IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JEROME C. SMITH and LISA M. SMITH, Plaintiffs,	)	
v.	)	Civil Action No. 03-349-KAJ
HENRY S. BRANSCOME, INC., MITCHELL DISTRIBUTING COMPANY, INC., and INGERSOLL-RAND CO., INC., Defendants.	)	

MEMORANDUM OPINION

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October 8, 2004
Wilmington, Delaware

JORDAN, District Judge

I. INTRODUCTION

This is a civil action removed to this court from the Superior Court for the State of Delaware in and for New Castle County ("Superior Court"). (Docket Item ["D.I."] 66, Ex. I.) Jerome Smith ("Plaintiff") filed suit against Ingersoll Rand Co., Inc. ("Ingersoll"), Henry S. Branscome, Inc. ("Branscome"), and Mitchell Distributing Co., Inc. ("Mitchell") in the Superior Court on January 23, 2003, alleging negligence, breach of the Delaware Uniform Commercial Code ("UCC"), and products liability. (*Id.*) Lisa Smith filed suit against the same parties for loss of consortium. (*Id.*) Defendant Ingersoll was dismissed from the case by stipulation of the parties. (D.I. 66 at 1.) Jurisdiction is proper based on diversity of citizenship under 28 U.S.C. § 1332.

Presently before me are three motions. The first is a Motion for Summary Judgment filed by defendant Branscome. (D.I. 66.) The second is a Motion for Summary Judgment filed by defendant Miller. (D.I. 67.) The third is Miller's Motion to Exclude the Testimony of Douglas Brooks. (D.I. 69.) For the reasons that follow, I will grant the motions for summary judgment and will deny as moot the motion to exclude testimony.

II. BACKGROUND

The undisputed facts are as follows. On June 22, 1999, Plaintiff was employed by Richard's Paving as the supervisor of a crew of workers repaving the driveway portions of the parking lot at the Price's Corner Shopping Center. (D.I. 68 at 3; *see* D.I.

66 at 1.)[1] Plaintiff was operating the paver and, behind him, Mr. Antonio Cervantes, a member of the crew, was operating an Ingersoll Rand, Model DA-48, vibratory roller (the "roller"). (D.I. 68 at 3; D.I. 73 at 3.) Mr. Cervantes drove the roller so close that he struck Plaintiff's leg and pinned it against the rear of the paver. (D.I. 68 at 3.) Mr. Cervantes tried to move the roller backwards, away from the paver, by pulling the propulsion lever toward him. (*Id.*) Instead of going backwards, the roller moved forward and crushed Plaintiff's lower leg, resulting ultimately in its amputation. (*Id.*)

Ordinarily, a roller operates in an intuitive way, with forward pressure on the propulsion lever causing the roller to move forward, and reverse pressure causing the reverse. At some unknown point in time, the cables connected to the roller's propulsion lever had been switched so that, when the propulsion lever was pushed forward, the roller would move in reverse instead of moving forward and, when the lever was pulled backward, the roller would move forward instead of moving backward. (D.I. 66 at 2-3.) The lever was marked with decals indicating the modified function. (*Id.*) There is "no record that Branscome [or] Mitchell, ... performed any repairs or modifications to the propulsion lever or its cables while it was in their possession." (*Id.*) The only repair to the roller of which there is evidence indicating a possible affect on the cables was performed by Mitchell on June 18, 1992. (*See* D.I. 68 at 5-6; D.I. 73 at 3.) Whether that repair included the modification that switched the propulsion direction on the roller is disputed. (D.I. 68 at 5; D.I. 73 at 3.) Plaintiff's expert, Mr. Brooks, opined that it was during these repairs that the modification occurred because they are the only records

[1]Some citations herein are to the parties' briefing, which in turn has citations to record evidence.

indicating that the cables in the pedestal were removed from the bell crank and the propulsion lever. (D.I. 73 at 4.)

Plaintiff, Mr. Cervantes, and Richard Pendiak, who is the owner of Richard's Paving, were all familiar with the modified propulsion lever on the roller. (D.I. 81, Ex. 1 at 58-61; D.I. 81, Ex. 2 at 107-09; *see* D.I. 66 at 1.) The roller was used by Richard's Paving for two and a half years before the accident to Plaintiff. (D.I. 81, Ex. 2 at 107.) According to Plaintiff, the modification "never seemed to be a problem." (*Id.* at 109.)

The roller at issue was manufactured by Ingersoll in 1986, sold to defendant Mitchell in August 1986, resold to Branscome in September 1986, and put up for auction ten years later, where it was purchased by Richard's Paving on October 30, 1996. (D.I. 66 at 1.) Branscome specializes in road construction and asphalt paving. (*Id.*) While Branscome owned the roller at issue, it performed routine maintenance, such as changing the oil and filters. (*Id.*) For major repairs or mechanical work, Branscome sent the roller to Mitchell. (*Id.*)

Mr. Pendiak, personally made the purchase of the roller at auction. (*Id.*) He received and reviewed an auction brochure which described the roller; he knew that he was buying the roller "as is," and, prior to making the purchase, he and his mechanic drove it back and forth. (*Id.*) Nevertheless, Mr. Pendiak was familiar with this type of roller. (*Id.* at 3.) Mr. Pendiak has no recollection that the roller operated differently than any other equipment in his possession. (*Id.* at 2.) He did not notice anything out of the ordinary in the way that the lever moved the roller forward and backward. (*Id.* at 3.)

Mr. Pendiak understood that the roller came with no warranties. (*Id.*) The brochure stated: "Descriptions and conditions of equipment in this catalog are merely a

guide and are in no way a warranty or guarantee, expressed or implied." (*Id.*) The following disclaimers were part of the sale agreement, as stated on page two of the brochure:

> NO WARRANTIES; all properties being sold AS-IS, WHERE-IS and with all faults. There are no warranties, representations or guarantees, expressed or implied, as to the quality, character, or condition of any of the property. The implied warranty of merchantability is expressly disclaimed. There is no warranty of fitness for a particular purpose.

(*Id.*) Page three of the brochure restated these same disclaimers and that the descriptions and conditions in the catalog of the items for sale were to be used as a guide only, and not as a warranty or guarantee. (*Id.*)

The roller was available for public inspection prior to the auction, and as mentioned, Mr. Pendiak and his mechanic tested it. (*Id.*) The signed registration agreement of Richard's Paving sets forth the same conditions and disclaimers. (*Id.*) Mr. Pendiak purchased the roller for $12,500 in 1996 and used it through March 2001. (*Id.*; D.I. 68 at 4.) According to the Plaintiff, the equipment was used by Richard's Paving with a frequency on the order of seven or eight times within any given six month period. (D.I 81, Ex. 2 at 109.)

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (2004). In determining whether there is a triable dispute of material fact, a court must review the evidence and construe all

inferences in the light most favorable to the non-moving party. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). To defeat a motion for summary judgment, Rule 56(c) requires that the non-moving party "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal citation omitted). The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c) (2004). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Inds. Co., Ltd.*, 475 U.S. at 587 (internal citation omitted). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

IV. DISCUSSION

Plaintiff has conceded that his breach of warranty claims against defendants Branscome and Mitchell are barred by the statute of limitations. (D.I. 74 at 5-7; D.I. 73 at 5.) Therefore, the only remaining claim asserted by Plaintiff is for negligence.[2] Inasmuch as jurisdiction in this case is based on diversity of citizenship, I must apply the substantive law of Delaware. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

[2] Plaintiff's wife, Lisa Smith, has asserted a claim for loss of consortium. (D.I. 66, Ex. I at 12.) This claim, however, is not the subject of the defendants' motions. Since the claim is strictly derivative of Plaintiff's claim, *See*, *James Wiers v. Roby Barnes*, 925 F. Supp. 1079, 1096 (D. Del. 1996), my holding in this case requires that her claim also be dismissed.

Defendant Branscome makes several arguments in support of its Motion for Summary Judgment. First, Branscome argues that Plaintiff has not alleged that Branscome owes Plaintiff a duty of care and that therefore, the allegations of negligence should be dismissed for failure to state a claim. (D.I. 66 at 16-18.) Second, Branscome argues that a seller of an allegedly defective product owes no duty of care to a buyer who purchases an item "as is" or otherwise acknowledges the defect or condition of the goods upon acceptance. (*Id.* at 19-22.) Third, Branscome argues that Plaintiff's employer, Richard Pendiak, was a "sophisticated purchaser" of an "As Is" vibratory roller, and that "Plaintiff and his co-workers were aware of the alleged alterations ... long before the accident occurred, thereby relieving defendant Branscome of a duty to warn Plaintiff." (D.I. 81 at 6-10.) Fourth, Branscome argues that Plaintiff has failed to offer any "proofs of fact" to support the claim that Branscome acted negligently or breached a standard of care and, therefore, Plaintiff has failed to establish a *prima facie* case of negligence. (D.I. 66 at 23-27.)

Plaintiff opposes Branscome's Motion for Summary Judgment and makes two arguments in response. First, Plaintiff points to two allegations in his Complaint which, he says, show that he has alleged that Branscome owed him a duty of care: (1) that "[d]efendant Mitchell sold the [roller] to defendant Branscome on September 16, 1986," and (2) that "[d]efendant Branscome owned and operated the roller until it was sold at auction on October 30, 1996 to Richard's Paving, Inc." (D.I. 74 at 8 (quoting D.I. 66, Ex. I, at ¶ 5.)) More specifically, Plaintiff alleges that Branscome owed a duty of care to him under § 388 of the Restatement (Second) of Torts because Branscome "was the supplier of a defective chattel." (*Id.*) Second, Plaintiff argues that Branscome cannot

evade liability for supplying a defective product, even if Plaintiff's employer purchased the roller "As Is." (*Id.* at 9.)

Defendant Mitchell argues that Plaintiff has failed to produce any evidence that Mitchell made the changes to the propulsion lever resulting in the reversal of the lever's directional control. (D.I. 68 at 9.) Mitchell argues that the Plaintiff's theory calls for pure speculation that during one of several occasions that Mitchell serviced the roller between 1992 and 1995, it reversed the propulsion direction. (*Id*. at 11.)

In order to recover in an action for negligence, one of the elements a Plaintiff must prove by a preponderance of the evidence is that the defendant's negligent act or omission violated a duty which was owed to the Plaintiff. *Culver v. Bennett*, 588 A.2d 1094, 1096-97 (Del. Supr. 1997). Delaware has recognized a duty of care that sellers have to warn of known dangers associated with products they place on the market. *Wilhelm v. Globe Solvent Co.*, 373 A.2d 218, 223 (Del. Super. Ct. 1977), *aff'd in part, rev'd in part*, 411 A.2d 611 (Del. Supr. Ct. 1979). A seller may have learned of such danger either through actual or constructive knowledge. (*Id.*)

Considering the undisputed facts in the light most favorable to Plaintiff, that Plaintiff has still failed to prove sufficient facts upon which to base a claim against either Branscome or Mitchell for negligence for failure to warn. Plaintiff has not offered sufficient evidence to prove that Mitchell or Branscome made the modification to the propulsion lever. Plaintiff asserts that Mitchell made the modification to the propulsion lever, but does so solely on the basis of its expert's speculation.

Plaintiff's expert, Mr. Brooks, prepared a report in which he based his conclusion on one repair record provided by Mitchell. (D.I. 71 at A-175-85, Preliminary Engineering

Report of Douglas Brooks, Jan. 30, 2004.) In his report, Mr. Brooks acknowledges that Mitchell serviced the roller on June 18, 1992 and concluded that it was at this time that the propulsion lever was reversed. (D.I. 71 at A-178.) Mr. Brooks notes that the service record described work performed on the "hoses, cables, and electrical wire" and the control console. (*Id.*) From that service record, Mr. Brooks inferred that there was a directional movement problem that had to be repaired. (*Id.*) Mr. Brooks' last statement, however, is illustrative of the Plaintiff's case: "What was done to repair this issue is unknown." (*Id.*) One is left with nothing more than an inference (that a directional movement repair was made negligently) upon an inference (that a directional movement repair was made at all) on which to hang the entire liability case, and they are not facially strong inferences either.[3]

Regardless of whether the directional change in the cables can be attributed to Mitchell, however, it is dispositive that both Plaintiff, who was the site supervisor, and Mr. Cervantes, the operator of the roller on the day of the accident, were fully aware of the modification to the propulsion lever. Both stated in their depositions that they were familiar with the operation of the modified lever. (D.I. 81, Ex. 1 at 58-61; D.I. 81, Ex. 2 at 107-09; *see* D.I. 66 at 1.) The roller had been used by Richard's Paving for two and a half years before the accident. (D.I. 81, Ex. 2 at 107.) According to Plaintiff, the modification "never seemed to be a problem." (*Id.* at 109.) These facts are undisputed. Therefore, it is clear that whatever dangerous condition the roller may have been in

[3]While I do not think it necessary to conclude that Mr. Brooks' testimony would have to be excluded under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993), I recognize that my conclusion as to the insufficiency of the evidence can be interpreted as, in effect, granting Mitchell's *Duabert* motion.

because of the modified propulsion lever, the owner, the operator, and the victim of the roller were all was aware of that danger. The Plaintiff himself was the individual on the site responsible for the work being done by the Richard's Paving crew, including the operation of the roller he knew to have directional modification of which he now complains.

Plaintiff alleges that defendant Branscome owed him a duty to warn under § 388 of the Restatement (Second) of Torts because Branscome "was the supplier of a defective chattel." (D.I. 74 at 8.) All parties acknowledge that Delaware has not conclusively adopted § 388 of the Restatement (Second) of Torts. Although the Delaware Supreme Court has not ruled on this issue, there are indications that the court would apply § 388 of the Restatement (Second) of Torts to determine the scope of such duty. *See In re Asbestos Litigation (Mergenthaler)*, 542 A.2d 1205, 1209 (Del. Super. Ct. 1986) (discussing the "sophisticated purchaser" defense in the context of § 388 of the Restatement (Second) of Torts); *Daniels v. Atl. Refining Co.*, 295 F. Supp. 125, 130 (D. Del. 1968) (finding that a Delaware court would follow the principles of § 388 of the Restatement (Second) of Torts when faced with a question involving the duty to warn); *Cropper v. Rego Distribution Center, Inc.*, 542 F. Supp. 1142, 1152 (D. Del. 1982) (discussing the duty to warn in the context of § 388 of the Restatement (Second) of Torts). Assuming for the sake of argument that Delaware would adopt this section, it is clear that Plaintiff has still failed to establish that Branscome or Mitchell owed him a duty to warn in this case.

Restatement (Second) of Torts § 388, entitled: "Chattel Known to be Dangerous for Intended Use," provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

RESTATEMENT (SECOND) OF TORTS § 388 (1965).

If Delaware were to adopt this section of the Restatement, it would also adopt the "sophisticated user" defense included in that section. Section 388, subsection (b), "embodies the sophisticated user doctrine, ... [which is described] as imposing no duty to warn *if the user knows* or should know *of the potential danger*, especially when the user is a professional who should be aware of the characteristics of the product." *Haase v. Badger Mining Corp.*, 669 N.W.2d 737, 743 (Wis. Ct. App. 2003) (emphasis added) (internal citations and quotations omitted); *see, e.g., Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1194-1200 (Md. Ct. Spec. App. 1990) (recognizing the sophisticated user defense); *Gray v. Badger Min. Corp.*, 676 N.W.2d 268, 276-77 (Minn. 2004) (recognizing the sophisticated user defense).

It is clear that, in this case, the Plaintiff knew of the potential danger resulting from the modification of the propulsion lever. Mr. Cervantes, the operator of the roller, and Plaintiff, the site supervisor, frankly admitted that they were aware of the modified

operation of the roller. Therefore, Plaintiff has failed to establish that Branscome or Mitchell[4] owed him a duty to warm.

Having concluded that summary judgment should be granted for both defendants, it is not necessary for me to consider Mitchell's Motion to Exclude the testimony of Douglas Brooks.[5]

V. CONCLUSION

Because of the lack of evidence provided by Plaintiff, the speculation regarding when the modification to the propulsion lever occurred, and the lack of a duty to warn Plaintiff, both Branscome's Motion for Summary Judgment (D.I. 66) and Mitchell's Motion for Summary Judgment (D.I. 67) will be granted. Mitchell's Motion to Exclude the Testimony of Douglas Brooks (D.I. 69) will be denied as moot. An appropriate order will follow.

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[4]With regard to Mitchell, the Plaintiff's claims of negligence and loss of consortium against it are identical to the claims made against Branscome (D.I. 1 Att. 1 at 5-12). Moreover, arguments and defenses raised by Mitchell in his Motion for Summary Judgment are substantially the same as those raised by Branscome. *(See,* D.I. 66; and D.I. 68.) Consequently, for the same reasons discussed above Mitchell's Motion for Summary Judgment is granted.

[5]*See* note 3, *supra*.

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ORDER

In accordance with the Memorandum Opinion issued today, it is hereby ORDERED that the Defendants' Motions for Summary Judgment (D.I. 66; D.I. 67) are GRANTED. Defendant Mitchell Distributing Company, Inc.'s Motion to Exclude the Testimony of Douglas Brooks (D.I. 69) is denied as moot.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
October 8, 2004