

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

Paul Rodriguez,	§	
	§	
Plaintiffs	§	
	§	
vs.	§	CIVIL ACTION H-07-1300
	§	
Jim O’Neal Distributing, Inc., a/k/a	§	
O’Neal Distributing	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Before the court are defendant Jim O’Neal Distributing, Inc.’s motion for summary judgment (Dkt. 15) and plaintiff Paul Rodriguez’s motion for partial summary judgment (Dkt. 17). Upon consideration of the summary judgment record, arguments of counsel, and applicable legal authorities, it is recommended that both motions be denied.

This is a personal injury case in which plaintiff Paul Rodriguez alleges that he suffered injuries to his toe while wearing a motorcycle boot. Rodriguez claims that O’Neal participated in the design of the boot and is therefore liable under Texas Civil Practice and Remedies Code § 82.003(a)(1). Jim O’Neal, however, denies liability because it advised on only the exterior design of the boot, such as choosing buckles, colors, and labels.

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th

Cir. 2001). Dispute about a material fact is “genuine” if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001). “An issue is material if its resolution could affect the outcome of the action.” *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002). The movant need not introduce evidence to negate the opponent’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

On this record, there is a factual dispute concerning whether O’Neal’s participation in the design of the boots is sufficient to warrant liability under Texas Civil Practice and Remedies Code Section 82.003(a)(1).¹ Rodriguez submits an agreement between O’Neal and Madiff, the manufacturer of the boots, as evidence that O’Neal participated in the design of the boots. Rodriguez claims that the agreement required Madiff to manufacture the boots in accordance with materials, design, tolerances, and or/quality parameters set forth by O’Neal. O’Neal, however, alleges that it only advised Madiff on the outward appearance of the boot and Rodriguez was injured by the interior the boot. The presence of fact issues concerning O’Neal’s participation in the design of the boot and the proximate cause of Rodriguez’s injuries render summary judgment for either side inappropriate at this time.

For these reasons, it is recommended that both motions for summary judgment be denied. The parties have ten (10) days from receipt of this Memorandum and

¹Section 82.003(a)(1) provides that “a seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant can prove that the seller participated in the design of the product.”

Recommendation to file written objections. *See* FED. R.CIV.P. 72. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error.

Signed at Houston, Texas on August 31, 2007.


Stephen Wm Smith
Stephen Wm Smith
United States Magistrate Judge