SUPERIOR COURT
of the
STATE OF DELAWARE

John E. Babiarz, Jr.
Judge

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May 30, 2006

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RE: *James J. Hyatt, et al. v. Toys "R" Us, Inc. v. Rand*
C.A. No. 99C-12-152-JEB

Dear Counsel:

James Hyatt was injured, allegedly seriously, when he fell from a bicycle purchased from the defendant Toys-R-Us, and manufactured by the third party defendant RAND International Leisure products. He filed suit only against Toy-R-Us alleging negligent assembly of the bike and breach of the implied warranty of merchantability. Toys-R-Us filed a third party complaint against RAND on the warranty theory.

Shortly before the first trial in this case, the Court granted a defense motion to bar the testimony of George Lankford, a metallurgist retained by plaintiff to testify regarding the warranty claim. The Court found that the plaintiffs had not disclosed the existence or identity of the expert until the very eve of trial in violation of the Court's trial scheduling order, effectively preventing any useful discovery of the expert's opinion by defendants. At trial, the plaintiff had no other expert on the issue of whether there was a design or manufacturing defect in the bicycle and Toys-R-Us also presented no expert in support of it's third party

claim. At that point the Court, *sua sponte* declared a mistrial.[1] In the mistaken belief that the defect in the case, arose from a defect in the lawyering rather than a lack of real merit. The Court specifically vacated the disqualification of Lankford and set a schedule for the discovery of his opinions.

At the second trial, plaintiffs' called Lankford as an expert witness. He testified as to matters tangential to the warranty claim and also on matters relevant to the negligence claim. On cross examination he flatly declared that the bicycle was properly designed and manufactured for normal use. As a consequence, the Court dismissed the manufacturer, RAND, from the case but submitted it to the jury on both the negligence and warranty claims against Toys-R-Us. The jury found in favor of Toys-R-Us on the negligence claim and against it on the warranty claim. It awarded one hundred thousand dollars to James Hyatt which was only a small fraction of what he was seeking, and nothing to Mrs. Hyatt. Toys-R-Us has moved for judgment notwithstanding the verdict and has renewed its motion for judgment as a matter of law originally made at trial. Plaintiff Duanna Hyatt has moved for a new trial on damages only.

One of the few issues not hotly contested in this case was the cause of James Hyatt's fall from the bicycle. He fell because one of the pedals came off while he was pedaling and it came off because the pedal was bent twelve degrees from the perpendicular. Plaintiffs contended that this was the result of negligent assembly of the bike by Toys-R-Us, which denied the allegation and suggested tampering by the plaintiff. The accident occurred several weeks after the bike had been purchased and after James Hyatt had used it exactly nineteen times. Hyatt and his wife testified that they had not noticed anything unusual about the bike before the accident. They presented a bicycle assemble expert who opined that the pedal was

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[1] Never again.

titled from the perpendicular because it was "cross-threaded" during assembly and hence negligently assembled. Toys-R-Us agreed that cross-threading would be negligent assembly but denied that it caused that condition. It pointed to plaintiff's failure to notice the condition at the time of the purchase, something that surely would have occurred to anyone riding the bike, according to Toys-R-Us. It also introduced evidence as to its own assembly and inspection procedures.

At the prayer conference in this case Toys-R-Us objected to the submission of the warranty theory to the jury. The Court overruled that objection reasoning that the sale of a negligently assembled product by a retailer is a breach of the implied warranty of merchantability as well as the basis for a direct action on negligence. I am not persuaded that the submission of both issues to a jury is erroneous as a matter of law. I am persuaded that it was erroneous to do so in this case. The alleged defect in this case could only have resulted from negligent assembly. No evidence was presented that this product was defective in any way other than by the alleged cross-threading of the pedal assembly. Thus to submit both claims to the jury in this case was to invite confusion. Once the jury determined that Toys-R-Us was not negligent in assembling the bicycle there was no rational basis for a finding that the alleged defect existed at the time of sale. Defendant's motion for a judgment notwithstanding the verdict is Granted.

Defendant has moved to have $15,125.66 taxed against plaintiffs as Court costs. Prior to the first trial Toys-R-Us filed an offer of judgment pursuant to Rule 68 in the amount of $190,002.00, which was not accepted by the plaintiffs. Prior to the second trial the offer of judgment was $250,000.00 and also was not accepted by the plaintiffs. Costs will not be awarded in connection with the first trial since it was terminated *sua sponte* by the Court over the objection of both parties. With regard to the second trial the Court will tax expert witness fees for times spent actually testifying in Court and transcription fees for depositions actually

presented at trial. The Court will allow $550.00 for the testimony of David Buccholz, $450.00 for the testimony of David Mitchell, P.E., $75.00 for the testimony of Barbara Stevenson, C.R.C., and $239.38 for the transcription of Dr. Buccholz's testimony. In all other regards, the defendant's motion is Denied as the claims are for items not properly recovered as Court costs. Judgment will be entered in favor of Toys-R-Us and against plaintiffs' in the amount of $1,314.38.

IT IS SO ORDERED.

Very Truly Yours,

Judge John E. Babiarz, Jr.

JEB,Jr./BJW
Original to Prothonotary