COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. No. SUCV2000-03953

JOHN CASEY,)
Plaintiff,)
)
vs.)
)
PACTIV CORPORATION and)
STAR MARKETS COMPANY, INC.,)
Defendants.)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Statement of Facts

On December 25, 1997, plaintiff John Casey was using an E-Z Foil Brand Large Rack 'N Roast Roaster bearing model numbered K 1916, which essentially is a large rectangular roaster pan with no handles, to cook a turkey for his family's Christmas dinner. He understood that this pan was capable of cooking a turkey weighing up to 20 pounds. After it was done cooking, Mr. Casey took the turkey (18 pounds) from the oven, and put it on a platter. Later, he was then taking the pan with the drippings[1] from the oven, when it suddenly seemed to separate, split, or fold at the bottom ridge. The pan collapsed, causing the hot drippings to pour out of the pan and onto his feet. These hot drippings spilled onto Mr. Casey's lower legs and feet, causing him to suffer second and third degree burns which necessitated numerous surgical procedures, and over time, has led to scarring and disfigurement.

[1] It is significant that the turkey was already out of the pan when Mr. Casey lifted the pan to remove it from the oven. With the turkey out of the pan, there was no need to support the bottom.

The pan Mr. Casey was using was designed, manufactured, and distributed by defendant Pactiv. Pactiv has been involved with the design and manufacture of these pans for many years. Defendant Star Market sold the product to plaintiff's wife. In designing the product, defendant Pactiv, through its agents, employees and affiliated companies, have authored and reviewed a number of patents concerning disposable cooking pans similar to the one involved in this incident. The text from those patents highlight the problems and defects associated with these pans. These patents contain the following statements:

a. "thin gauge foil pans are inherently weak and are incapable of carrying heavy loads."

b. "additional strengthening means are still desirable in the larger pans such as those used for cooking heavy loads such as roasts, hams, and turkeys."

c. "the rectangular pans have the problem of bending when they are lifted, sometimes causing the hot juices to spill over."

d. "significant buckling and twisting problems are encountered when using many prior art 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.... Buckling and twisting of disposable aluminum foil pans may cause the spilling of very hot cooking juices over the side walls of the roasting pans as well as indentations in the body of the pans."

Defendant Pactiv was well aware of these patents and the problems involving disposable aluminum pans. Indeed, defendant was aware that buckling and twisting of disposable aluminum foil pans may cause the spilling of very hot cooking juices over the side walls of the roasting

pans. Most significantly, the patent authored by defendant's 30(b)(6) designee Thomas J. Hayes states that "thin gauge foil pans are inherently weak and are incapable of carrying heavy loads." Defendant's patent also stated that: "additional strengthening means are still desirable in the larger pans such as those used for cooking heavy loads such as roasts, hams, and turkeys."

Defendant Pactiv was aware that these aluminum pans would twist or collapse when not supported on the bottom. Defendant Pactiv was also aware that these aluminum pans would bend or had a tendency to bend when lifted. In fact, defendant Pactiv's 30(b)(6) designee Thomas J. Hayes testified in a previous case that he was concerned about buckling failure in home usage when he designed the subject product.

An alternative design for the pans such as that involved in the incident are those which include handles and/or stabilizing bars. As indicated in the label for the product manufactured by defendant, the pan with handles is "perfect size for roasts up to 20 pounds" and does not require additional support for the bottom of the pan when lifting. According to the patents for same, the alternative design pan with handles and stabilizing bars "may be constructed for approximately the same cost as prior art disposable pans, notwithstanding the increased effectiveness of the present invention.... In addition, the pan of the present invention alleviates the bending problem concomitant with prior art rectangular disposable aluminum pans.... A still further object of the present invention is to provide a disposable pan that can easily be handled by the user, without requiring the pan to be lifted from underneath." Defendant Pactiv's 30(b)(6) designee Thomas J. Hayes testified in a previous case that the handled roaster was superior to the non-handled roaster in terms of buckling potential.

Defendant Pactiv manufactures, markets and sells the disposable pan with handles, consistent with the description set forth above. In this case, the hazard could have been eliminated with the use of handles and the structure which is incorporated into other roasting pan models manufactured and sold by Pactiv.

Defendant Pactiv has had notice of at least three other incidents similar to plaintiff's which caused personal injuries to individuals as a result of buckling or collapsing of a disposable aluminum roasting pan. In those other incidents, there were allegations that the pan collapsed and that the consumer did not support the bottom with a cookie sheet. As the designer of the product, defendant admitted that information concerning these other incidents would be useful, but he was not provided with this information by his company.

Prior to Mr. Casey's incident, defendant Pactiv never did any field studies or analysis to determine whether users were supporting the bottom of the pans with cookie sheets. In addition, defendant testified that he expected that his company would apprise him of any such field studies. In fact, defendant Pactiv did not do any real-world testing of its products until 1998 (after Mr. Casey's incident and injuries. The real-world testing done by defendant Pactiv revealed that juices were accumulating at dangerous levels in these pans, hot juices were spilling, and more cautionary labeling was required. After Mr. Casey's incident, the warnings included on these pans were changed to alert users to remove hot juices with a turkey baster. The warnings were changed because testing by the defendant revealed that hot juices were being spilled from these pans in the ordinary course of home usage. After 1998, it was the company's recommendation that a user remove all juices before lifting the pan. No such warning relative to the accumulation and removal of hot juices was included on the pan sold to plaintiff. Defendant

Pactiv admits that the hazard relative to the accumulation of hot juices in these pans existed in 1997.

Defendant Pactiv admits that the first principle of product design is to "eliminate the hazard from the product or process by altering its design, material, usage or maintenance method." Indeed, this was an engineering principle to which the defendant Pactiv adhered. Moreover, it was a practice or policy at Pactiv for the product designer to look first at eliminating the hazard through design and then look to warnings.

Argument

1. *Standard for Summary Judgment*

In considering a motion for summary judgment, a court does not weigh the evidence or make its own determination of the facts. *Attorney General v. Bailey*, 386 Mass. 367, 370 (1982). In addition, a court should neither grant a motion for summary judgment because the facts offered by the moving party appear more plausible than the non-movant, nor because it appears the opponent is unlikely to prevail at trial. *Id*. Instead, in drawing inferences from the affidavits, depositions, exhibits or other material, the court must view them in the light most favorable to the party resisting the motion. *Hub Assocs v. Goode*, 357 Mass. 449, 451 (1970) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). A mere "toehold" of controversy is enough to survive a motion for summary judgment. *Marr Equipment Corp. v. ITO Corp. of New England*, 14 Mass. App. Ct. 231, 235, *fur. app. rev. den.*, 387 Mass. 1103 (1982). For this reason, summary judgment should be granted only where the opposing party has no *reasonable* expectation of proving an essential element of that party's case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991) (emphasis added). In this case, plaintiff has presented ample

evidence which demonstrates that summary judgment is wholly inappropriate. Summary judgment is not proper because the aluminum roasting pan without handles was defective and unreasonably dangerous, and caused injuries to the plaintiff.

2. *Manufacturer and Seller Liable for Defective Product*

Under Massachusetts law a manufacturer is liable in negligence and breach of warranty if it sells an unreasonably dangerous product that causes injury. *Carey v. General Motors Corp.*, 377 Mass. 736, 740 (1979); *Uloth v. City Tank Corp.*, 376 Mass. 878 (1978). A product is unreasonably dangerous if it is defective by design, manufacture or distribution. *Id*. A seller impliedly warrants its products as "fit for the ordinary purpose for which such goods are used." This includes "the uses intended by the manufacturer and those which are reasonably foreseeable." G.L. c. 106, § 2-314(2)(c). See *Hayes v. Ariens Co.*, 391 Mass. 407, 413 (1984) (focus on whether the product defective and unreasonably dangerous, not conduct of seller); *Back v. Wickes*, 375 Mass. 633, 643 (1978) (jury considers gravity of danger posed by challenged design, likelihood of danger, mechanical feasibility of alternative, financial costs, and adverse consequences of alternative design). Under a claim for breach of the implied warranty of merchantability, the focus is whether the defect renders the product unreasonably dangerous and therefore unfit for its ordinary use and purpose. *Back v. Wickes*, 375 Mass. at 642. While the manufacturer is not an insurer of its user's safety, it, nonetheless, must "anticipate the environment in which its products will be used, and it must design against the reasonably foreseeable risks attending the product's use in that setting." *Id*. at 640-41.

In evaluating the reasonableness of a product's design, factors to be considered include (1) the manufacturer's knowledge or appreciation of the risks associated with the product; (2) the

gravity of the danger of the design, if any; (3) the feasibility and cost of a safer design; and (4) the negative consequences of an alternative design to the product and the consumer. *Back v. Wickes Corp.*, 375 Mass. 633, 642 (1978). The aluminum pan without handles is manifestly too risky in light of its low utility and the existence of a feasible and safer alternative which performs the same function. *Passwater v. General Motors*, 454 F.2d 1270 (8th Cir. 1972) (unshielded operation of propeller-like blades on the four wheels of an automobile created a high risk of foreseeable harm to the general public); *Parzini et al. v. Center Chemical Company et al.*, 34 Ga.App. 414, 214 S.E.2d 700 (under merchantability may be considered such questions as whether a drain solvent consisting of 95% to 99 1/2% pure sulphuric acid is unmerchantable and dangerous because too potent for ordinary use).

A product is also "unreasonably dangerous and, therefore, ... not fit for the purposes for which such goods are used, if foreseeable users are not adequately warned of dangers associated with its use." *Hayes v. Ariens*, 391 Mass. 407, 413 (1984). At the very least, Pactiv is subject to liability for its blatant failure to adequately warn plaintiff of the dangers associated with the pan which, by its own admission, is “inherently weak.” In Massachusetts, a manufacturer can be found liable to a user of the product if the user is injured due to the failure of the manufacturer to exercise reasonable care in warning potential users of hazards associated with use of the product. See, e.g., *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (1986); *Killeen v. Harmon Grain Products*, 11 Mass.App. 20, 413 N.E.2d 767, 770 (1980); W. Prosser & W.P. Keeton, *The Law of Torts* § 96, at 685 (5th ed. 1984). However, 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. In such a case the burden to prevent needless injury is best placed

on the designer or manufacturer rather than on the individual user of a product. *Uloth v. City Tank Corp.*, 376 Mass. 874, 881 (1978).

"The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form." *Uloth v. City Tank Corp.*, 376 Mass. 874, 881 (1978) (quoting *Palmer v. Massey-Ferguson, Inc.*, 3 Wash.App. 508, 517, 476 P.2d 713, 719 (1970). Warnings are not a substitute for reasonably safe design. Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193 (1994). A manufacturer has a duty to design a product with reasonable care so as to eliminate avoidable dangers. *Fahey v. Rockwell Graphic Systems, Inc.*, 20 Mass.App.Ct. 642, 647 (1985); *Uloth v. City Tank Corp.*, 376 Mass. 874, 878 (1978). The applicable standard of care is that of an "ordinary reasonably prudent designer in like circumstances." *Fahey v. Rockwell Graphic Systems, Inc.*, 20 Mass.App.Ct. at 647. There is a case for the jury 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 v. City Tank Corp.*, 376 Mass. 874, 881 (1978). See 2 F. Harper & F. James, *Torts* § 28.5, at 1543 (1956). Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 Yale L.J. 816, 876 (1962).

A product that functions as intended, is accompanied by warnings, and whose danger is obvious may still be negligently designed if it is made "according to an unreasonably dangerous design and when it does not meet consumer's reasonable expectations as to its safety. The focus is on the design itself, not on the manufacturer's conduct." Richard W. Bishop, *Prima Facie*

Case-- Proof and Defense § 890 (West 1987); *Fahey v. Rockwell Graphic Systems, Inc.,* 20 Mass.App.Ct. 642, 648 (1985).

Evidence of incidents similar to the plaintiff's is admissible. *Santos v. Chrysler Corp.*, 430 Mass. 198 (1999). Other incident testimony is relevant evidence to establish notice, to corroborate the alleged defect, and to refute evidence that the product was designed without safety hazards. *Id*. Additionally, a manufacturer cannot turn a deaf ear to advice from collateral sources that will make use of one of its products safer. *Fiorentino v. A. E. Staley Mfg. Co.*, 11 Mass.App.Ct. 428 (Mass.App.1981).

In this case, there is overwhelming evidence of a product defect. The defendant admitted that its product was inherently weak and are incapable of carrying heavy loads. Moreover, the defendant has testified that it was aware of buckling, twisting, and collapsing of pans in the ordinary course of home usage. Further, defendant was aware that buckling and twisting of disposable aluminum foil pans could cause the spilling of very hot cooking juices over the side walls of the roasting pans. Defendant also acknowledged that: "additional strengthening means are still desirable in the larger pans such as those used for cooking heavy loads such as roasts, hams, and turkeys." The other incidents involving collapsing roasting pans is further evidence that defendant Pactiv was on notice of a defect in the product. These defects in the product could have easily been eliminated. The addition of handles and wire supports on these products was a feasible alternative design that would have made the product safer. Indeed, the defendant in this case manufactured a product which was a feasible alternative. Defendant Pactiv's 30(b)(6) designee Thomas J. Hayes testified that the handled roaster was superior to the non-handled roaster in terms of buckling potential.

3. *Expert testimony not Necessary to Prove Product Defect*

Expert testimony is not necessary to prove the defect in this case. See, e.g., *Smith v. Ariens Co.*, 375 Mass. 620, 377 N.E.2d 954 (1978). "[I]n cases in which a jury can find of their own lay knowledge that there exists a design defect which exposes users of a product to unreasonable risks of injury, expert testimony that a product is negligently designed is not required." *Id.* at 625.[2] "Where a matter may easily be comprehended by jurors the testimony of an expert has no place." *Coyle v. Cliff Compton, Inc.*, 31 Mass.App.Ct. 744, 750 (1992) (quoting *Turcotte v. DeWitt*, 332 Mass. 160, 165 (1955)). It is within common experience that a properly fabricated pan which was designed to lift a 20 pound turkey and which used in the foreseeable manner would not mysteriously fail if put to the use for which it was intended. *Calvanese v. W.W. Babcock Co., Inc.*, 10 Mass. App. Ct. 726, 733 (1980). Mr. Casey had no knowledge whatsoever that the pan could fail under these conditions. He had removed the turkey prior to lifting the pan, and could not have reasonably expected that it would fail when lifted without a heavy object inside. Pactiv was in the superior position to recognize and eliminate these defects. *Solimene v. B. Grauel and Co., K.G.*, 399 Mass. 790, 796 (1987).

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[2] In *Smith v. Ariens*, the plaintiff was injured when her head came down on protrusions from the brake bracket after a collision with a rock. The court recognized that it is foreseeable that snowmobiles, like automobiles, will be involved in collisions with other objects. Thus Ariens owed a duty to users of its snowmobiles to design them so as to avoid unreasonable risks of injury following a collision. The defendant further argued, however, that even if it owed such a duty to users, the plaintiff did not present sufficient evidence to establish a breach of this duty because she did not introduce any expert testimony tending to show that the snowmobile was negligently designed. However, the court found that it is within the knowledge of a jury whether unshielded metal protrusions on the handle bar of a snowmobile constitute a defect in design which creates an unreasonable risk of harm. The evidence presented to the jury, including the existence and placement of the protrusions and the absence of guards to cover them, was sufficient to allow the jury to determine whether the snowmobile was negligently designed. *Cf. Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959).

Jurisdictions which model their decisional law along Restatement lines *uniformly* hold that a strict liability claimant may demonstrate an unsafe defect through direct eyewitness observation of a product malfunction, and need not adduce expert testimony to overcome a motion for summary judgment. *Perez-Trujillo v. Volvo Car Corp. (Sweden),* 137 F.3d 50, 55 -56 (1st Cir.1998). "'Although it is helpful for a plaintiff to have direct evidence of the defective condition which caused the injury or expert testimony to point to that specific defect, such evidence is not essential in a strict liability case based on § 402A [of the Restatement (Second) of Torts],' " and direct observation of " '[t]he malfunction itself is circumstantial evidence of a defective condition.' " *Ducko v. Chrysler Motors Corp.,* 433 Pa.Super. 47, 639 A.2d 1204, 1206 (1994).[3] Here, plaintiff's testimony of the bending, collapse, or buckling of the pan, under the

[3] See, e.g., *Woods v. General Motors Corp.*, No. 920516326S, 1996 WL 57016, at *3 (Conn.Super.Ct. Jan. 24, 1996) ("We conclude that in a product liability action, it is not necessary to present expert testimony to establish [a genuine factual dispute] that [a vehicle] was defective."); *Varady v. Guardian Co.*, 153 Ill.App.3d 1062, 106 Ill.Dec. 908, 506 N.E.2d 708, 712 (1987) (same, where "plaintiff testified that as she turned to her left with her crutches under her armpits, the left crutch collapsed, causing her to lose her balance and fall"); *Virgil v. "Kash N' Karry" Serv. Corp.*, 61 Md.App. 23, 484 A.2d 652, 656 (1984) (same, where plaintiff testified "that a thermos bottle ... implode[d] when coffee and milk [were] poured into it," since testimony would prove that the "product fail[ed] to meet the reasonable expectations of the user"); *Tune v. Synergy Gas Corp*., 883 S.W.2d 10, 14 (Mo.1994) (en banc) (same); *Falls v. Central Mut. Ins. Co.*, 107 Ohio App.3d 846, 669 N.E.2d 560, 562 (1995) (same, where plaintiff attested that "the seat belt came unfastened during the collision," despite expert's opinion that belt was not defective); *Dansak v. Cameron Coca-Cola Bottling Co*., 703 A.2d 489, 496-97 (Pa.Super.Ct.1997) (same, where plaintiff stated that "[s]he opened the carton, removed a six-pack, and was cut by a broken bottle in the six- pack"); *Sipes v. General Motors Corp*., 946 S.W.2d 143, 154 (Tex.App.1997) (same, where plaintiff contended that air bag failed to deploy, and defendant's expert contradicted) (citing *McGalliard v. Kuhlmann*, 722 S.W.2d 694 (Tex.1986)); *Potter v. Van Waters & Rogers, Inc*., 19 Wash.App. 746, 578 P.2d 859, 865 (1978) (same, where lay witnesses testified that rope was defective). In *Richard v. American Mfg. Co., Inc*. 21 Mass.App.Ct. 967, 967 (1986), the court ruled that since there was evidence that a simple guard could have reduced the risk "without undue cost or interference with the performance of the machinery," the jury were warranted in finding the defendant negligent in designing the machine. *Uloth v. City Tank Corp*., 376 Mass. 874, 881 (1978). *Fahey v. Rockwell Graphic Systems, Inc*., 20 Mass.App.Ct. 642, 649 (1985). Accordingly, the court pointed out that in this case no expert testimony was necessary, as the jury could of their own knowledge determine that a design defect existed which exposed users of the machine to an unreasonable risk of injury. See *Smith v. Ariens*, 375 Mass. 620, 625 (1978).

circumstances of this case, is sufficient to make out a prima facie case of a product defect. The issue of strict liability, therefore, is a disputed issue for the jury. Eyewitness testimony – standing alone – represents competent evidence that the product had an unsafe defect. *See Sipes v. General Motors Corp.,* 946 S.W.2d 143, 154 (Tex.App.1997) (noting that "[t]he fact finder may accept lay testimony [that an air bag failed to deploy during frontal collision] over that of [defendants'] experts").

With regard to evidence of other incidents, expert testimony regarding the existence of the same defect in the subject incident, and other pans involved in similar incidents, is not required to allow admission of testimony regarding other incidents in a products liability action where the other incident testimony is offered not to prove the existence of a defect, but to establish notice, corroborate the alleged defect, and refute evidence that the product was designed without safety hazards. *Santos v. Chrysler Corp.*, 430 Mass. 198 (1999).

4. *Defendants also Liable for Failure to Warn*

Generally, a manufacturer's duty of care includes an obligation, whenever possible, to eliminate known or reasonably knowable conditions of the product, or to provide an adequate warning of the latent dangers arising from the normal and intended use of the product. *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 75 (1976). *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 135 (1985). *Maldonado v. Thomson Natl. Press Co.*, 16 Mass.App.Ct. 911, 912 (1983). The Supreme Judicial Court, however, declined to adopt any rule which permits a manufacturer or designer to discharge its total responsibility to workers by simply warning of the dangers of a product. Whether or not adequate warnings are given is a factor to be considered on the issue of negligence, but warnings cannot absolve the manufacturer or designer

of all responsibility for the safety of the product. *Uloth v. City Tank Corp.*, 376 Mass. 874, 880 (1978). The manufacturer can be held liable even if the product does exactly what it is supposed to do, if it does not warn of the potential dangers inherent in the way a product is designed. *Schaeffer v. General Motors Corp*., 372 Mass. 171, 174, 360 N.E.2d 1062, 1065 (1977).

Ordinarily, "a manufacturer of a product, which the manufacturer knows or should know is dangerous by nature or is in a dangerous condition," is under a duty to give warning of those dangers to "persons who it is foreseeable will come in contact with, and consequently be endangered by, that product." *H.P. Hood & Sons v. Ford Motor Co.*, 370 Mass. 69, 75 (1976). A manufacturer of a product which lacks the requisite warning is, by virtue of that deficiency, in breach of an implied warranty of merchantability. *Hayes v. Ariens Co.*, 391 Mass. 407, 413 (1984). *Yates v. Norton Co.*, 403 Mass. 70 (1988). If directions or warnings as to the use of a particular product are reasonably required in order to prevent the use of such product from becoming unreasonably dangerous, the failure to give an adequate warning or directions, is evidence of negligence. *Wolfe v. Ford Motor Co.*, 6 Mass. App. Ct. 346 (1978). The question on warnings is whether defendant did all that was practicable to prevent such an accident as occurred. *Shaffer v. General Motors Corp.*, 372 Mass. 171 (1977).

An adequate warning is by definition one that would in the ordinary course have come to the user's attention. The failure to give such a warning therefore permits the inference that it would have alerted the user to the danger and forestalled the accident. The jury is free to draw such an inference absent some negating evidence binding on the plaintiffs. *Wolfe v. Ford Motor Co.*, 6 Mass.App.Ct. 346 (1978). To be adequate, a warning must be displayed so as to catch the eye of a reasonably prudent person. *Town of Bridport v. Sterling Clark Lurton Corp.*, 693 A.2d

701 (Vt. 1997). See, e.g., *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 85 (4th Cir.1962) (where manufacturer has duty to warn, warning must be in such form as to catch attention of reasonably prudent person); *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 723 n. 12 (D.C.1985) ("The adequacy of a warning 'depends, not only on its content, but also on its ability to catch the eye, inducing the user to read it.' ") (quoting *Ferebee v. Chevron Chem. Co.*, 552 F.Supp. 1293, 1303 (D.D.C.1982)). Unless the warning specifies the risk, it may be wholly ineffective. When the possible harm is severe, quite specific information may be required. *Fyssakis v. Knight Equipment Corporation*, 826 P.2d 570 (Nev. 1992).

The common law duty to warn necessitates a warning "comprehensible to the average user and ... convey[ing] a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person." *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, (1985) (quoting *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind.App. 33, 49, 388 N.E.2d 541 (1979), quoting *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 85 (4th Cir.1962)). Whether a particular warning measures up to this standard is almost always an issue to be resolved by a jury; few questions are "more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person." *Ferebee v. Chevron Chem. Co.*, 552 F.Supp. 1293, 1304 (D.D.C.1982).

Expert testimony is not required in a failure to warn case. In this regard, the case of *Cottam v. CVS Pharmacy,* 436 Mass. 316, 326 (2002) is instructive. There the court noted that:

> The common- law duty to warn "necessitates a warning 'comprehensible to the average user and ... [one] convey[ing] a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.' " *MacDonald v. Ortho Pharm. Corp*., supra at 140, 475 N.E.2d 65, quoting *Ortho Pharm. Corp. v. Chapman,* 180 Ind.App. 33, 49, 388 N.E.2d 541 (1979). At issue is the adequacy

> of the warning, not the technical performance of the pharmacist. The crucial issues in this aspect of the case were the extent of CVS's undertaking to warn and whether a reasonable person would have been misled by the warning. In this case, the determination did not involve professional or technical knowledge for which a jury need expert aid. Rather, it involved a commonsense determination regarding the understanding of an ordinary, reasonably prudent person, a determination properly left to the jury without expert testimony.

At a minimum, Pactiv failed to properly warn and instruct users about the propensity of hot liquids to accumulate in the pans, and their tendendency to buckle and twist. Warnings about accumulation of juices never appeared on product despite defendant's knowledge of the dangers. After Mr. Casey's incident, the warnings included on these pans were changed to alert users to remove hot juices with the turkey baster. The warnings were changed because testing by the defendant revealed that hot juices were being spilled from these pans in the ordinary course of the use. It was the company's recommendation that a user remove all juices before lifting the pan. No such warning relative to the accumulation and removal of hot juices was included on the pan sold to plaintiff.

5. *Defendant's Spoliation Claim has no Basis*

The actual roasting pan involved in plaintiff's incident is not necessary for continued prosecution of this design defect case. Shortly after the incident, plaintiff secured an identical pan as that involved in his incident of December 25, 1997. This exemplar product, together with the testimony of plaintiff as to how the incident occurred, is sufficient to proceed on design defect and warnings theories and defendant cannot credibly claim any prejudice given the product history and its knowledge of the inherent weakness of these pans. Accordingly,

dismissal of plaintiff's claims for alleged spoliation[4] of evidence is a wholly inappropriate remedy and would not be grounded in fact or law.

6. *Defendant's Misuse Defense Fails as a Matter of Law*

The implied warranty of fitness includes uses which are reasonably foreseeable but does not include unforeseeable misuses of a product. *Allen v. Chance Manufacturing Co.*, 398 Mass. 32, 34 (1986). To prove his case, "a plaintiff asserting a personal injury claim based on a breach of an implied warranty of merchantability must prove that at the time of his injury he was using the product in a manner that the defendant seller, manufacturer, or distributer reasonably could have foreseen." *Id.* Massachusetts recognizes an affirmative defense which would bar the plaintiff from recovery on a warranty theory if:

1) the plaintiff violated a duty to act reasonably with respect to a product he knew to be defective and dangerous; and

2) the plaintiff's conduct was a cause of the injury.

Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 355-356 (1983). As the court in *Allen* explained:

> A defendant making such a claim must prove that the plaintiff knew of the product's defect and its danger, that he proceeded unreasonably to use the product and that, as a result, he was injured. Id. Restatement (Second) of Torts § 402A, comment n (1965). This defense differs from the traditional doctrine of assumption of the risk because it combines a subjective element, the plaintiff's actual knowledge and appreciation of the risk, with an objective standard, the reasonableness of his conduct in the face of a known danger.

Allen v. Chance Manufacturing Co., 398 Mass. at 34 (emphasis added).

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[4] Defendant's suggestion that plaintiff intentionally disposed of evidence is unwarranted. Shortly after the traumatic burn incident, members of plaintiffs family simply discarded this disposable pan which had buckled and crumbled. They had no reason to know that it had any evidentiary value and clearly they would distraught by what they witnessed involving their father. In these circumstances, saving the pan was the farthest thing from their minds. Defendant is not given any reason to support its alleged prejudice from the disposal of the pan in this case.

The burden of proving that the plaintiff violated a duty to act reasonably with respect to a product he knew to be defective and dangerous and that such conduct was the cause of the plaintiff's injury rests with the defendant. *Allen v. Chance Manufacturing Co.*, 398 Mass. 32 (1986). This defense incorporates a subjective state of mind requirement into the "misuse defense" — the plaintiff's actual knowledge and appreciation of the risk along with a determination of the reasonableness of the plaintiff's conduct in the fact of the known danger. The subjective element "refers not simply to the plaintiff's general knowledge of the danger, but to his awareness that he is voluntarily encountering the danger on the occasion in question." *Venturelli v. Cincinnati, Inc.*, 850 F.2d 825, 830 (1st Cir. 1988) (emphasis in original). For example, in *Allen*, the plaintiff, an amusement park employee attempted to drive an assembly pin with a hammer through a motor's mounting hole. The assembly pin fragmented and pieces flew into the plaintiff's eyes. The plaintiff testified that he was fully aware of the danger prior to using the product, and despite the knowledge, intentionally misused it. This, concluded the court, was unreasonable conduct — a knowing and intentional misuse — and barred the plaintiff's recovery on his breach of warranty claim.[5]

In this case, Mr. Casey was using the pan in a foreseeable manner and lacked any knowledge of the product defect. Indeed, there is no evidence whatsoever to indicate that Mr. Casey knew of any defect, and proceeded unreasonably in the face of any known danger.

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[5] See *Tibbetts v. Ford Motor Company*, 4 Mass. App. Ct. 738 (1975) (plaintiff testified he knew proper way to use product, but knowingly misused it anyway); *Venturelli v. Cincinnati, Inc.*, 850 F.2d 825 (1st Cir. 1988) (defendant must prove plaintiff knowingly and voluntarily encountered the danger on the occasion in question); *Zahrte v. Sturn, Ruger & Co., Inc.*, 664 P.2d 17 (Mont. 1983) (defendant must establish that plaintiff voluntarily and unreasonably exposed himself to known danger); *Elder v. Crawley Book Machinery Company*, 441 F.2d 771 (3rd Cir. 1971) (voluntarily means done by design or intention, intentional proposed, intended or not accidental).

Therefore, his conduct is irrelevant in the context of considering whether the product is defective and unreasonably dangerous.

7. *Star Market is Liable as the Product Seller*

Under Massachusetts law a seller such as Star Market is liable in negligence and breach of warranty if it places into the stream of commerce an unreasonably dangerous product that causes injury. *Carey v. General Motors Corp.*, 377 Mass. 736, 740 (1979); *Uloth v. City Tank Corp*., 376 Mass. 878 (1978). The word "seller" includes any merchant of goods of the kind, including roasting pans. The standard for determining if a defendant is a merchant is whether the defendant regularly deals in goods of the kind involved or otherwise has a professional status with regard to the goods such that it could be expected to have specialized knowledge or skill peculiar to those goods. *Ferragamo v. Massachusetts Bay Transportation Authority*, 395 Mass. 581 (1985). Star Market is certainly a "seller" of roasting pans.

Conclusion

In light of the foregoing, defendants' motions for summary judgment should be DENIED.

Plaintiff,
By his attorneys,

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