IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JENNIFER MIX and JEFFREY D. MIX, individually and as next friends of S.V. MIX, a minor,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 3:09-cv-0382
	§	JURY DEMANDED
TARGET CORPORATION, a Minnesota corporation, and BUMBO LTD., a foreign corporation,	§	
Defendants.	§	

DEFENDANT TARGET CORPORATION'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE PHILIP R. MARTINEZ, UNITED STATES DISTRICT JUDGE:

Defendant Target Corporation ("Target" or "Defendant") hereby files this Motion for Summary Judgment, as follows:

I. Summary of the Argument

Plaintiffs Jennifer Mix and Jeffrey D. Mix ("Plaintiffs") acknowledge that Target is a non-manufacturing seller of the Bumbo baby seat out of which their daughter allegedly fell and suffered injuries. Companies like Target normally are not liable for harm caused by products they sell. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a) (Vernon Supp. 1999). Plaintiffs attempt to evade this general rule through citing two exceptions in Chapter 82 of the Texas Civil Practice and Remedies Code ("Chapter 82"): the "express factual representation" exception and the "actual knowledge" exception. Neither one applies.

Plaintiffs did not receive any oral or written representations from Target before Mrs. Mix bought a Bumbo baby seat. Nor did either Mrs. Mix or Mr. Mix review any marketing provided

by Target regarding the Bumbo baby seat. Consequently, Target did not make and could not have made any express factual representations to Plaintiffs.

Plaintiffs believe that when Mrs. Mix purchased a Bumbo baby seat in August 2007, Target had actual knowledge of a defect in the Bumbo baby seat because customers complained about—and attorneys filed lawsuits regarding—that product. Customer complaints about a product, however, show only that an individual suffered injuries while using a product, not the cause of those injuries. Similarly, pleadings filed in pending litigation consist of assertions that may, nor may not, be established at trial.

Plaintiffs cannot show that Target had actual knowledge of any alleged defect in the Bumbo baby seat. Thus, none of the exceptions in section 82.003(a) applies and Target is an "innocent seller" of the Bumbo baby seat. The Court should grant summary judgment.

Finally, and at a minimum, Plaintiffs' misrepresentation claim should not survive summary judgment. Target made no oral or written representations to Mrs. Mix before she purchased the Bumbo baby seat. Mr. Mix cannot identify any alleged misrepresentations made by Target. Consequently, the Court should grant summary judgment on Plaintiffs' misrepresentation claim.

II. Background

In August 2007, Mrs. Mix purchased a Bumbo baby seat from a Target store in El Paso, Texas. Exhibit A: Plaintiffs' Second Amended Complaint at p. 4, ¶ 11; Exhibit B: Plaintiffs' Objections and Answers to Defendant Target Corporation's First Set of Interrogatories at p. 2 (Jennifer Mix Interrogatory No. 4). Before making that purchase, she received no oral or written representations from Target concerning the Bumbo baby seat. Exhibit B at pp. 3-4 (Jennifer Mix Interrogatory No. 13). Mrs. Mix "did not review any Target marketing prior to buying the

Bumbo Seat from Target." *Id.* at p. 5 (Jennifer Mix Interrogatory No. 18). She does not recall examining the Bumbo baby seat on Target's website. *Id.* at pp. 2-3 (Jennifer Mix Interrogatory No. 7).

Similarly, Mr. Mix cannot identify any alleged misrepresentations made by Target. *Id.* at p. 13 (Jeffrey Mix Interrogatory No. 5). He did not review any marketing from Target prior to his "wife's purchase of the Bumbo Seat from Target." *Id.* (Jeffrey Mix Interrogatory No. 7).

On October 19, 2007, Mrs. Mix's daughter, S.V., allegedly fell out of the Bumbo baby seat, onto a kitchen island, and then backwards onto a hard floor. Exhibit A at p. 4, ¶ 12. Mrs. Mix allegedly witnessed the incident. *Id.* at p. 5, ¶ 13. Plaintiffs contend that S.V. Mix "suffered severe head injuries, including a skull fracture . . . ." *Id.* at p. 4, ¶ 12.

Plaintiffs have sued Target for strict products liability, negligence, misrepresentation, and bystander liability. *Id.* at pp. 10-14, ¶¶ 35-54. Plaintiffs seek to recover actual damages and exemplary damages from Target. *Id.* at p. 17, ¶¶ 64-67.

III. Statement of Summary Judgment Evidence

Target relies on, attaches, and incorporates by reference the following summary judgment evidence pursuant to Federal Rule of Civil Procedure 56(c)(2):

Exhibit A: Plaintiffs' Second Amended Complaint; and

Exhibit B: Plaintiffs' Jennifer Mix and Jeffrey Mix's Objections and Answers to Defendant Target Corporation's First Set of Interrogatories.

IV. Arguments and Authorities

A. Legal Standard

A movant is entitled to summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2). Issues of

material fact are genuine only if they require resolution by a trier of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also* FED. R. CIV. P. 56(c)(2). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

To meet this burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "coming forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quotation omitted). Summary judgment should be granted only if the evidence indicates that a reasonable fact-finder could not find in favor of the nonmoving party. *Anderson*, 477 U.S. at 248.

B. Analysis

1. Target Is An "Innocent Seller" Under Chapter 82.

Plaintiffs judicially admit that Target is a seller of the Bumbo baby seat. Exhibit A at p. 10, ¶ 38. Plaintiffs also acknowledge that Target did not manufacture the Bumbo baby seat that Mrs. Mix bought. *Id.* at p. 5, ¶ 16. Non-manufacturing sellers like Target generally are "not liable for harm caused to the claimant by that product . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a).[1] This rule governs all of Plaintiffs' claims against Target. *E.g., Meritor Auto., Inc.*

[1] Chapter 82 "reflects a legislative intent to restrict liability for defective products to those who manufacture them." *New Texas Auto Servs., L.P. v. De Hernandez*, 249 S.W.3d 400, 405 (Tex. 2008) (footnote omitted).

v. Ruan Leasing Co., 44 S.W.3d 86, 91 (Tex. 2001); *Freeman Fin. Inv. Co. v. Toyota Motor Corp.*, 109 S.W.3d 29, 34 (Tex. App.—Dallas 2003, pet. denied).[2]

Chapter 82 sets forth seven exceptions to the general rule that non-manufacturing sellers aren't liable for harm caused by products. TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(1)-(7). Plaintiffs mention two of these exceptions. Exhibit A at p. 10-11, ¶¶ 40-44. First, Plaintiffs contend that Target made express factual representations about the Bumbo baby seat that are incorrect. *Id.* at pp. 10-11, ¶ 41(a)-(b). Second, Plaintiffs claim that Target actually knew of a defect in the Bumbo baby seat when Target sold that product to Mrs. Mix. *Id.* at p. 11, ¶ 44. Neither contention is valid.

a. Target Did Not Make Express Factual Representations About The Bumbo Baby Seat.

To establish that Chapter 82's "express factual representation" exception applies, Plaintiffs must show that:

> (A) the seller made an express factual representation about an aspect of the product;[3]
> (B) the representation was incorrect;
> (C) the claimant relied on the representation in obtaining or using the product; and
> (D) if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(5)(A)-(D). Plaintiffs, however, cannot prove that this exception applies.

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[2] Plaintiffs assert both negligence and strict products liability claims against Target. Exhibit A at p. 1, ¶ 1. This lawsuit consequently qualifies as a "products liability" action under Chapter 82. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(2).

[3] Chapter 82 contains no definition of the term "express factual representation." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(1)-(4). The Court, however, must interpret this phrase in accordance with its plain meaning, unless doing so would contravene the Legislature's goals in enacting the statute or produce an absurd result. *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985); *Buzek v. Pepsi Bottling Group, Inc.*, 501 F. Supp. 2d 876, 880 (S.D. Tex. 2007).

Target made no oral or written representations to Mrs. Mix before she purchased the Bumbo baby seat. Exhibit B at p. 4 (Jennifer Mix Interrogatory No. 13). Thus, Mrs. Mix literally could not have relied on any representations made by Target in buying—or using—the Bumbo baby seat. *See id*. at p. 4-5 (Jennifer Mix Interrogatory No. 17). Notably, Mrs. Mix does not believe that Target made any misrepresentations to her. *Id*. at p. 4 (Jennifer Mix Interrogatory No. 16).

Similarly, Mr. Mix doesn't believe Target made any misrepresentations to him. *Id*. at p. 13 (Jeffrey Mix Interrogatory No. 5). He is unable to identify any misrepresentations on which he relied. *Id*. (Jeffrey Mix Interrogatory No. 6). No matter how broadly the Court interprets the term "express factual representations," it is plain that Target didn't communicate to Plaintiffs in connection with their purchase and use of the Bumbo baby seat. Consequently, Plaintiffs' reliance on section 82.003(a)(5) is unavailing.

b. Target Did Not Have Actual Knowledge Of Any Alleged Defects About The Bumbo Baby Seat.

To establish that Chapter 82's "actual knowledge" exception applies, Plaintiffs must show that:

> (A) the seller actually knew of a defect to the product at the time the seller supplied the product; and
> (B) the claimant's harm resulted from the defect . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(6)(A)-(B). The Texas Legislature "used 'knew,' not 'should have known.'" *Lott v. Dutchmen Mfg., Inc.*, 422 F. Supp. 2d 750, 754 (E.D. Tex. 2006). The question before the Court is consequently simple: when Mrs. Mix bought a Bumbo baby seat from Target in August 2007, did Target actually know of any alleged defects in that product?

The basis for Plaintiffs' assertion that Target actually knew of defects in the Bumbo baby seat is twofold: customer complaints about children falling out of that product and pleadings filed in "at least two different lawsuits" regarding the Bumbo baby seat. Exhibit A at p. 11, ¶ 44. Customer complaints, however, only indicate a concern about a particular product—not proof that the product itself is defective. At best, customer complaints are knowledge that injuries have resulted; the cause of those injuries, however, is not demonstrated.

Further, mere allegations that a product is defective in lawsuits (which eventually may be dismissed, settled, or appealed) are just that: allegations. These unverified statements in pleadings, even if filed by August 2007, do not show, much less intimate that Target actually knew of any alleged defects in the Bumbo baby seat. If a contrary rule existed, sellers could be held liable simply because there are allegations that a product is defective. Neither Chapter 82's text nor its legislative history supports such an overly expansive interpretation.[4]

Cases interpreting Chapter 82's "actual knowledge exception" are sparse. Courts have interpreted this exception in evaluating whether a defendant has been improperly joined.[5] There is, however, no logical reason for the "actual knowledge" exception to apply simply because some customers have complained about a product and some attorneys have filed suit to recover damages for alleged harm caused by it. Even taking Plaintiffs' allegations as true, Plaintiffs

[4] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(6)(A)-(B); *see also See* Debate on Tex. S.B. 4 on the Floor of the Senate, 73rd Leg., R.S., 2, at 2 (Jan. 28, 1993 (statement of Senator Parker), *cited in* Jeffrey Nolan Diamant, Comment, *Texas Senate Bill 4: Product Liability Legislation Analyzed*, 31 HOUS. L. REV. 921, 923 & n.9 (noting that Chapter 82 was designed to protect innocent sellers from product liability lawsuits unless those companies had significantly and intentionally participated in the product's design or assembly).

[5] *Lott*, 422 F. Supp. 2d at 750-56; *see also Rubin v. DaimlerChrysler Corp.*, Civil Action No. H-04-4021, 2005 U.S. Dist. LEXIS 42102, at *21 (S.D. Tex. May 20, 2005); *Reynolds v. Ford Motor Co.*, Civil Action No. 5:04-CV-085-C, 2004 U.S. Dist. LEXIS 27106, at *9-*11 (N.D. Tex. Dec. 13, 2004).

cannot show that Target actually knew of any defect in the Bumbo baby seat when Mrs. Mix purchased that product in August 2007. Thus, section 82.003(a)(6) affords Plaintiffs no relief.

Target is a non-manufacturing seller of the Bumbo Seat. None of Chapter 82's seven exceptions applies. Consequently, Plaintiffs cannot recover any damages from Target. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a); *see also Freeman Fin. Inv. Co.*, 109 S.W.3d at 34.

2. Target Made No Representations to Plaintiffs.

Plaintiffs believe that Target "misrepresented the character and quality of the BUMBO BABY SEAT in question." Exhibit A at p. 13, ¶ 51. It is uncertain whether Plaintiffs believe that Target made negligent or intentional misrepresentations. *See id.* Both claims require proof of, among other things, (1) a representation; (2) on which the plaintiff relied. *See Fed. Land Bank Ass'n of Tyler v. Sloan*, 825 S.W.2d 439, 442 (Tex. 1991) (negligent misrepresentation); *Smith v. Tilton*, 3 S.W.3d 77, 82 n.3 (Tex. App.—Dallas 1999, no pet.) (intentional misrepresentation). Plaintiffs cannot establish either of these two elements.[6]

Plaintiffs acknowledge in their interrogatory answers that Target did not make any misrepresentations to them. Exhibit B at p. 4 (Jennifer Mix Interrogatory Nos. 13, 16), p. 13 (Jeffrey Mix Interrogatory No. 5). Target made no oral or written representations to Mrs. Mix before she purchased a Bumbo baby seat. *Id.* at p. 4 (Jennifer Mix Interrogatory No. 13). Regardless of whether the Court concludes that Target is an "innocent seller" under Chapter 82, summary judgment is warranted on Plaintiffs' misrepresentation claim.

V. Conclusion and Prayer

The Court should grant Defendant Target Corporation's Motion for Summary Judgment

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[6] Target makes no concessions regarding the other elements of Plaintiffs' misrepresentation claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been duly sent via CM/ECF on this the tenth day of June, 2010 to all counsel of record, as follows:

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