STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Lyle Aliff, Jr.,
Plaintiff Below, Petitioner

v.) No. 101316 (Fayette County 07-C-218)

Carrier Corporation,
Defendant and Third-Party Plaintiff, Respondent

v.)

International Environmental Corporation,
Third-Party Defendant, Respondent

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Lyle Aliff, Jr., plaintiff below, appeals the circuit court's order granting summary judgment in favor of Respondent Carrier Corporation, defendant below, in petitioner's suit asserting products liability. Respondent has filed a response brief.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner asserts that he received third-degree burns through his clothing while leaning against and sitting upon a heating unit in a hospital room while he was visiting his grandmother. He asserts that because he lacks any sensation in the lower half of his body, he did not realize until later that he had been burned. He asserts that it is undisputed that he did not come into contact with any other heated surface.

This unit is a Carrier-brand wall-mounted fan-coil unit with a slant top and steel cabinet that was installed in the hospital room in approximately 1982. The unit was manufactured for Respondent Carrier by International Environmental Corporation ("IEC"), also a respondent herein. The respondents did not install the unit or design the hospital's HVAC system. The unit itself does not produce hot or cold air; rather, hot or cold water that is generated elsewhere in the hospital runs through the unit. The respondents did not manufacture the hospital's boiler that heated the water. The unit contains a warning directing that the maximum permissible temperature for water entering the unit is 190˚ Fahrenheit. Petitioner did not produce evidence as to what the water temperature was on the date in question, or what temperature would be required to produce third degree burns through the denim jeans and disposable brief that he was wearing.

Petitioner filed suit against Carrier asserting strict products liability. Carrier filed a third-party complaint against IEC for contribution and indemnification. Both respondents denied the petitioner's allegations and denied problems with this type of unit. Respondents argue that this unit was in use for more than twenty years without ever getting hot enough to burn anyone. [1]

By order entered May 28, 2010, the circuit court granted Carrier's motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure and dismissed Carrier with prejudice. Petitioner's expert had opined that the unit was defective because of the lack of a control valve on the inlet water pipe, but the court found no evidence that the lack of a valve resulted in the unit getting hot enough to burn plaintiff through his garments, or that a reasonably prudent manufacturer in 1982 would have required inclusion of a valve. In this appeal, petitioner no longer relies on the lack of a control valve as a theory of liability.

Petitioner also argued to the circuit court, and he argues in this appeal, that he would not have been burned unless this unit was defective. He relies upon this Court's opinions in *Anderson v. Chrysler Corporation, infra,* and subsequent cases to argue that he is not required to identify the specific defect that caused the loss and that the jury may infer the existence of a defect by circumstantial evidence.

> Circumstantial evidence may be sufficient to make a *prima facie* case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect.

[1] Petitioner also filed a claim against the hospital which has since been settled.

> Moreover, the plaintiff must show there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.

Syl. Pt. 3, *Anderson v. Chrysler Corp.*, 184 W.Va. 641, 403 S.E.2d 189 (1991); Syl. Pt. 4, *Bennet v. ASCO Services, Inc.*, 218 W.Va. 41, 621 S.E.2d 710 (2005) (per curiam); Syl. Pt. 9, *Adkins v. K-Mart Corp.*, 204 W.Va. 215, 511 S.E.2d 840 (1998) (per curiam). The circuit court rejected this argument. The court found that petitioner could not sustain his burden of proving that a defective condition of the unit was the proximate cause of his injuries just by presenting evidence that he was injured. Moreover, the court found that petitioner did not rule out secondary causes that may have contributed to his claimed injuries. For example, it was undisputed that hospital maintenance staff had worked on this unit earlier in the day when petitioner's grandmother complained that her room was too cold.

This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Upon a review of the record and arguments of the parties, we conclude that there is no genuine issue of material fact and affirm the circuit court's summary judgment order.

In the opinions of this Court upon which petitioner relies, there was some circumstantial evidence that a malfunction would not have occurred in the absence of a defect, but we find no such circumstantial evidence present in this case. Moreover, petitioner cannot rule out an abnormal use of the product or a reasonable secondary cause for the alleged malfunction. This unit, itself, does not produce heat and contained a warning label that the maximum inlet water temperature should not exceed 190˚ Fahrenheit. Petitioner cannot rule out that the hospital's maintenance staff negligently allowed the unit to be used for a purpose other than it was intended, i.e., with inlet water temperature exceeding 190˚ Fahrenheit.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:
Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

Chief Justice Margaret L. Workman disqualified.