IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DAWN ALFRED	§	
	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 01-cv-774**
	§	
	§	
LEVITON MANUFACTURING CO., INC.	§	
	§	
Defendant.	§	

DEFENDANT LEVITON MANUFACTURING CO., INC.'S
MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendant Leviton Manufacturing Co., Inc., ("Defendant" or "Leviton") files this Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), and in support would respectfully show the following:

I.

FACTUAL BACKGROUND AND SUMMARY OF MOTION

Plaintiff claims to have suffered damages allegedly arising from a fire in her home at 2215 Hazel Street in Beaumont. She has sued Leviton, attempting to fashion a products liability case out of an event that was solely the result of her own negligence. Plaintiff admitted in her deposition that, shortly before the fire, she was burning two candles in her bedroom. Exh. A (Alfred Depo. at 16). She left her home at 6:30 a.m. for a quick trip to the store, leaving the two candles lit in her bedroom. When she returned approximately twenty minutes later, at 6:50 a..m., her house was on fire and the fire department was already there, attempting to put out the blaze. *Id.* at 19, 22-23, 29. Plaintiff was aware that her conduct was unreasonably dangerous:

> Q: Ms. Alfred, you know that leaving a burning candle unattended is a potentially dangerous situation, do you not?

A: Yes.

Q: You don't need anyone to tell you that, do you?

A: No.

Id. at 23.

Earl White, who investigated the fire for the Beaumont Fire Department, has been a fireman since 1980, a certified Texas peace officer since 1991, and a certified cause and origin investigator for over 10 years. Exh. B (White Depo. at 6-7). Mr. White concluded that the cause of the fire was an "unattended candle." Exh. C (White Depo. Exh. 1; Fire Dept. Incident Report). On the morning of the fire, Mr. White arrived while the firefighting personnel were still there, and he spoke with Plaintiff. Exh. B at 7-8, 44-45. He testified that he asked Plaintiff if she could tell him what had happened, and "[b]asically she said, 'well, I think it could be caused from candles I may have left burning.'" *Id.* at 9. Mr. White's investigation corroborated this, showing that the fire originated in the bedroom where Plaintiff left candles burning. *Id.* at 9-10, 30; Exh. A (Alfred Depo. at 14-16 and Exh. 1).

But despite the evidence showing that the fire was solely a result of Plaintiff's negligence, Plaintiff and her insurance company, and the lawyer hired by her insurance company, have concocted an as yet unexplained "electrical outlet failure" theory in an effort to blame Leviton for the fire and enable her insurance company to recoup what it paid on Plaintiff's property damage claim.[1] Plaintiff testified that investigators hired by her insurance company first came up with the "electrical failure" idea. Exh. A (Alfred Depo. at 42). According to this theory, an outlet in Plaintiff's bedroom –

[1]Ms. Alfred testified that her insurance company paid her claim. Exh. A (Alfred Depo. at 73). Plaintiff's Rule 26 Disclosures, filed February 5, 2002, state that Farmers Insurance Group is the "real party in interest."

acting independently of the multiple unattended lighted candles in the same room – spontaneously combusted into a house-consuming fire within minutes after she left for the store.

Significantly, when the fire investigator, Earl White, spoke with Plaintiff after the fire, Plaintiff did not say anything about ever having any electrical problems in the house. Exh. B (White Depo. at 15). Indeed, Mr. White's investigation showed that there was nothing plugged into the outlet in the area of origin. *Id.* at 51. The heaviest fire damage in the bedroom of origin was closer to the bed than it was to the outlet. *Id.* at 97-98. Mr. White testified that, despite attempts by Plaintiff's counsel and Plaintiff's expert to persuade him otherwise, there was no doubt in his mind that a candle caused the fire. *Id.* at 104.

Plaintiff's "electrical failure" theory is frivolous, as is this lawsuit. Plaintiff's petition asserts no specific facts, but instead recites a litany of boilerplate claims, consisting of eight general theories of negligence (Exh. D; Pet. at ¶ VIII), general products liability claims of defective design, defective manufacture and defective marketing (*id.* at ¶ X), and five general theories of breach of express and implied warranties (*id.* at ¶ XII).

Although Plaintiff's case as been on file since September 2001, Plaintiff has not produced a shred of evidence to support any of her theories. In an effort to find out the factual basis of Plaintiff's case, Leviton served interrogatories, requests for production and requests for admissions. Plaintiff refused to answer them. *See* Exh. E. When a letter requesting Plaintiff's voluntary compliance with discovery failed to bring any response, Leviton filed a motion to compel discovery. *See* Exh. F. That motion is currently pending before the Court.

Thus, nine months after filing her suit, approximately one month before the discovery deadline, and only a few days before the deadline for dispositive motions, Plaintiff still has not produced any facts or evidence supporting her claims against Leviton. Aside from the Rule 11

implications of Plaintiff's filing a suit for which she is unable or wiling to provide any factual support, this is an eminently appropriate case for summary judgment.

II.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Harbor Insurance Co. v. Trammel Crow Co.*, 854 F.2d 94, 98 (5th Cir. 1988). Where the moving party does not bear the burden of proof, that party need only point out the absence of evidence on an essential element of the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325, 106 S.Ct. 2548, 2553-2554 (1986). The non-movant must then "go beyond its pleadings and designate, by competent summary judgment evidence, specific facts which demonstrate genuine triable issues." *Id.*

III.

ARGUMENT AND AUTHORITIES

A. There is no evidence that Leviton was negligent.

Plaintiff's petition alleges, in boilerplate fashion, that Leviton engaged in the following general acts of negligence: (1) negligently designing, manufacturing or marketing an unsafe Receptacle;[2] (2) negligently failing to test the Receptacle to make sure it was safe for its intended use;[3] (3) negligently failing to warn Plaintiff of the "serious danger and harm" that the Receptacle

[2] "(1) Failing to design and manufacture the outlet and/or its components [sic] parts in a safe manner; (2) Failing to ensure that the outlet and/or its component parts were designed and manufactured in a safe manner; (3) Failing to properly and adequately design/manufacture the outlet and/or its component parts; (4) Designing, manufacturing, selling, distributing and/or supplying a defective outlet and/or its component parts that subjected Plaintiff to an unreasonable risk of harm ...." Exh. D(Pet. at VIII(1-4)).

[3] *Id.*at VIII(5).

could cause;[4] and (4) generally being negligent.[5] The common law doctrine of negligence consists of three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990). Plaintiff has produced no evidence to support Plaintiff's negligence claims. Plaintiff refused to respond to Leviton's interrogatories, requests for admissions, and requests for documents asking for information supporting Plaintiff's negligence allegations. *See, e.g*, Exh. E (Interrogatories Nos 12, 13, 14, 15, 16, 21; Req. Pro. 6, 7, 8, 9, 10, 47, 51); Exh. F (Leviton's Motion to Compel).

Because Plaintiff has produced no evidence to support any of Plaintiff's negligence claims, and Leviton is aware of no such evidence, Leviton moves for summary judgment separately as to each of Plaintiff's independent "counts" of negligence:

(1) Failing to design and manufacture the outlet and/or its components [sic] parts in a safe manner;

(2) Failing to ensure that the outlet and/or its component parts were designed and manufactured in a safe manner;

(3) Failing to properly and adequately design/manufacture the outlet and/or its component parts;

(4) Designing, manufacturing, selling, distributing and/or supplying a defective outlet and/or its component parts that subjected Plaintiff to an unreasonable risk of harm

(5) Failing to test the outlet and/or its component parts to ensure it was safe for its intended use;

(6) Failing to warn Plaintiff of the serious danger and harm the outlet and/or its component parts could cause to Plaintiff and Plaintiff's property;

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[4] *Id.* at VIII(6).

[5] "(7) Failing to act as a reasonably prudent person would have under the same or similar circumstances; and (8) Otherwise failing to use due care under the circumstances." *Id.* at VIII(6-7).

(7) Failing to act as a reasonably prudent person would have under the same or similar circumstances; and

(8) Otherwise failing to use due care under the circumstances.

Exh. D (¶ VIII). As to each of these counts, there is no evidence of either a breach by Leviton, or damages proximately resulting from a breach by Leviton. Therefore, summary judgment is proper.

B. There is no evidence that Leviton's product was defectively designed.

Plaintiff asserts generic strict product liability claims, contending that Leviton "designed, manufactured, marketed, sold and/or distributed" a product that was "unreasonably dangerous for its reasonably foreseeable use." Exh D (Pet. at ¶ X). The elements of a "defective design" products liability claim in Texas are:

(a) The product had a design defect at a time the product left the manufacturer's control. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 588 (Tex. 1999).

(b) The design defect rendered the product unreasonably dangerous to the user.[6] *Hernandez v. Tokai Corp.*, 2 SW.3d 251, 255-56 (Tex. 1999).

(c) The risk of harm was foreseeable. *Id*. at 257.

(d) The product reached the user without a substantial change in the condition in which it was sold. *Torres v. City of Waco*, 5 S.W.3d 814, 827 (Tex. App.–Waco 2001, no pet.).

(e) There was a safer alternative design, defined as "a product design other than the one actually used that in reasonable probability: (1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and (2) was economically and technologically feasible at the time the product left the control of the manufacturer

[6]This factor requires conducting a risk-utility analysis in which the product's utility to its intended users is weighed against the risk of use. Factors to be considered include: "(a) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (b) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (c) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (d) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of the general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and (e) the expectations of the ordinary consumer." *Id.*

or seller by the application of existing or reasonably achievable scientific knowledge." TEX. CIV. PRAC. & REM. CODE § 82.005 (Vernon Supp. 2002).

(f) The defect was a producing cause of the injury, damage or death for which plaintiff seeks recovery. *Id.*

Plaintiff has produced no evidence to support any of the foregoing elements of a "defective design" products liability claim.[7] In particular, Plaintiff has refused to indicate just exactly what she believes was defective in Leviton's product. Plaintiff has refused to offer any alternative design – much less any evidence that an alternative design is economically or technologically feasible.

Because Plaintiff has produced no evidence to support Plaintiff's "defective design" products liability claim, and Leviton is aware of no such evidence, Leviton respectfully asks the Court to grant summary judgment in its favor on Plaintiff's "defective design" products liability claim.

C. There is no evidence that Leviton's product was defectively manufactured.

The elements of a "defective manufacturing" products liability claim in Texas include the following:

(a) The finished product deviates, in either its construction or quality, from the design specifications. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 434 (Tex. 1997).

(b) The deviation from design specifications renders the product "unreasonably dangerous to the user." *Id.*[8]

(c) The product was defective when the manufacturer sold it. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 844 (Tex.2000).

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[7]Plaintiff refused to respond to Leviton's interrogatories, requests for admissions, and requests for documents asking for information supporting Plaintiff's products liability allegations. *See, e.g*, Exh. E (Interrogatories Nos. 13, 14, 15, 18, 19, 20, 21; Req. Pro. 7, 8, 9, 13, 14, 15, 42, 44, 45, 48, 49).

[8]"Unreasonably dangerous" has been defined in this context as "dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics." *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 617 and n. 11 (Tex. App.–Corpus Christi 1994, writ denied).

(d) There is "a causal connection between [the defective] condition and the plaintiff's injuries or damages." *Grinnell*, 951 S.W.2d at 434.

Plaintiff has produced no evidence to support any of the foregoing elements of a "defective manufacturing" products liability claim.[9]

Because Plaintiff has produced no evidence to support Plaintiff's "defective manufacturing" products liability claim, and Leviton is aware of no such evidence, Leviton respectfully asks the Court to grant summary judgment in its favor on Plaintiff's "defective manufacturing" products liability claim.

D. There is no evidence that Leviton's product was defectively marketed.

The elements of a "defective marketing" products liability claim in Texas are as follows:

(a) a risk of harm that is inherent in the product or that may arise from the intended or reasonably anticipated use of the product must exist;

(b) the product supplier must actually know or reasonably foresee the risk of harm at the time the product is marketed;

(c) the product must possess a marketing defect [*i.e.*, adequate warnings or instructions were not provided; *see Sims v. Washex Mach. Corp.*, 932 S.W.2d 559, 561-62 (Tex. App.--Houston [1st Dist.] 1995, no writ)];

(d) the absence of the warning and/or instructions must render the product unreasonably dangerous to the ultimate user or consumer of the product; and

(e) the failure to warn and/or instruct must constitute a causative nexus in the product user's injury.

[9]Plaintiff refused to respond to Leviton's interrogatories, requests for admissions, and requests for documents asking for information supporting Plaintiff's "defective manufacturing" products liability allegations. *See supra* at 4 and n. 7.

USX Corp. v. Salinas, 818 S.W.2d 473, 483 (Tex. App.--San Antonio 1991, writ denied). Plaintiff has produced no evidence to support any of the foregoing elements of a "defective marketing" products liability claim.[10]

Because Plaintiff has produced no evidence to support Plaintiff's "defective marketing" products liability claim, and Leviton is aware of no such evidence, Leviton respectfully asks the Court to grant summary judgment in its favor on Plaintiff's "defective marketing" products liability claim.

E. There is no evidence that Leviton breached an implied warranty of merchantability and "fitness for ordinary use."

Plaintiff alleges that Leviton impliedly warranted that "the outlet was merchantable and fit for ordinary use"[11] Exh. D (Pet. at ¶ XII). Plaintiff alleges that Leviton breached this alleged warranty by (1) "designing, manufacturing, selling and/or distributing the outlet in a defective condition rendering it unreasonably dangerous for its reasonably foreseeable use;" (2) "failing to design, manufacture, sell and/or distribute the outlet in the highest quality condition;" (3) "failing to adequately, safely and properly test the outlet;" (4) "negligently designing, manufacturing, inspecting, selling and/or distributing the outlet;" and (5) "[o]therwise breaching" implied warranties. *Id.*

The elements of the implied warranty of merchantability require the plaintiff to show, among other things, that Leviton's product was defective, *i.e.*, not fit for the ordinary purposes for which

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[10]Plaintiff refused to respond to Leviton's interrogatories, requests for admissions, and requests for documents asking for information supporting Plaintiff's "defective marketing" products liability allegations. *See supra* at 4 and n. 7.

[11]Texas law only recognizes two implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Plaintiff's allegation of breach of implied warranties of "merchantability" and "fitness for ordinary purposes" is the same thing, since fitness for ordinary purpose is what is warranted by the implied warranty of merchantability. Plaintiff does not allege breach of an implied warranty of fitness for particular purposes.

it was used because of a lack of something necessary for adequacy. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665 (Tex.1999); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex.1989). This requires proof of a defect. *Plas-Tex*, 772 S.W.2d at 443. The plaintiff must show that the goods were defective at the time they left the manufacturer's possession. *Id.* at 444.

Plaintiff refused to respond to Leviton's interrogatories, requests for admissions, and requests for documents asking for information supporting Plaintiff's implied warranty claims. *See, e.g,* Exh. E (Interrogatories No. 7; Req. Pro. 11, 50); Exh. F (Leviton's Motion to Compel).

Here, there is no evidence that Leviton's product was unfit for the ordinary purpose for which it was used, *i.e.*, the purpose of serving as an electrical outlet. Nor is there any proof that the outlet had a defect, nor that it had a defect when it left Leviton's possession. Therefore, Leviton is entitled to summary judgment on Plaintiff's "breach of implied warranty of merchantability" claim.

F. The evidence conclusively establishes that Leviton did not breach an express warranty to Plaintiff.

In a carbon copy of Plaintiff's implied warranty claims, Plaintiff alleges that Leviton *expressly* warranted that "the outlet was merchantable and fit for ordinary use." Exh. D (Pet. at ¶ XII). Plaintiff likewise alleges that Leviton breached this alleged warranty by a general litany of wrongdoing.[12]

For an express warranty claim to exist in Texas, there must be an express warranty. An express warranty is created when "[a]ny affirmation of fact or promise [is] made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." *Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62 (Tex. App.–Houston [1st Dist.] 1998, pet.

[12](1) "[D]esigning, manufacturing, selling and/or distributing the outlet in a defective condition rendering it unreasonably dangerous for its reasonably foreseeable use;" (2) "failing to design, manufacture, sell and/or distribute the outlet in the highest quality condition;" (3) "failing to adequately, safely and properly test the outlet;" (4) "negligently designing, manufacturing, inspecting, selling and/or distributing the outlet;" and (5) "[o]therwise breaching" express warranties." Exh. D (Pet. at ¶ XII).

denied) (citing TEX. BUS. & COM. CODE ANN. § 2.313(a)(1) (Vernon 1994)). The express warranty must be the basis of the parties' bargain, and the buyer must rely on the express warranty *Harris Packaging*, 982 S.W.2d at 66 ("'Basis of the bargain' imposes the reliance requirement into express warranty claims.").

Here, Plaintiff admits that she did not purchase the outlet and therefore had no part of any "bargain" between Leviton and the purchaser. Plaintiff testified in her deposition that the outlet was already installed when she purchased her home in December 1999. Exh. A (Alfred Depo. at 63). She did not buy the outlet for installation in her home. *Id.* She never saw the box or packaging for the outlet. *Id.* at 63-64. Further, Plaintiff testified frankly that she has never received or seen any written warranties or warranty information from Leviton. *Id.* at 64. Plaintiff also admitted the foregoing facts in her responses to Leviton's Requests for Admissions. *See* Exh. E (Plaintiff's Resp. to Requests for Admission Nos. 28, 29, 30, 33, 35, 36).

As a matter of law, Plaintiff's admissions disprove the existence of an express warranty, and Leviton is entitled to summary judgment on Plaintiff's express warranty claim.

G. Alternatively, there is no evidence that Leviton breached an express warranty.

Even if the Court does not find as a matter of law that there was no express warranty to Plaintiff, there is no evidence of an express warranty to Plaintiff. Plaintiff refused to respond to Leviton's interrogatories, requests for admissions, and requests for documents asking for information supporting Plaintiff's express warranty claims. *See, e.g,* Exh. E (Interrogatories No. 7; Req. Pro. 11, 50); Exh. F (Leviton's Motion to Compel).

Because Plaintiff has produced no evidence to support Plaintiff's express warranty claims, and Leviton is aware of no such evidence, Leviton respectfully asks the Court to grant summary judgment in its favor on Plaintiff's "express warranty" claim.

IV.

CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiff requests that the Court render summary judgment that Leviton Manufacturing Company, Inc., is entitled to judgment as a matter of law as to the claims asserted by Plaintiff Dawn Alfred in this matter, and to such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

HOLMAN & KEELING, P.C.

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ATTORNEYS FOR DEFENDANT LEVITON MANUFACTURING CO., INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been furnished to the following counsel of record by facsimile, and/or by overnight delivery and/or by certified mail/ return receipt requested, on this _____ day of June, 2002:

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