

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CASE NO. 3:08-CV-349

ELECTRONICALLY FILED

ALISON COX PREGLIASCO mother and natural
guardian of A.P., an infant, and ALISON COX
PREGLIASCO, Individually,

Plaintiffs,

vs.

CROCS, INC., a Colorado Corporation,

Defendant.

CROCS, INC.,

Third-Party Plaintiff,

vs.

KONE, INC. and ATLANTA AIRLINES
TERMINAL CORPORATION,

Third Party Defendants

**DEFENDANT CROCS, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT**

Defendant Crocs, Inc., ("Crocs") submits the following Memorandum in Support of its
Motion for Summary Judgment.

I. INTRODUCTION

This case arises from an accident at the Atlanta Hartsfield International Airport, during which the minor Plaintiff's foot was entrapped in an escalator while she was wearing Crocs™ shoes. Plaintiffs' First Amended Complaint sets forth claims for 1) "product liability" (later clarified to be defective design only)¹; 2) breach of express and implied warranties; and 3) failure to warn of a known danger.

This Court should dismiss Plaintiffs' defective design and breach of warranty claims because Plaintiffs failed to submit any Rule 26 disclosure for expert testimony that identifies any defect or malfunction in the shoes at issue. Expert testimony is required under Kentucky law to establish a defect in a products liability action such as this. Accordingly, Plaintiffs' defective design and breach of warranty claims fail, and Crocs is entitled to summary judgment on those claims.

Summary judgment is also warranted on Plaintiffs' claim for failure to warn of a known danger. Plaintiffs cannot establish the requisite proximate cause in light of Plaintiff Alison Pregliasco's admissions that she knew of the potential danger, yet failed to read the warnings prominently displayed on the escalator and failed to instruct her children according to those warnings. Given that testimony, no jury could conclude that Ms. Pregliasco would have read and heeded any warning placed on the shoes purchased months earlier. Nor can Plaintiffs establish that Crocs shoes were the substantial factor since the lack of any warning to the child may have resulted in the same injury regardless of the shoes worn.

¹ In Plaintiffs' Supplemental Response to Crocs' First Set of Discovery, Plaintiffs clarified that they were pursuing a products liability claim for defective design only. *See* Exhibit 1, at p. 2, response (a).

Finally, Plaintiff Alison Pregliasco's claim for loss of services fails as a matter of law where Ms. Pregliasco testified that she is not seeking damages for that claim.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS²

1. On or about June 4, 2008, infant Plaintiff A.P. (hereinafter "A.P.") was riding on an escalator ("the subject escalator") in Terminal B in the Atlanta Hartsfield International Airport, when her right foot became entrapped in the escalator's sidewall ("the accident"). Am. Compl. at ¶28.

2. A.P. was wearing a pair of shoes manufactured by Crocs when the accident took place. Id.

3. At the time of the accident, A.P. was accompanied by her mother, Plaintiff Alison Pregliasco, her 3-year old twin sibling, and another adult friend of Ms. Pregliasco's, Amy Rosenberger (Dep. of Alison Pregliasco at 73:22-74:23, attached as Exhibit 2).³

4. Contrary to her conduct on the date of the accident, Ms. Pregliasco testified that she almost always avoided riding escalators when she had her children and the stroller, and testified that she instead opted for elevators in those situations. (Exhibit 2 at 42:6-43:6.)

5. The entrance of the subject escalator was affixed with safety warnings and instructions, that, among other precautions, specifically cautioned parents to "attend children" and provided the following:

² For purposes of this summary judgment motion only, Crocs assumes certain facts as alleged in Plaintiffs' Amended Complaint ("Am. Cmpl.") to be "undisputed."

³ All selections of Alison Pregliasco's deposition transcript are attached collectively as Exhibit 2.

SAFETY RULES

1. no strollers on escalator
2. hold handrails
3. keep shoes and sneakers away from sides
4. no riding barefooted
5. face forward at all times
6. no children un-attended

PARENTS please ask your children to obey these safety precautions

[Exhibit 10 to Rosenberger deposition, attached hereto as Exhibit 3. *See also* Exhibit 2 at 193:19-23 noting Plaintiff does not contest safety signage in place on escalator.]

6. Ms. Pregliasco admittedly did not read the safety warnings on the subject escalator prior to the accident. (Exhibit 2 at 44:3-45:3).

7. Ms. Pregliasco admitted to being aware of the potential danger of escalator entrapments prior to the accident. (Exhibit 2 at 43:20-25).

8. Ms. Pregliasco did not give any instruction or warning to the twins regarding how to stand, or how to safely ride the escalator, before the accident took place. (Exhibit 2 at 80:20-23.)

9. Ms. Pregliasco testified that at the time of the accident she backed onto the escalator, carrying multiple bags along with a twin double stroller, and she proceeded to descend on the escalator facing sideways. (Exhibit 2 at 202:19-203:22).

10. Following Ms. Pregliasco, Ms. Rosenberger stepped onto the escalator with one twin on each side of her. (Dep. of Amy Rosenberger at 55:1-8, attached as Exhibit 4).⁴ Ms. Rosenberger and the two twins were riding down the escalator all standing on the same step. (Exhibit 3 at 55:25-56:1).

11. Ms. Pregliasco did not see A.P.'s foot get entrapped. (Exhibit 2 at 83:9-12.)

12. Ms. Pregliasco is not seeking damages for lost wages, medical expenses, or any other out of pocket expenses, and that the only damages sought are for her daughter's pain and suffering. (Exhibit 2 at 162:1-165:17).

13. Plaintiffs have no intent of identifying or disclosing any expert witness in this case. (4/15/09 Status Conference Tr. at 13:25-14:10, attached as Exhibit 5).

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

To overcome summary judgment, Plaintiffs must present more than a mere scintilla of evidence in support of their position; they must present evidence on which the trier of fact could reasonably find in their favor. *See Brown v. Mason and Dixon Lines, Inc.*, 2009 WL 1470337,*1 (W.D.Ky. 2009) (slip copy attached at Exhibit 6)⁵ (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). “Mere speculation will not suffice to defeat a motion for

⁴ All selections of Amy Rosenberger's deposition transcript are attached collectively as Exhibit 4.

⁵ Exhibit 6 includes copies of all authorities cited to as slip copies or unpublished opinions.

summary judgment, and the mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate.” *Brown*, at *1 citing *Moinette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996).

Given the undisputed relevant and material facts, summary judgment is appropriate in Crocs’ favor.

B. Plaintiffs cannot meet their burden to establish a defect in the design of the shoes.

As recognized by this Court, expert witnesses are generally necessary, if not essential, to prove product defect and proximate causation, in cases such as this where the nature of the defect and resultant injuries are not within the general knowledge of the ordinary person. *See, e.g., Early v. Toyota Motor Corp.*, No. 07-5734., 2008 WL 2001727, 6-7 (6th Cir. May 8, 2008) (unpublished - copy attached at Exhibit 6) (applying Kentucky law and affirming trial court’s grant of summary judgment to vehicle manufacturer after Plaintiffs’ expert was excluded by the District Court). *See also Thomas v. Manchester Tank and Equip.*, No. 3:03CV705H , 2005 WL 3673118 *1 (W.D. Ky. May 13, 2005) citing William S. Haynes, *Kentucky Jurisprudence: Torts* § 21-18. As aptly stated by this Court in *Thomas*,

Without expert testimony to establish a product defect case, “the jury is left to speculate whether the product even malfunctioned, whether such malfunction was attributable to a defect, whether someone altered the product, whether the product was improperly maintained, or any number of other theories, including the possibility that a combination of unusual circumstances caused the [incident giving rise to an injury]. What actually occurred is left unexplained and to the jury's imagination.

Thomas, 2005 WL 3673118 at *3.

There can be no dispute that shoe design, and what would constitute a defective design of a Crocs' shoe such that it caused this child's injury, is not within the purview of a layperson. It defies logic to suggest that by simply wearing the shoes onto an escalator, the child's foot became entrapped – or sucked into the escalator. Expert testimony is required to establish a design defect, and without an expert, summary judgment should be granted.

In *Thomas*, this Court appropriately granted summary judgment in favor of a water heater manufacturer in an action involving a child who was burned when the water temperature abruptly spiked. In granting summary judgment, the Court explained that plaintiff, as in the present case, failed to submit an appropriate Rule 26 disclosure for expert testimony that identified a defect or malfunction in either the water heater or its heat regulator. The only purported expert testimony that plaintiff in *Thomas* tendered was a one page letter containing the results of a water temperature test that plaintiff's expert conducted, showing that when the water heater was set at 120 degrees temperature, it produced water at about 145 degrees. In granting summary judgment, the Court explained, “[a]ssuming the jury believes these test results, it will have no reason to understand them without further explanation. The internal mechanisms of a water heater are not within the common knowledge of the ordinary lay person.” *Id.* at *2.

Here, Plaintiffs have not submitted any Rule 26 expert disclosure in support of their defective design claim, and the deadline to do so has long since passed.⁶ Rather, as Plaintiffs' counsel admitted recently during a hearing before this Court, Plaintiffs have no intent of

⁶ The deadline for Plaintiffs' expert disclosures expired on February 15, 2009. *See* Oct. 6, 2008 scheduling Order adopting agreed discovery schedule [Docket # 31] and Amended Scheduling Order [Docket # 87].

identifying or disclosing such an expert. *See* 4/15/09 Status Conference Tr. at 13:25-14:10, attached as Exhibit 5.

Applying the court's rationale in *Thomas*, where plaintiff submitted an expert opinion albeit an insufficient one, to the circumstances of this case where Plaintiffs have offered no expert opinion whatsoever, summary judgment is warranted. Simply that a child was injured wearing the shoes is not enough to prove the shoes were defective under Kentucky law. *See Enlow v. St. Jude Medical, Inc.*, 327 F. Supp. 2d 738, 741-42 (W.D. Ky. 2003) (jury may not infer defect simply because injury occurred). Thus, pursuant to the Kentucky decisions cited above, without an expert opinion in support of their defective design claim, Plaintiffs' defect claim fails as a matter of law.

C. Plaintiffs' breach of warranty claims similarly fail where Plaintiffs offer no expert opinion in support of any product defect

Plaintiffs' breach of warranty claim alleges that Crocs implicitly and expressly warranted its products were "fit, safe, capable and suitable for the use and purpose intended, and that it was not unsafe or defective." *See* Am. Compl. ¶¶ 32, 33. It further alleges that Crocs breached these warranties because its footwear was allegedly "unsafe, dangerous and defective." *Id.*

It is axiomatic that in order to survive summary judgment on their breach of warranty claims, Plaintiffs must first establish the shoes were defective. *See, e.g., McCoy v. General Motors Corp.*, 47 F.Supp. 2d 838, 839 (E.D.Ky. 1998) ("Even under a breach of warranty, a plaintiff must still prove that the product is defective") citing, *Gordon v. Proctor & Gamble Distributing Co.*, 789 F.Supp. 1384, 1385 (W.D. Ky. 1992); *Fritz v. Campbell Hausfeld/Scott Fetzer Co.*, No. 82-5512 2007 WL 1558509, 3 (E.D. Ky. 2007) (same) (internal citations omitted).

As demonstrated above, Plaintiffs cannot establish that Crocs' shoes were defective without the testimony of an expert witness. Plaintiffs have no expert witness, and have no intention of obtaining one. Thus, Plaintiffs' claim for breach of warranty against Crocs fails as a matter of law.

D. Where Ms. Pregliasco admits she knew of the potential entrapment danger, and she failed to warn her child, Plaintiffs cannot establish the requisite proximate cause.

In light of Ms. Pregliasco's testimony that she knew of the potential danger of escalator entrapments, and that she failed to read – or heed – the written warning on the escalator on the day of the accident, Plaintiffs cannot establish the requisite proximate cause between the alleged failure to warn by Crocs and A.P.'s injuries. Under Kentucky law, Plaintiffs have the burden of establishing the elements of the claim for failure to warn, including the element of causation. *Anderson v. Ridge Tool Co.*, No. 06-116-HRW 2008 WL 1908716 *9 (E.D.Ky. April 30, 2008) citing *Morales v. American Honda Motor Co.*, 71 F.3d 531, 537 (6th Cir. 1995). “[C]ausation or proximate cause is defined by the substantial factor test: was the defendant's conduct a substantial factor in bringing about plaintiff's harm?” *Anderson*, 2008 WL 1908716 at *9. Proximate cause presents a question of law when, as in the instant case, “there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence.” *See Pathways, Inc.*, 113 S.W.3d at 92.

It is common knowledge (and common sense) that when riding an escalator, there is a potential danger of clothing, shoes, shoestrings and extremities becoming entrapped in the moving parts. Ms. Pregliasco admitted to being aware of this potential danger prior to the accident. (*See* Exhibit 2 at 43:20-25). Ms. Pregliasco testified that prior to the accident, she would always opt for the elevator instead of an escalator as the means of transporting her twins and their stroller.

(*See* Exhibit 2 at 42:6-43:6). However, Ms. Pregliasco admitted that on the date of the accident she did not take the elevator, but instead admitted that she backed onto the escalator with a double stroller, carrying multiple bags, (*see* Exhibit 2 at 202:19-203:22), and without giving any instructions on riding the escalator safely to her two three-year old children. *See id* at 80:20-23.

The lack of an escalator warning on the subject shoes was not a substantial, if any, factor in A.P.'s injury in light of Ms. Pregliasco's admission that she did not even read the warning prominently displayed on the escalator. It is undisputed that there was a safety warning affixed to the subject escalator at the time of the subject accident warning riders to stand forward with their shoes away from the sides. (*See* Exhibit 3. *See also* Exhibit 2 at 193:19-23 noting Plaintiff does not contest safety signage in place on escalator). In addition to warning parents to "attend children," the signage stated explicitly:

SAFETY RULES

1. no strollers on escalator
2. hold handrails
3. keep shoes and sneakers away from sides
4. no riding barefooted
5. face forward at all times
6. no children un-attended

PARENTS please ask your children to obey these safety precautions

Ms. Pregliasco admitted in her deposition testimony that she did not read the safety warning on the escalator before her child's accident. (Exhibit 2 at 44:3-45:3). In addition, she admitted to violating several of the rules stated including: bringing a stroller on the escalator, facing forward at all times and asking her children to obey the safety rules. (Exhibit 2 at 202:19-

203:22). That Ms. Pregliasco chose to ignore the obvious danger, and ignore the warning signs posted on the escalator about rider safety, does not shift the responsibility to Crocs as a shoe manufacturer to warn her again of this same hazard.

Courts have repeatedly found there to be no proximate cause between an allegedly inadequate warning and the injury, where an individual fails to read or disregards the allegedly inadequate warning at issue. *See, e.g., Mohnney v. USA Hockey, Inc.*, No. 04-3227, 2005 WL 1655023 (6th Cir. Oct. 21, 2005) (unpublished- copy attached at Exhibit 6) (manufacturer of hockey helmet held not liable where hockey player did not read warning on the back of helmet indicating it afforded no protection for neck or spinal injury); *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1329 (6th Cir. 1992) (no proximate cause existed between the warning label and Hurt's injury because Hurt failed to read the warning); *Thornton v. E.I. Du Pont De Nemours and Co., Inc.*, 22 F.3d 284, 290 (11th Cir. 1994) (by failing to read the warning, any insufficiency in the warning label is not the proximate cause of an injury); *Motus v. Pfizer Inc.*, 358 F.3d 659, 660-661 (9th Cir. 2004) (where doctor failed to read published warnings on prescription drug prior to prescribing, court concluded that there was no causal connection between the allegedly inadequate warning and decedent's suicide).

Because Ms. Pregliasco failed to read the safety warning on the escalator and/or convey the information to the children, there is no reason to believe she would have read or conveyed escalator safety information contained on a warning tag on shoes purchased months earlier, nor that the accident would not have occurred had a warning been attached to the shoes. Indeed, Plaintiffs can point to nothing but pure conjecture to support such a theory. *See, Stanback v. Parke, Davis & Co.*, 657 F.2d 642, 646 (4th Cir. 1981) (where there is a complete lack of

evidence that a failure to warn was a factor producing the injury, there is insufficient proof of causation to survive a motion for summary judgment).

Even assuming an escalator warning had been affixed to the subject shoes, and that Ms. Pregliasco read it, it is equally speculative to assume that she would not have purchased the shoes or that A.P. would have obeyed an instruction from her to keep her feet away from the escalator's siderails. *See Baugn v. Honda Motor Co., Ltd., et al.*, 727 P.2d 655 (Wash. 1986) (agreeing with the trial court that the subject collision would have occurred even if there had be more vivid warnings because children may not follow their parents instructions, and noting it was purely speculative to assume parents would not have purchased a product with a stronger warning). Moreover, given Ms. Pregliasco's admissions that she did not give the children any warning before they got onto the escalator, Plaintiffs cannot establish the accident would not have happened regardless of the shoes worn by the child.

Additionally, Ms. Pregliasco, having failed to read the safety warnings posted on the escalator herself, cannot as a matter of law sustain a negligence claim on a failure to warn theory on behalf of the minor Plaintiff. *See Chase v. Kawasaki Motors Corp.*, 140 F.Supp. 2d 1280, 1287-88 (M.D. Ala. 2001) (granting manufacturer of ATVs summary judgment on minor Plaintiffs' failure to warn claim where it was undisputed that neither the parents nor the Plaintiffs read the allegedly inadequate warning). Indeed, a written warning to a three-year-old who cannot read would be superfluous, and accordingly, A.P.'s independent failure to warn claim must also be dismissed for failure to establish proximate cause. *See, Estrada et al. v. Berkel Inc.*, 14 A.D.3d 529 (N.Y. App. Div. 2005) (affirming summary judgment for manufacturer on failure to warn theory, because no proximate cause could be established where minor who was injured by a meat grinder was an infant who could not read a warning).

Because Plaintiffs can point to no evidence tending to demonstrate the lack of a warning by Crocs played any role, much less that it was a substantial factor in this accident, they cannot establish the requisite proximate cause between the alleged failure to warn and A.P.'s injuries. Accordingly, Crocs is also entitled to summary judgment on the failure to warn claim.

E. Crocs' is entitled to summary judgment on the Loss of Services claim because Alison Pregliasco is not claiming any damages for this cause of action.

Actions for a parent's loss of his or her child's services where the child was injured by the alleged negligence of another is statutory in Kentucky. K.R.S. § 405.010. Thus, where a minor is allegedly injured by the negligence of another, two causes of action arise; one is in favor of the infant for pain/suffering and the permanent impairment of her power to earn money after reaching majority; and the other is in favor of her parent(s), pursuant to K.R.S. 405.010, for the loss of the infant's services and earnings until she reaches majority and for medical care/expenses. *Smith v. Geoghegan and Mathis* 333 S.W.2d 254, 257 (Ky. App. 1960) citing *Kentucky Service Co. v. Miracle*, 56 S.W.2d 521, 522 (Ky. App. 1933).

The Court should dismiss Ms. Pregliasco's claim for her loss of A.P.'s services. Critically, Plaintiffs have not plead, nor could they, that A.P, a three year old infant with no work history nor capability of providing her mother with household assistance or services, suffered permanent, or any, work impairment, nor that she lost wages to which Ms. Pregliasco is entitled as a result of her injuries. *See generally* Am. Compl. Ms. Pregliasco testified during her deposition that she is not seeking damages for lost wages, medical expenses, or any other out of pocket expenses, and that the only damages sought are for her daughter's pain and suffering. (Exhibit 2 at 162:1-165:17). By Ms. Pregliasco's own admission, she has not claimed, and has no intention of

pursuing any of the damages she may otherwise be entitled to under K.R.S. 405.010 on her loss of child's services claim. Accordingly, this claim is futile, and should be dismissed with prejudice.

IV. CONCLUSION

For the foregoing reasons, Crocs respectfully requests the Court grant its Motion and enter an order dismissing Plaintiffs' claims with prejudice, and awarding Crocs whatever other relief this Court deems just.

Dated: June 23, 2009

Respectfully submitted,

s/ Julie M. Walker

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2009, I electronically filed the foregoing **DEFENDANT CROCS, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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