IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BROCK SIMPSON,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 4:17-cv-00731-NKL**
	)	
MAGNUM PIERING, INC., et al.,	)	
	)	
Defendants.	)	

DEFENDANT MAGNUM PIERING, INC.'S SUGGESTION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Magnum Piering, Inc (hereinafter "Magnum"), by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7.0 and 56.1, and provides the following Suggestions in Support of its Motion for Summary Judgment. Magnum incorporates by reference its Motion for Summary Judgment, filed contemporaneously herewith, as if fully set forth herein.

I. STATEMENT OF UNCONTROVERTED MATERIAL FACTS

1. Bernard B. Dwyer ("Brian Dwyer") purchased Magnum in 1999 or 2000. (Exhibit A, Perko, 11:12-14; Exhibit B, B. Dwyer, 12:1-4, 14-17).

2. The design for the pier had been used for twelve years before Bernard B. Dwyer purchased the company, or staring in 1987. (Exhibit B, B. Dwyer, 12:15-8).

3. Nothing has changed in the components of the ram or the assembly of the ram since the patent was secured by Dondeville M. Rippe. (Exhibit B, B. Dwyer, 23:19-25; Exhibit F, Patent).

4. The ram materials and parts have not changed since the initial patent. (Exhibit B, B. Dwyer, 24:1-4).

5. Bernard B. Dwyer ("Brian Dwyer") testified that the nothing could go wrong during the manufacturing process that would cause a ram to malfunction. (Exhibit B, B. Dwyer, 24:5-9).

6. The channels and ram shoe cannot be installed backwards. (Exhibit B, B. Dwyer, 24:10-15).

7. Bernard B. Dwyer ("Brian Dwyer") no knowledge of a ram ever failing during operation before Plaintiff brought this current lawsuit. (Exhibit B, B. Dwyer, 26:16-21).

8. No one has ever called Magnum to state that they are receiving bad pipe. (Exhibit B, B. Dwyer, 29:25, 30:1-6).

9. Bernard B. Dwyer ("Brian Dwyer") is unaware of any else becoming injured due to an equipment malfunction. (Exhibit B, B. Dwyer, 56:5-8).

10. Various Magnum products were independently tested by Briem Engineering and CTL Thompson. Inc. (Exhibit B, B. Dwyer, 61:9-18).

11. The ram is tested and guaranteed and the pipe is tested by the steel manufacturer. (Exhibit B, B. Dwyer, 62:6-15; 63:1-5).

12. The steel is certified by the steel company manufacturer. (Exhibit B, B. Dwyer, 66:14-25).

13. KC Quality's rams were used to drive at least seven hundred and twenty (720) push piers during their first year of use. (Exhibit E, Quick 137:21-25; 138:1-8).

14. Plaintiff used the alleged subject ram in the days before June 1, 2012 on the same project, as well as in the morning of June 1, 2012, without incident. (Exhibit D, Simpson, 40:20-23).

15. Plaintiff does not actually remember the pipe bending on June 1, 2012, as he was working alone. (Exhibit D, Simpson, 61:25, 62:1-4; 78:11-16).

16. Dr. Howard Perko, who has a PhD in Engineering, reviewed the designs of the products to make sure there are no structural deficiencies. (Exhibit A, Perko, 6:15-17, 11:15-19).

17. The Magnum products have been made the same way since 2000. (Exhibit A, Perko, 11:19-22).

18. Every contractor is testing the piers when he or she installs a pier. (Exhibit A, Perko, 28:17-21).

19. Dr. Howard Perko has no knowledge of Magnum equipment binding or jamming (Exhibit A, Perko, 50:1-3).

20. Dr. Howard Perko is not aware of misalignment or bending stresses or tilting with Magnum products (Exhibit A, Perko, 50:19-22).

21. Dr. Howard Perko has no knowledge of any bending in Magnum piers, where all signs would point to misalignments. (Exhibit A, Perko 50:25, 51:1-7).

22. There is not possibility of misalignment if the shoe is properly attached to the bracket tube and the safety bolt is used. (Exhibit A, Perko, 53:13-20).

23. Dr. Howard Perko is not aware of any incidents in which pier or spacer pipe bent. (Exhibit A, Perko, 53:18-21).

24. Dr. Howard Perko is not aware of any time when the ram has broken off of a bracket during operation. (Exhibit A, Perko, 53:22-25).

25. Dr. Howard Perko is not aware of any other incidents in which somebody was injured while using Magnum equipment. (Exhibit A, Perko, 55:21-24).

26. Sales manager Bernard B. Dwyer, Jr. ("BJ Dwyer") is not aware of any incidents in which a pier or a spacer piper has broken free of a bracket. (Exhibit C, B. Dwyer, Jr., 6:16-18; 47:17-20).

27. Bernard B. Dwyer, Jr. ("BJ Dwyer") is not aware of any incidence where someone has been injured using Magnum products. (Exhibit C, B. Dwyer, Jr., 47:21-24).

28. Bernard B. Dwyer, Jr. ("BJ Dwyer") is not aware of a ram shoe ever breaking or the welds ever breaking. (Exhibit C, B. Dwyer, Jr., 49:20-22).

II. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986) "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. "The initial burden is placed on the moving party." *Williams ex rel. Williams v. City of Beverly Hills, Mo.*, No. 4:04-CV-631 CAS, 2006 WL 897155, at *1–2 (E.D. Mo. Mar. 31, 2006). The non-moving party may not rest on the allegations in its pleadings, but by affidavit and other evidence must set forth specific facts showing that a genuine issue of material fact exists." *Id*. "Self-serving, conclusory statements without support are not sufficient to defeat summary judgment." *Id.*

B. Plaintiff is Unable to Bring Forward Evidence Demonstrating that Defendant's Products Were Dangerous to Support his Strict Liability – Defective Product Claim

Plaintiff generally alleges that the Magnum products at issue were in a defective condition

that were unreasonably dangerous when put to a reasonably anticipated use. (Doc. 1-1, ¶ 33). Missouri law recognizes a defective design as well as liability for failure to warn of the inherent danger in the product for defective product claims. The elements of a defective design claim require proof of the following four (4) elements: 1) the defendant sold the product in the course of its business; 2) the product was in a defective condition unreasonably dangerous when put to reasonably anticipated use; 3) the product was used in the manner reasonably anticipated; and 4) the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold. *Linegar v. Armour of Am., Inc.,* 909 F.2d 1150, 1152 (8th Cir.1990), citing *Fahy v. Dresser Indus.,* 740 S.W.2d 635, 637–38 (Mo.1987), *cert. denied,* 485 U.S. 1022, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988).

A failure to warn claim requires proof of the following five (5) elements: 1) the defendant sold the product in the course of business; 2) the product was unreasonably dangerous at the time of the sale when used as reasonably anticipated without knowledge of its characteristics; 3) no adequate warning; 4) the product was used in a manner reasonably anticipated; and 5) the user was damaged a direct result of the product. *Morris v. Shell Oil Co.,* 467 S.W.2d 39 (Mo. Sup. Ct. 1971). Whether a product is unreasonably dangerous is the determinative factor in a design defect case. *Hylton v. John Deere Co.,* 802 F.2d 1011, 1015 (8th Cir.1986), citing *Nesselrode v. Executive Beechcraft, Inc.,* 707 S.W.2d 371, 378 (Mo.1986). "[T]he obviousness of a defect or danger is material to the issue whether a product is 'unreasonably dangerous'." *McGowne v. Challenge–Cook Bros.,* 672 F.2d 652, 663 (8th Cir.1982).

A review of Plaintiff's Petition for Damages does not reveal which defective product theory is being alleged by Plaintiff, so Magnum shall address both causes of action. (*See generally* Doc. 1-1). Plaintiff is unable to bring forward any evidence to support the second requirement for both

defective design and failure to warn claims, specifically support that the product was in a defective condition. Magnum's owner, Brian Dwyer (hereinafter "Mr. Dwyer"), purchased the company in 1999 or 2000. (Exhibit A, Perko, 11:12-14; Exhibit B, B. Dwyer, 12:1-4, 14-17). The design for the pier had been used for twelve years before Mr. Dwyer purchased the company, or starting in 1987. (Exhibit B, B. Dwyer, 12:15-8). Before Mr. Dwyer purchased the company, he previously used Magnum piers in his business dealings since 1992. (Exhibit B, B. Dwyer, 12:9-13). Nothing has changed in the components of the ram or the assembly of the ram since the patent was secured by Dondeville M. Rippe. (Exhibit B, B. Dwyer, 23:19-25; Exhibit F, Patent). The ram materials and parts have not changed since the initial patent. (Exhibit B, B. Dwyer, 24:1-4).

Mr. Dwyer further testified that the nothing could go wrong during the manufacturing process that would cause a ram to malfunction. (Exhibit B, B. Dwyer, 24:5-9). The channels and ram shoe cannot be installed backwards. (Exhibit B, B. Dwyer, 24:10-15). He has no knowledge of a ram ever failing during operation before Plaintiff brought this current lawsuit. (Exhibit B, B. Dwyer, 26:16-21). Above all, Plaintiff waited five (5) years before ever notifying anyone on behalf of Magnum about his alleged injuries while using the products. (Exhibit B, B. Dwyer, 28:17-20).

As further evidence that the Magnum products are neither defective nor unreasonably dangerous, no one has ever called Magnum to state that they are receiving bad pipe. (Exhibit B, B. Dwyer, 29:25, 30:1-6). Mr. Dwyer is unaware of any else becoming injured due to an equipment malfunction. (Exhibit B, B. Dwyer, 56:5-8). He is unaware of any incident where a ram has broken off a bracket during an install. (Exhibit B, B. Dwyer, 60:15-19). He is further not aware of a base coming off the shoe or a weld breaking on the base. (Exhibit B, B. Dwyer, 60:20-23). No one has ever returned a ram because the channels were bent or out of alignment. (Exhibit B, B. Dwyer, 61:5-8). Various Magnum products were independently tested by Briem Engineering and CTL

Thompson. Inc. (Exhibit B, B. Dwyer, 61:9-18). The ram is tested and guaranteed and the pipe is tested by the steel manufacturer. (Exhibit B, B. Dwyer, 62:6-15; 63:1-5). The steel is certified by the steel company manufacturer. (Exhibit B, B. Dwyer, 66:14-25).

Reviewing the record as a whole demonstrates that the various Magnum products alleged by Plaintiff, including the rams, push piers, push pipes, and brackets, are not in a defective condition. The track record of the products coupled with the extensive testing conducted by outside companies and agencies, ***including Plaintiff's own expert witness' engineering firm***, demonstrate that the products are reliable and safe. This conclusion is further bolstered by the products usage in *thousands* of projects across the country without incident. Other than this lawsuit, Magnum is unaware of any other incidents of injury while using its products. Plaintiff will be unable to bring forward any evidence demonstrating that the products are, and were, in a defective condition at the time of June 1, 2012, as required under their product defect claim.

KC Quality, including Plaintiff, had used Magnum's products, including the ram, when they began piering work in 2010. (Exhibit E, Quick, 28:8-10). Before June 1, 2012, KC Quality had completed fifteen (15) to twenty (20) jobs using Magnum's products in 2011 through 2012. (Exhibit E, Quick, 136:1-5). KC Quality would use multiple rams to either drive a pier or complete a lift at a job site. (Exhibit E, Quick, 136:13-20). The rams were used to drive at least seven hundred and twenty (720) push pier during their first year of use. (Exhibit E, Quick 137:21-25; 138:1-8). KC Quality's ram that was allegedly used by Plaintiff on June 1, 2012 was used on prior jobs and did not fail before June 1, 2012. Plaintiff used the alleged subject ram in the days before June 1, 2012 on the same project, as well as in the morning of June 1, 2012, without incident. (Exhibit D, Simpson, 40:20-23). If the Magnum products were in-fact defective, they would have failed immediately or during the first times of usage. During all of these push pier installations,

both before and after June 1, 2012, no injury was reported nor any failure of the Magnum products by KC Quality or any individual or entity.

Plaintiff, and his employer KC Quality, continue to purchase Magnum products. (Exhibit E, Quick, 67:13-15). No current employees of KC Quality have indicated to Kody Quick that they are either scared to use Magnum products, or that they have been injured using Magnum products. (Exhibit E, Quick, 67:16-24). Employee Michael Gilmore concurred that he has no reason to feel unsafe using Magnum products before or after June 1, 2012. (Exhibit G, Gilmore, 59:10-16). The record is devoid of a single fact indicating that the Magnum products were defective at or around June 1, 2012. Instead, Plaintiff's claims are simply operator error injuries masked as a product defect case. Simply, the material and uncontroverted facts in this matter demonstrate that the Magnum products have both an impressive, time-tested, and reliable track record. Plaintiff's employer, and Plaintiff's own friends and co-workers, continue to order, use, and install Magnum products up until the present day. Magnum is entitled to judgment as a matter of law because Plaintiff does not know what happened at the site on June 1, 2012; Magnum has no knowledge about an alleged defect or dangerous condition; Magnum was provided no notice of Plaintiff's alleged injuries; and there is no known defect evidence presented by Plaintiff.

C. Plaintiff is Unable to Bring Forward Evidence that Defendant Knew or Should Have Known about the Alleged Product Defect to Support his Negligence Claim

The elements of a negligence claim are: 1) a legal duty by the defendant to conform to a certain standard of conduct to protect others against unreasonable risks; 2) a breach of that duty; 3) a proximate cause between the conduct and the resulting injury, and 4) actual damages to the plaintiff's person or property. *Horn v. B.A.S.S.*, 92 F.3d 609 (8th Cir.1996) (citing *Hoover's Dairy, Inc. v. Mid -America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo.1985) (en banc)). Strict liability focuses upon the product itself, while negligence focuses on the conduct of the

manufacturer. *Spuhl v. Shiley, Inc.*, 795 S.W.2d. 573, 577 (Mo.App.1990); *Racer v. Utterman*, 629 S.W.2d. 387, 395 (Mo.App.1981). Key to the negligence analysis that the Defendant *knew or should have known* about the dangerous defect under the duty element, as Plaintiff alleges. Plaintiff alleges that Defendant failed to use the degree of care that an ordinarily careful and prudent corporation would use under the same or similar circumstance. (Doc. 1-1, ¶ 40).

Magnum incorporates by reference its deposition citations and arguments contained in the strict liability arguments and authorities section. *Infra* subsection B. Magnum products have no history of defect causing injuries to its users. Magnum has not received correspondence or complaints from other individuals, entities, or corporations indicating that its products are unsafe, dangerous, or defective. As further evidence demonstrating that Magnum did not have any knowledge or reason to know about this alleged defect in its products, Plaintiff waited five (5) years before bringing this alleged incident to Magnum's attention by filing a lawsuit. (Exhibit B, B. Dwyer, 28:17-20). Plaintiff, and his employer KC Quality, continue to order and use Magnum's products in the course and scope of their business. (Exhibit E, Quick, 67:13-15).

Plaintiff testified that he is unable to remember the June 1, 2012 incident. (Exhibit D, Simpson, 61:12-15). Plaintiff does not actually remember the pipe bending on June 1, 2012, as he was working alone. (Exhibit D, Simpson, 61:25, 62:1-4; 78:11-16). Thus, Plaintiff cannot articulate what Magnum should or could have known about an alleged dangerous defect, as Plaintiff is unable to articulate even the basic factual elements of his claim.

When looking at the conduct undertaken by Magnum pertaining to the testing and manufacture of its products, Magnum has numerous levels of testing and safety checks. Dr. Howard Perko (hereinafter "Dr. Perko") reviewed the designs of the products to make sure there are no structural deficiencies. (Exhibit A, Perko, 11:15-19). Dr. Perko has thirty (30) years of

experience while working at Magnum. (Exhibit A, Perko, 34:1-5). The Magnum products have been made the same way since 2000. (Exhibit A, Perko, 11:19-22). Aside from the independent testing completed by Briem Engineering and CTL Thompson, Inc., every contractor is testing the piers when he or she installs a pier. (Exhibit A, Perko, 28:17-21). The ram is purchased from a third-party vendor. (Exhibit A, Perko, 30:4-10). Testing was completed on the buckling capacity of the Magnum products. (Exhibit A, Perko, 31:8-9). There is a reduction of potential injury by using aluminum channels (Exhibit A, Perko, 48:7-14).

Dr. Perko has no knowledge of Magnum equipment binding or jamming (Exhibit A, Perko, 50:1-3). Dr. Perko is not aware of misalignment or bending stresses or tilting with Magnum products (Exhibit A, Perko, 50:19-22). Dr. Perko has no knowledge of any bending in Magnum piers, where all signs would point to misalignments. (Exhibit A, Perko 50:25, 51:1-7). There is not possibility of misalignment if the shoe is properly attached to the bracket tube and the safety bolt is used. (Exhibit A, Perko, 53:13-20). Dr. Perko is not aware of any incidents in which pier or spacer pipe bent. (Exhibit A, Perko, 53:18-21). Dr. Perko is not aware of any time when the ram has broken off of bracket during operation. (Exhibit A, Perko, 53:22-25). Dr. Perko is not aware of any other incidents in which somebody was injured while using Magnum equipment. (Exhibit A, Perko, 55:21-24).

As further evidence, Magnum employee and sales manager, BJ Dwyer is not aware of any incidents in which a pier or a spacer piper has broken free of a bracket. (Exhibit C, B. Dwyer, Jr., 6:16-18; 47:17-20). BJ Dwyer is not aware of any incidence where someone has been injured (Exhibit C, B. Dwyer, Jr., 47:21-24). BJ Dwyer is not aware of a ram shoe ever breaking or the welds ever breaking. (Exhibit C, B. Dwyer, Jr., 49:20-22). BJ Dwyer is not aware of bent cylinders on pistons. (Exhibit C, B. Dwyer, Jr., 49:23-25). BJ Dwyer was never contacted about the June 1,

2012 incident (Exhibit C, B. Dwyer, Jr., 62:2-11). When reviewing the statements presented by Brian Dwyer, Dr. Howard Perko, and Brian Dwyer, Jr., the Court can reasonably conclude that Plaintiff will be unable to bring evidence demonstrating that Magnum knew or should have known about a dangerous defect, or its conduct did not rise to the appropriate standard of care.

III. CONCLUSION

Because Plaintiff will fail to bring forward evidence establishing that Magnum knew or should have known about the alleged defective and/or dangerous condition of its products, and that the subject Magnum products are not in a defective condition that renders the product unreasonably dangerous, Magnum is entitled to judgment as a matter of law.

WHEREFORE Defendant Magnum Piering, Inc. respectfully prays that the Court grant summary judgment in its favor on both of Plaintiff's strict liability product defect and negligence claims, and/or for such other and further relief that the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was E-Filed via the Court's electronic filing system, and a copy was served via email on December 21, 2018, to:

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