

(1983) THE COMMONWEALTH OF MASSACHUSETTS
NORFOLK, s.s.

COMMONWEALTH OF MASSACHUSETTS

QUINCY DISTRICT COURT

1356 CV 0954

AMY WARBURTON

v.

COLGATE-PALMOLIVE COMPANY

FINDING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this case, the Plaintiff filed a claim against the Defendant with four counts, a count under M.G.L. 93A, a count of Breach of Implied Warranty of Merchantability, a count of Negligence, and a count of Intentional and/or Negligent Infliction of Emotional Distress. After discovery and depositions, the Defendant filed a Motion for Summary Judgment. Applying the well-established standard applicable for such a motion the burden is on the moving party to show "that there is no genuine issue of material fact on every relevant issue, even if it would have no burden on an issue if the case were to go to trial." *Pederson v. Time Inc.* 404 Mass. 14, 17 (1989). See *Bergendahl v. Massachusetts Electric Co.*, 45 Mass.App.Ct. 715 (1998).

In this matter, the undisputed facts show that the Plaintiff brushed her teeth with Colgate brand Max Fresh toothpaste on Sunday, July 22, 2012, and her mouth began to feel fuzzy with rough raised edges. The Plaintiff went to her workplace, which was a hospital, and wound up in the emergency room where she was treated for complaints of an allergic reaction. The Plaintiff had used this toothpaste for two previous days with no adverse reaction. The Plaintiff had not read any instructions of the box, and used the toothpaste as a person would normally use such a product. The Plaintiff had been prescribed Prednisone for bug bites on her arm, and had first used Prednisone on Friday, two days prior to the reaction. The Plaintiff had eaten on Saturday night at a new Vietnamese restaurant. Emergency room medical records identified Vietnamese noodles as a possible trigger for the allergic reaction. The toothpaste was never tested after this event. There was no medical testing after the event to verify whether the subject toothpaste or any specific ingredient in the toothpaste caused the Plaintiff's allergic reaction. The Plaintiff is relying on herself and her treating physician as experts.

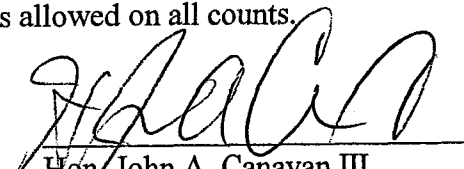
There is no expert evidence in the record that the toothpaste was unreasonably dangerous and defective in design. The toothpaste was never tested, and no expert can testify as to any defect in the design of the toothpaste, and whether or not it was unreasonably dangerous and defective. Expert testimony is required to prove that a product is unreasonably dangerous or defective in design. There were no tests done on the Plaintiff nor any done on the toothpaste. No evidence has been presented that the toothpaste was defective because it contained inadequate

warnings or lacked warnings altogether. The record indicates that the Plaintiff did not read any labels on the toothpaste box and tube prior to using the toothpaste for the three day period. The Defendant attached a certificate of compliance regarding the product and its manufacturing. There is evidence in the record that there have been six cases since 2009 where people have had allergic reactions to this toothpaste.

Under Massachusetts law, in a breach of warranty case, a manufacturer is not liable for damages caused by its product unless the product was sold in an unreasonably dangerous and defective condition. See *Back v. Wickes Corp.*, 375 Mass. 633 (1978). Expert testimony would be required to prove that a product is unreasonably dangerous or defective in its design. There is no expert evidence as to what the industry standards are and how Colgate failed to comply with such standards. Expert testimony would be needed on this subject. Despite the medical backgrounds of the Plaintiff and her doctor, neither would be qualified to give an opinion as to design and manufacturing issues. Doctor Platt testified at a deposition that he did not know what specific ingredients in the toothpaste caused the allergic reaction. He testified that he did not do any medical tests to verify whether or not the toothpaste was the cause of the allergic reaction.


A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. A defendant cannot be found to be negligent without having breached the warranty of merchantability. *Hayes v. Ariens Company*, 391 Mass. 407, 410 (1984). Accordingly, the negligence claim is derivative of the breach of warranty of merchantability claim, and the negligence claim must also fail. The claim of Intentional and/or Negligent Infliction of Emotional Distress is also derivative of the breach of implied warranty of merchantability and negligence claims. If all three claims fail, the 93A claim would also fail.

The Plaintiff may seek to have Dr. Platt give an opinion as to if he believed that the allergic reaction was caused by the toothpaste, given the timing of the reaction in relation to when she brushed her teeth. However, it is undisputed that Dr. Platt does not know what specific ingredient caused the reaction. It is undisputed that no testing was done to verify whether the toothpaste caused the reaction. There is no evidence that the Plaintiff is allergic to any or some of the chemicals that make up this toothpaste. At the end of his deposition, Dr. Platt testified that he did not know whether the Plaintiff's allergic reaction was caused by the subject toothpaste. The final deposition question was "that in your impression and plan that you had written that she had a severe mucosal reaction to a new toothpaste, do you think you were correct?" Dr. Platt responded with an answer of "I don't know." Given the state of the undisputed facts of this case as they relate to causation, breach, negligence and design defect, applying the standard for a motion for summary judgment, the Defendant's motion is allowed on all counts.


Hon. John A. Canavan III
2-12-15

2232-1

JMC
MCS

NOTICE TO THE PARTIES	DOCKET NUMBER 1356CV000954	Trial Court of Massachusetts District Court Department 
CASE NAME Amy Warburton v. Colgate-Palmolive Company		
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF NOTICE IS ISSUED James M Campbell, Esq. Campbell Campbell Edwards & Conroy, P.C. One Constitution Plaza Third Floor Boston, MA 02129	COURT NAME & ADDRESS Quincy District Court One Dennis Ryan Pkwy Quincy, MA 02169	
<p>TO THE PARTIES TO THIS CASE:</p> <p>see attached</p>		
DATE ISSUED February 18, 2015	CLERK-MAGISTRATE/ASST. CLERK Arthur H Tobin	