically, the patent addressed "significant buckling and twisting problems [that] are encountered when using many prior art (sic) disposable aluminum foil pans to bake heavy food items because the weight of these food items was often too heavy to be supported by the pan. These problems were particularly serious when the baking process has ended and the user of the roasting pan attempted to remove the pan from the oven while it was very hot. If there were liquids in the pan, such as cooking juices . . . the user was often required to take great care to

prevent spillage and burns." See patent # 5, 503, 062.

The pan, which did not have any support rack or handles, included following words on the label in very small print:

> Perfect size for roasts up to 20 lbs when bottom of pan is properly supported. Caution: Do not lift by sides only. To avoid spilling always support bottom of pan with a cookie sheet.

Above those words, and in the middle of the pan in larger print it states

> "E-Z Foil
> Disposable
> Reusable
> Convenient
> Sturdy"

Finally, imprinted in the aluminum on the bottom of the pan are the words: "SUPPORT THE BOTTOM."

## DISCUSSION

1. Summary Judgment Standard of Review:

The Court grants a motion for summary judgment where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Mass. R Civ. P. 56(c); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that it is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). Summary judgment is appropriate where the moving party submits affirmative evidence that negates an essential element of the opposing party's case or where the moving party (who will not bear the burden of proof at trial) demonstrates that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical

Communications Corp., 410 Mass. 805, 809 (1991). In settling out the facts, the Court resolves any evidentiary conflicts in the summary judgment record and makes all logically permissible inferences in the non-moving party's favor. Attorney General v. Bailey, 386 Mass. 367, 371 (1982). In drawing inferences the Court must view them in the light most favorable to the party resisting the motion; in this case, the plaintiff.

There are two issues that are equally applicable to the negligence and breach of warranty claims against both defendants.

2. Negligent Design

The manufacturer, Pactiv, is under a duty to exercise reasonable care to eliminate foreseeable dangers to the user of the product. Uloth v. City Tank Corp., 376 Mass. 874, 881 (1978). In exercising reasonable care, a manufacturer "must anticipate the environment in which the product will be used and design against reasonably foreseeable risks attending the product's use in that setting." Id. A product may be defective "when it is properly made according to an unreasonably dangerous design" and it does not meet a consumer's reasonable expectation of its safety. Everett v. Bucky Warren, Inc., 376 Mass. 280, 290 (1978). Factors to be considered in evaluating the adequacy of a product's design include: "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product from an alternative design." Back v. Wickes Corp., 375 Mass. 633, 642 (1978).

A trial is warranted if the plaintiff can show "an available design modification which would reduce the risk without undue cost or interference with the performance of the [product]." Uloth., 376 Mass. at 881. In the present case, there is evidence that Pactiv has designed and

marketed a much safer model roasting pan with handles at the two ends of the pan and an internal support system. In effect, it addressed and eliminated the dangers of the collapse which occurred here causing the plaintiff's injury. The plaintiff has presented sufficient evidence that the defendants knew or should have known of this pan's dangerous and defective design, which could cause serious injury to someone using their product. Here there is evidence that the Pactiv created a safer design to eliminate the possibility of collapse. Thus, summary judgment is inappropriate.

3. Negligence in Failure to Give an Adequate Warning:

A manufacturer or retailer is required to give an adequate warning of the reasonably foreseeable dangers from any foreseeable use of its product. Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 20 (1998).

Here, a jury could find that the pan without a designed-in support system was not reasonably safe. "It is true that a manufacturer or seller of a product is not under a duty to warn of product-connected dangers that are obvious or to give warnings to someone who already knows of the product's hazardous propensities." Fiorentino v. A.E. Staley Mfg. Co., 11 Mass. App. Ct. 428, 436, n.8 (citing a collection of cases where it was held necessary to give an adequate warning even when the injured party knew of some of danger). However, experience with a product does "not necessarily alert users to all of the dangers associated with it . . . and it is now a generally settled principal of product liability law that a manufacturer who undertakes to advise users as to the proper method of handling his product must provide complete and accurate warnings respecting inherent dangers." Id. at 436. Thus, providing an adequate warning may not

avoid the manufacturer's liability. "Balanced against the somewhat limited effectiveness of warnings is the designer's ability to anticipate and protect against possible injuries. If a slight change in design would prevent serious, perhaps fatal, injury, the designer may not avoid liability by simply warning of the possible injury." Uloth, 376 Mass. at 880.

In this case, the plaintiff was using a brand new "E-Z Foil Large Rack N' Roaster," which has in large, legible words: "Reusable" and "Sturdy." These words give the message to the consumer that this a solid, strong product ("sturdy"); in fact, strong enough to be "reusable." There is also printed on the label a further description, in much smaller letters, stating: "Perfect size for roasts up to 20 lbs when bottom of pan is properly supported." This statement may not be considered a warning and could be viewed as essentially a "sales pitch" or instructions for use. "Furnishing instructions designed to make the product's use more efficient will not necessary discharge the duty to warn; the manufacturer still must call attention to the dangers to be avoided". Fiorentino, 11 Mass. App. Ct. at 434.

Additional, even smaller printing, although in all capitals, states: "CAUTION: DO NOT LIFT BY SIDES ONLY, TO AVOID SPILLING ALWAYS SUPPORT THE BOTTOM OF THE PAN WITH A COOKIE SHEET." It remains a question of fact whether this "caution" can be considered an adequate warning. This Court cannot say as a matter of law that it is, especially because the printing on the label was not permanent (it is a wrapper that must be removed before using the product) and not conspicuous.

Further, it is an issue of fact whether the language of the "caution" is adequate. It reads: "Do not lift by sides only." In this case, the plaintiff, after removing the turkey, lifted the pan by its two ends. The definition of "sides" includes "one of the longer bounding surfaces on lines of

an object especially contracted with the ends." Merriam-Webster Collegiate Dictionary, 10th ed. at 1089. It was when the plaintiff grasped the pan by its ends, not by its sides, that it collapsed and scalded him. If the defendant meant "ends" when it said "sides," this too is misleading and confusing.

Moreover, the label states: "to avoid spilling always support bottom of pan with a cookie sheet." Assuming the user has a cookie sheet at his home, this statement does not explain if a cookie sheet is only needed when a turkey is in the pan. It does not explicitly warn of a danger of collapse of the pan. It certainly did not warn of the danger of serious burns.

In his deposition, the plaintiff testified that he did not read the small print on the label. The defendant argues that, because the plaintiff did not read the label, the warning and directions included with the pan are immaterial and of no consequence. Assuming, arguendo, that the pan contained an adequate warning, the defendant's argument is without merit. The plaintiff testified that he saw the prominent printing ("E-Z Foil" "Reusable" and "Sturdy") on the label before he disposed of it. The small photo of the pan on the label shows a person holding the pan, filled with a turkey and all the fixings, on a cookie sheet. A manufacturer "is required to give explicit warning about a foreseeable and anticipated use of its [product] which said manufacturer knew or should have known to be fraught with danger not apparent to its anticipated users." Fegan v Lynn Ladders Co., Inc., 3 Mass. App. Ct. 60, 63 (1975). As noted above, "a manufacturer who undertakes to advise users as to the proper method of handling his product must provide complete and accurate warnings respective the inherent dangers." Fiorentino, 11 Mass. App. Ct. at 436. "The forcefulness of the warning must be commensurate with the danger involved." Wolfe v. Ford Motor Co., 6 Mass. App. Ct. 346, 350 (1978).

It is within a jury's function to evaluate the location and size of writing on the label and decide whether the defendant failed to adequately warn the consumer that this pan could collapse with just turkey juices in it. The inconspicuous nature of the caution on the label, the size of the print, its contradictory words, its failure to be complete and accurate regarding the inherent dangers in the use of this pan, and its failure to mention the possibility of the pan "collapsing" may all be considered by a jury.[2]

The Court is convinced that the plaintiff has made a sufficient showing on the negligence and breach of warranty counts and that the issue should be decided by a jury and not the Court.[3]

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[2] Pactiv argues that because the plaintiff did not preserve the pan that collapsed and caused his burns, he has effectively precluded Pactiv from proving that the pan was misused or altered prior to the incident. However, this case presents an issue of whether the pan suffers a design defect: whether and how the plaintiff was using the pan he claims to have been using is for a jury to determine.

[3] For this reason, Star Market is not entitled to summary judgment as to its liability. Whether the pan is defective is an issue for a jury. Star Market also argues that the plaintiff is precluded from showing that the pan is defective because he does not have an expert. However, this argument is without merit because negligence in design may be established without the use of an expert. Smith v. Ariens, 375 Mass. 620, 625 (1978) (snowmobile); Hayes v. Hobart Corp., 7 Mass. App. Ct. 889 (1979) (food chopper); doCanto v. Ametek, Inc., 367 Mass. 776, 782 (1975) (machine design and guarding). The jury certainly doesn't need an expert to tell them that this product was dangerous. After reviewing the design and function of the defendant's alternately designed firmly supported pan, all the jury would need is common sense.

Pactiv also moves for summary judgment as to Star Market's cross claim for contribution. Pactiv argues that Star Market is not entitled to contribution from Pactiv because Pactiv is not liable to the plaintiff. However, because this Court has decided that Pactiv is not entitled to summary judgment as to its liability, it is also not entitled to summary judgment on the contribution issue.

**ORDER**

After a hearing and upon review of all submissions, the defendant Pactiv's motion for summary judgment is **DENIED** and the defendant, Star Market Company, Inc.'s Motion for Summary Judgment is **DENIED**.

By the Court

Thomas E. Connolly
Justice of the Superior Court

DATED: June 7, 2004

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