IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

CASE NO.: 50-2016 CA 010435 XXXX MB

NICO GOODMAN, a minor

Plaintiff,

vs.

NINGBO LITESUN ELECTRIC CO., LTD., a Chinese Company,

Defendant.
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ORDER ON MOTIONS TO EXCLUDE AND FOR SUMMARY JUDGMENT

THIS MATTER, having come before this Honorable Court for the Special Set hearing held on September 19, 2023, on NINGBO LITESUN ELECTRIC CO., LTD.'s (hereinafter "Defendant") Renewed Motions for Summary Judgment and to Exclude Michael Scordilis, both dated March 9, 2023, and the Court having taken the matter under advisement after hearing the argument of competent counsel, requested proposed competing Orders resolving the motions and allowed sufficient time for the parties to assert objections thereto, and the court being fully advised in the premises, it is, **ORDERED AND ADJUDGED** that:

I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

1. As Plaintiff averred in his motion for preferential trial setting and during oral argument, both more than a year ago, discovery has long been closed. Dkt. 420, p. 1, ¶ 4[1]; *Transcript of September 30, 2022 Oral Argument*, "**Ex. A**", p. 20, lns. 13–15, p. 25, lns. 5–6.

[1] Per Plaintiff on August 18, 2022: "***Discovery is complete***, many depositions have been taken, many dispositive motions have been heard, the minor Plaintiff was 15 years old in middle school at the time of this accident and the Plaintiff is now a 21-year-old college student." [emphasis added]

2. After 7 years of extensive litigation, including multiple rounds of oral argument and dispositive motion practice, the only specific allegation made by Plaintiff is that the subject Power Strip should have had 15 amp short circuit protection. Dkt. 56, *Plaintiff's Amended Complaint*, pp. 2–3, ¶8; p. 5, ¶16; and p. 8, ¶29. Plaintiff also advances a boilerplate failure to warn claim and previously withdrew a manufacturing defect claim. *Id.*; and Dkt. 448.

3. Following the exclusion of Dr. Morse, the Court found that the deposition transcript of Dr. Scordilis created a genuine issue of material fact, and, accordingly, the Court gave Defendant leave to move to exclude Scordilis and for summary judgment. Dkt. 451. The only evidence provided by Plaintiff to create a genuine issue of material fact to date is said transcript.[2]

II. MOTION TO EXCLUDE DR. SCORDILIS

4. The burden of proof to establish the admissibility of the expert's testimony is on the proponent of the testimony, and the burden must be established by a preponderance of the evidence.[3] Plaintiff has failed to meet his burden to show that the opinions of Scordilis satisfy either the reliability or relevance prongs of *Daubert*.

5. Scordilis' own testing, recorded on video, confirmed that 15 amp short circuit protection in a power strip will not activate when exposed to a short circuit if a home's circuit breaker already has 15 amp short circuit protection. Dkt. 454, p. 3, ¶¶7–8, and 11.

6. Scordilis then directly contradicted himself by testifying that the power switch on the tested power strip moved despite video footage unequivocally showing that it did not move

[2] At the 11th hour, on the eve of summary judgment, Plaintiff mentioned a third expert, Edward Brill, for the very first time. **Ex. B**, *Transcript of Oral Argument on September 19, 2023*, p. 23, ln. 14. Defendant averred that Brill never gave an opinion about the Power Strip's design and was not qualified to do so, and Plaintiff failed to respond in any way or adduce any evidence to the contrary during oral argument. *Id.*, p. 24, lns. 3–6, p. 26, lns. 12–21.

[3] *Booker v. Sumter Cnty. Sheriff's Off./N. Am. Risk Servs.*, 166 So. 3d 189, 193 (Fla. Dist. Ct. App. 2015) *citing Daubert*, 509 U.S. at 592 n. 10, 113 S.Ct. 2786 *and* McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002).

and during which Scordilis states that it did not move. *Id.*, ¶7–9. Further, Scordilis made this incredible testimony despite having admitted that his home's circuit breaker had tripped. *Id.*, ¶8.

7. This attempt to sweep unfavorable testing results "under the rug" without explaining them or modifying Plaintiff's sole theory of defect is cherry-picking, the quintessence of unreliability. *In re TMI Litig.*, 193 F.3d 613, 676 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000)[4]; *In re Zantac (Ranitidine) Prod. Liab. Litig.*, No. 20-MD-2924, 2022 WL 17480906, at *57 (S.D. Fla. Dec. 6, 2022).[5]

8. Defendant has also provided example upon example of Scordilis' failures to conduct necessary investigation or consider relevant evidence, just some of which include:

> (1) failing to inspect the subject premises or consider that the subject home's circuit breaker already had 15 amp short circuit protection; (2) failing to read Plaintiff's deposition transcript; (3) baselessly assuming without any expertise, evidence, or investigation that the injuries were caused by amperage at or above 15 amps[6]; (4) failing to test whether less than 15 amps of current could have caused the necklace to become hot enough to burn Plaintiff; (5) failing to provide crucial data which would allow his auto ignition test to be reproduced; (6) failing to test the electrical resistance of the subject chain, or identify the specific alloy of metal comprising it; (7) failing to conduct any testing where, as in the alleged incident, metal was touched to the energized prongs of an appliance partially plugged into a power strip; and (8) failing to provide measurements, calculations, diagrams, or testing to show the alleged incident's foreseeability. Dkt. 454, pp. 2–6 and 11–14.

9. The above confirms that Scordilis' opinions are connected to existing data only by his *ipse dixit*, and that there is simply too great an analytical gap between the data and the opinion proffered. *Kemp*, 280 So. 3d at 89 *citing Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146,

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[4] Where experts' theory undermined by testing and they failed to modify or explain theory given contradictory test results, exclusion not abuse of discretion: ***"[T]he hypothesis was undermined by Data Chem's testing, yet [it] was not further modified or explained… [This failure]… is the antithesis of good science and dramatically undermines their proffered opinions."*** [emphasis added]

[5] *Citing* the following [emphasis added]: *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 892 F.3d 624, 634 (4th Cir. 2018) (***"Result-driven analysis, or cherry-picking, undermines principles of the scientific method and is a quintessential example of applying methodologies [unreliably]…Courts have consistently excluded expert testimony that cherry-picks relevant data because such an approach does not reflect scientific knowledge, is not derived by the scientific method, and is not good science."***; *EEOC v. Freeman*, 778 F.3d 463, 469–70 (4th Cir. 2005) (***"courts have consistently excluded expert testimony that 'cherry-picks' relevant data***") [emphasis added].

[6] This assumption raises an obvious rhetorical question, "Is it not entirely plausible that these injuries could have been caused by 14.9$\overline{9}$ amps?"

118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *Daubert*, 509 U.S. at 590 (expert opinion must be based upon "scientific knowledge," not merely "subjective belief or unsupported speculation.").

10. Further, Scordilis' opinions fail to satisfy the reliability or "fit" prong of Daubert because the home's circuit breaker already had the very same 15 amp short circuit protection Plaintiff avers that the subject Power Strip should have had. Dkt. 460, p. 4, ¶16.

11. The common sense implication is that if the home already had short circuit protection, there is simply no reason for the product to have also had this same feature. *Daubert*, 509 U.S. at 590–591 (opinion which does not advance the question in dispute for which it is proffered lacks "fit" and should be excluded).

12. This is all the more true in light of Scordilis' testing which confirmed that 15 amp short circuit protection in a home's circuit breaker will activate irrespective of any such protection in a power strip, that the 15 amp short circuit protection in the tested power strip did not activate, and the fact that Plaintiff has failed to put forth any evidence to show why the product should have redundantly had 15 amp short circuit protection. Dkt. 454, p. 3, ¶¶7–8, and 11; Dkt. 460.

13. Accordingly, Scordilis' opinions must be excluded under *Daubert* and its progeny. *Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492, 498 (Fla. 3rd DCA 2014); *Kemp v. State*, 280 So. 3d 81, 89 (Fla. 4th DCA 2019).

III. MOTION FOR SUMMARY JUDGMENT

14. As will be explained below, Defendant has met its burden on summary judgment to show the absence of any genuine issue of material fact. *In Re: Amendments to Florida Rule of Civil Procedure 1.510*, 309 So.3d 192 (Fla. 2020); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

a. DESIGN DEFECT CLAIM

15. It is ultimately Plaintiff's burden to prove defective design. *Builders Shoring & Scaffolding Equipment Co. v. Schmidt*, 411 So.2d 1004 (Fla. 5th DCA 1982), *rev. den.* 419 So.2d 1200. To do so, Plaintiff must show that the design was unreasonably dangerous due to either: (1) reasonable foreseeability of the alleged incident; or (2) that the product failed to perform as safely as an ordinary consumer would expect when used as intended.[7]

16. Through Scordilis or otherwise, Plaintiff has failed to provide any evidence to show the reasonable foreseeability of the alleged incident, whereas defendant has shown that there are no similar prior incidents. Dkt. 454, p. 6, ¶23; Dkt. 460, p. 5, ¶21.

17. Further, both through counsel and Scordilis separately, Plaintiff has already conceded that he misused the Power Strip. Dkt. 454, p. 6, ¶23 and fn. 21; **Ex. C**, *Transcript of August 5, 2022 Oral Argument*, p. 19, lns. 15–23.[8]

18. As such, Defendant made a *prima facie* case as to the absence of any unreasonable danger of the design. The burden then shifted to Plaintiff, who failed to adduce any contrary evidence, and thus there is no genuine issue of material fact on this issue. *Lopez v. Southern Coatings, Inc*, 580 So.2d 864 (Fla. 3rd DCA 1991); *Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So.2d 335 (Fla. 3rd DCA 1984); *Rodriguez v. New Holland North America, Inc.* 767 So. 2d 543 (3rd DCA 2000). *In Re: Amendments to Florida Rule of Civil Procedure 1.510*, 309 So.3d 192 (Fla. 2020); *Celotex*, 477 U.S. at 323.

19. Causation provides yet another independent basis for summary judgment. Under Florida law, "a plaintiff must prove that the product defect proximately caused his injury." *Rink,*

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[7] *Supreme Court of Florida Standard Jury Instructions*, 403.7 Strict Liability: "A product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended OR when used in a manner reasonably foreseeable by the manufacturer]."

[8] "Yes, Judge. And they can argue and they have pled comparative fault…They can argue comparative. ***I'm not here saying there isn't any***." [emphasis added]

400 F.3d at 1295. Proximate cause must be shown by more than pure speculation or conjecture. *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So.2d 1015 (Fla. 1984).

20. The subject premises already had 15 amp short circuit protection, which Plaintiff admitted would have prevented the alleged incident had 15 or more amps been involved. Dkt. 454**,** p. 4, ¶11. Further to that, testing confirmed that 15 amp short circuit protection in a home's circuit breaker will activate irrespective of any such protection in a power strip, and the 15 amp short circuit protection in the tested power strip did not activate. Dkt. 454, p. 3, ¶¶7–8, and 11.

21. The above constitutes another *prima facie* case for entitlement to summary judgment, which shifted the burden to Plaintiff to set forth specific facts showing a genuine issue of material fact. *Celotex*, 477 U.S. at 322 (1986). Despite this, Plaintiff failed to adduce any evidence to show how redundant 15 amp short circuit protection in the subject Power Strip would have or could have prevented the alleged incident.

22. Plaintiff therefore failed to rebut Defendant's *prima facie* case on causation, thereby necessitating dismissal. *Gooding*, 445 So.2d 1015; *Rink*, 400 F.3d at 1295; *Celotex*, 106 S. Ct. at 2552.

23. Moreover, Defendant provided evidence that the Power Strip design was certified as compliant with both UL 1363 and all other applicable safety standards. Dkt 460, pp. 2, ¶ 5, pp. 8–9; *Jackson v. H.L. Bouton Co.*, 630 So. 2d 1173, 1175 (Fla. 4th DCA 1994) (recognizing compliance with industry standards is evidence that a product was not defective).

24. Once again, the burden shifted to Plaintiff to set forth specific facts showing that there is a genuine issue of material fact on this issue, and he has failed to meet that burden. *Celotex*, 477 U.S. at 322 (1986); *Gulf & Western Mfg. Co.*, 458 So. 2d 58, 59 (Fla. 3rd DCA 1984) ("Trade custom at the time of a product's manufacture is a valid defense in a products liability suit" and

affirming jury verdict of no defect because "the custom of the industry was such that the machine should not be considered 'unreasonably dangerous'"); *Al-derman v. Wysong & Miles Co.*, 486 So. 2d 673, 679 (Fla. 1st DCA 1986) (industry-standard evidence properly admitted because "evidence of industry standards...is generally considered relevant in a strict products liability action on the issue of alleged design defects").

25. Finally, as a fourth independent basis for summary judgment, when, as here, a jury is asked to assess complex scientific issues outside of the scope of a layperson's knowledge, expert testimony is required to establish both causation and the presence of design defect. *Fauteux v. The Country Club at Woodfield, Inc.*, 2020 WL 7714186, at *3 (Palm Beach, Fla.Cir.Ct. 2020); *Cramer v. Ford Motor Co., Inc.*, No. 2007-CA-2135-NC, 2011 WL 2477232 (Sarasota Fla.Cir.Ct. June 09, 2011) ("to prove design defect, a plaintiff must offer an expert opinion that the product is indeed defective"); *Phelps v. R.J. Reynolds Tobacco Co.*, No. 2020-005579-CA-01, 2022 WL 2965495, at *1 (Miami-Dade Fla.Cir.Ct. June 09, 2022) ("A design defect must be proven by expert testimony."); *AstraZeneca Pharmaceuticals LP*, 602 F.3d 1245, 1256 (11th Cir. 2010) (under Florida law "the exclusion of [plaintiffs' expert's] testimony is a basis for granting summary judgment").

26. The only expert opinion Plaintiff has introduced into the record to create an issue of fact is that of Dr. Scordilis, which has now been excluded. As such, Plaintiff's design defect claim, whether in strict liability or negligence, also fails as a matter of law due to a lack of expert opinion to support it. *Celotex*, 477 U.S. at 323 (judgment warranted when "the [nonmovant] has failed to make a sufficient showing on an essential element" for which he has the burden of proof); *Rink v. Cheminova, Inc.,* 400 F.3d 1286, at 1295 (11th Cir. 2005).[9]

[9] *Grunow v. Valor Corp. of Fla.*, No. CL00-9657-AB, 2003 WL 22020032, at *3 (Fla. 4th DCA 2003), *aff'd*, 904 So. 2d 551 (Fla. Dist. Ct. App. 2005): "Cases are legion which stand for the proposition that a jury's Finding of no defect

b. FAILURE TO WARN CLAIM

27. As to the failure to warn claim, Plaintiff has failed to contradict Defendant's showing that: (1) Plaintiff's mother previously warned him of the risk of electric shock by using a power strip without first fully inserting any devices; and, in any event, (2) Plaintiff did not read the Power Strip warnings before using it. Dkt. 460, p. 3, ¶10; p. 4, ¶¶14–15.

28. Yet again, the burden then shifted to Plaintiff to set forth specific facts showing that there is a genuine issue of material fact, and he has failed to meet that burden. *Celotex*, 477 U.S. at 322 (1986); *Lopez v. Southern Coatings, Inc*, 580 So.2d 864 (Fla. 3rd DCA 1991) (inadequate warnings claim properly dismissed where the evidence showed plaintiff did not read warning label); *Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So.2d 335 (Fla. 3rd DCA 1984) (summary judgment properly granted where plaintiff did not read the instructions on the ladder and therefore any negligent failure to warn could not, as a matter of law, be the proximate cause of plaintiff's injuries).; *Rodriguez v. New Holland North America, Inc.*, 767 So. 2d 543 (Fla. 3rd DCA 2000) (manufacturer held not liable for negligent failure to warn when the plaintiff testified that he was aware that if one of his body parts made contact with the product's boom path it would be crushed); *Wickham*, 327 So.2d at 826 (adequacy of a warning label held to be immaterial because plaintiff was cognizant of dangers involved with using product)

IV. PLAINTIFF'S PROCEDURAL ARGUMENTS ARE UNAVAILING

29. Plaintiff's repeated failures to set forth any specific facts to oppose Defendant's numerous independent *prima facie* showings of entitlement to summary judgment illustrate why

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in a products liability case precludes a negligence claim and requires judgment in favor of the defendant…A jury's finding of no defect in a products liability case precludes a negligence claim, particularly where the allegations in the negligence claim are completely dependent upon a finding of a defect in the product."

it is beyond peradventure of doubt that there is no genuine issue for trial. *Shaw v. City of Selma*, 884 F.3d 1993 (US 11th Cir. 2018); *Celotex*, 477 U.S. at 323.

30. Neither of Defendant's motions are motions for rehearing, and the Court has never denied with prejudice any motion to exclude Scordilis or a summary judgment motion. In fact, multiple Court orders[10] gave Defendant leave to file the instant motions, which are consistent with the Court's June 5, 2023 Order denying Plaintiff's request to adjourn the pending motions.

31. This is also consistent with the Court's recent Orders granting Defendant's July 21, 2023 motion to extend certain pre-trial deadlines until after the pending dispositive motions have been decided so that the parties and Court can avoid potentially unnecessary trial preparation.

32. Nevertheless, in both his opposition papers and during oral argument, Plaintiff elected to make irrelevant procedural arguments rather than address the merits of Defendant's motions. No expert opinion or evidence whatsoever was offered to controvert Defendant's multiple showings of entitlement to summary judgment. Further, Plaintiff failed to adduce any evidence to rebut Defendant's assertion that Brill did not even give an opinion about the Power Strip.[11]

33. Accordingly, any potential arguments or evidence Plaintiff now seeks to advance through Brill or otherwise were waived. *Universal Underwriters Ins. Co. v. Tucker*, 736 So. 2d 778, 779 (Fla. 4th DCA, 1999) *citing Dober v. Worrell*, 401 So.2d 1322 (Fla.1981) ("This argument, not having been made in the trial court, is waived"); *State v. Cubic*, 946 So. 2d 606, 609 (Fla. 4th DCA, 2007) ("A legal argument must be raised initially in the trial court by the presentation of a specific motion or objection at an appropriate stage of the proceedings…The

[10] This includes the January 27, 2022 Order cited by Plaintiff, the November 8, 2022 Order at pp. 1–2, ¶3, and the Court's March 27, 2023 and June 29, 2023 Orders which specially set both of the pending motions for hearing.
[11] Again, Defendant averred that Brill never gave an opinion about the Power Strip's design and was not qualified to do so, and Plaintiff failed to respond in any way or adduce any evidence to the contrary during oral argument. **Ex. B**, p. 24, lns. 3–6, p. 26, lns. 12–21.

failure to preserve an issue for appellate review constitutes a waiver of the right to seek reversal based on that error."); *Greenberg v. Bekins of South Florida*, 337 So. 3d 372 (Fla. 4th DCA 2022) ("It is generally inappropriate for a party to raise an issue for the first time on appeal…[T]o be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") [citations omitted]; *Sanchez v. Miami-Dade Cnty.*, 286 So. 3d 191, 195 (Fla. 2019).[12]

34. As admitted by Plaintiff multiple times, discovery is and has been closed, and the Court will not reopen discovery on the eve of summary judgment in this 7 year old action, as to do so would be the very definition of unfair surprise and extremely prejudicial to defendant. *Periera v. Florida Power & Light Co.*, 680 So. 2d 617 (Fla. 4th DCA, 1996), *decision approved*, 705 So. 2d 1359 (Fla. 1998) (a plaintiff's request for continuance in order to complete discovery was properly denied, and consideration of motion for summary judgment was proper, where outstanding discovery about which plaintiff complained was not initiated until three days before summary judgment hearing and over three years after filing of action).

35. Finally, assuming *arguendo* that the Court could entertain additional evidence from Brill or otherwise, which it cannot and will not, Plaintiff's sole theory of defect is that the subject Power Strip should have had 15 amp short circuit protection.

36. Any expert opinion that the Power Strip should have had 15 amp short circuit protection would not only be unreliable but irrelevant because: (1) the Court has already excluded

[12] "In the end, Petitioner presents this Court with a new theory of liability and fails to make any argument why he should survive summary judgment on the claim that was actually litigated below. Petitioner thus has changed horses in midstream. That doesn't work. ***A litigant seeking to overturn a lower court's judgment may not rely on one line of argument in the trial court and then pursue a different line of argument in the appellate courts***." [emphasis added]

this theory of design defect as one of the opinions held by Scordilis; (2) Plaintiff's prior testing disproved this theory; and (3) the home's circuit breaker already had this protection and Plaintiff has failed to meet his burden to show that such redundant protection was necessary and/or would have prevented the alleged incident. *Celotex*, 477 U.S. at 322 (1986); *Rink,* 400 F.3d at 1295; *Gooding*, 445 So.2d 1015.

V. CONCLUSION

37. For all of the above reasons, Plaintiff's claims of design defect and failure to warn fail as a matter of law. *Lopez*, 580 So.2d 864 (Fla. 3rd DCA 1991); *Ashby*, 458 So.2d 335 (Fla. 3rd DCA 1984); *Rodriguez.* 767 So. 2d 543 (3rd DCA 2000). *In Re: Amendments*, 309 So.3d 192 (Fla. 2020); *Celotex*, 477 U.S. at 323.

38. Accordingly:

a. Defendant's Renewed Motion to Exclude Dr. Scordilis (Dkt. 454) is **GRANTED** in its entirety, and any affidavits, reports, or other materials containing the opinions of Scordilis are excluded from admissibility at trial;

b. Dr. Scordilis is therefore precluded from offering any testimony at trial and Scordilis' opinions cannot be used in any further proceedings in this case; and

c. Defendant's Renewed Motion for Summary Judgment (Dkt. 460) is **GRANTED** in its entirety, and all of Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida.

502016CA010435XXXXMB 10/11/2023
Scott Kerner
Circuit Judge

Copies furnished to:

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