NO. 26,836-B

SHARON LEE	**§**	**IN THE DISTRICT COURT OF**
V.	**§**	**LIMESTONE COUNTY, TEXAS**
PARKVIEW REGIONAL HOSPITAL, INC.; PROVINCE HEALTHCARE COMPANY; CHARLES RONALD SMITH, D.O.; ALPHA OMEGA LABS; GREG CATON; HERBOLOGICS, LTD.; AND LUMEN FOOD CORP.	**§**	**87TH JUDICIAL DISTRICT**

DEFENDANT LUMEN FOOD CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Lumen Food Corp., hereinafter referred to as Movant, and moves for Partial Summary Judgment as to the action filed against it by Plaintiff, Sharon Lee, in the above entitled and numbered cause, and in support thereof shows the Court as follows:

I. Grounds

Movant is entitled to judgment as a matter of law under Tex. Rule Civ. Proc. 166a(i) on the ground that there is no evidence of one or more essential elements of the claims alleged against Movant on which the Plaintiff would have the burden of proof at trial. Additionally, Movant is entitled to partial summary judgment as there is no material issues of fact with respect to certain of the plaintiff's causes of action as set forth below.

II. Facts

This lawsuit arises out of a claim by the Plaintiff that adhesions found in her abdomen after a partial hysterectomy were caused by a product sold to the Plaintiff's doctor, the Co-Defendant, Dr. Charles Ronald Smith.

III. Plaintiff's Causes of Action

In order to prevail on the above claims against Movant, Plaintiff will have the burden of proof at trial on the following elements:

1. NEGLIGENCE

A. Duty

The Plaintiff must establish the Defendant had a legal duty. Graff v. Beard 850 SW2nd 918, 919 (Tex 1993). The duty of the supplier of products is somewhat limited with respect to the general public. Such a supplier has a duty to use reasonable care in warning foreseeable ultimate users of dangers inherent in products that are known or which should have been known to the supplier and that are not readily apparent to the ultimate user of the product. Bean v. Baxter Healthcare Corp., 965 SW 2nd 656,661-2 (Houston [14th Dist.]) (1998 no pet.).

Here the product was sold to a physician. Nowhere is there any evidence of any promotion of the product for use intra-abdominally. Additionally, the buyer, a physician, is or least should be aware of any potential problems with the use of the product. The plaintiff's own expert witness, Dr. Snodgrass has testified to such effect. See Exhibit 3.

B. Breach of Duty

Plaintiff must establish that the Defendant breached its legal duty. In this instance the standard of care is the ordinary care. See Mt. Pleasant ISD v. Lindburg, 766 S.W.2d 208 (Tex. 1999).

C. Proximate Cause

The Plaintiff must establish the Defendant's breach of duty proximately caused the Plaintiff's injury, if any. Proximate cause includes both (1) cause in fact, and (2) foreseeability. D. Houston, Inc. v. Love, 92 S.W.3d at 450, 454 (Tex. 2002).

D. Damages

The Plaintiff must prove that he or she has sustained damages.

2. DTPA

A. Plaintiff must be a consumer.

Plaintiff must establish its status as a consumer. Eckman v. Centennial Savings Bank , 784 S.W.2d 672, 674 (Tex. 1990). This requires three elements: (1) the plaintiff was a person listed in Section 17.45 (4); that (2) plaintiff sought or acquired, by purchase or lease; and (3) goods or services.

In this case, it is clear that the plaintiff did not seek the goods in question. The plaintiff testified that she did not seek or acquire the goods in question. Her doctor did. See Exhibit 1. See, Nast v. State Farm, 82 S.W.3d 114, 123 (Tex. App. – San Antonio 2002, no pet.). Therefore, the question becomes whether or not the plaintiff acquired goods as required by the DTPA. When someone other than the plaintiff acquired the goods or services, the plaintiff must establish the primary purpose for the acquisition was to benefit the plaintiff. Bohls v. Oakes, 75 S.W. 3d 473, 479 (Tex. App. – San Antonio 2002, pet. den.).

The DTPA does not define the term "purchase." Therefore, you must look to other sources for its meaning. Purchase is defined as the "transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration." See, Hall v. Beene, 582 S.W.2d 263, 265 (Tex. App. – Beaumont 1979, no writ.) Goods or services are not "purchased" when they are provided gratuitiously. Rayford v. Maselli, 73 S.W.3d 410, 411 (Tex. App. – Houston [14th Dist.] 2002, no pet.). There is no evidence in this case that the plaintiff was charged for the use of the product in question.

*** B. Defendant can be sued under the DTPA.

C. There must be wrongful acts.

D. Producing cause.

E. Damages.

3. BREACH OF EXPRESS WARRANTY

A. Defendant sold or leased goods to the Plaintiff.
B. Defendant made affirmative representation(s).
C. Representations were the basis of the bargain.
D. There was a breach.
E. The Plaintiff gave notice to the Defendant of the breach.
F. Injury resulted.

4. BREACH OF IMPLIED WARRANTY

A. Defendant sold or leased goods to Plaintiff.
B. Goods were unmerchantable.
C. Plaintiff gave notice of breach to Defendant.
D. Injury.

5. FRAUDULENT CONCEALMENT/MISREPRESENTATION

A. Defendant made representation to Plaintiff must be false.
B. Made knowingly, recklessly.
C. Intent that Plaintiff rely.
D. Reliance.
E. Injury.

6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Defendant's conduct must be intentional or reckless.

Texas Farm Bureau Mutual Insurance Company Ins. Co. v. Sears, 84 S.W.3d 604, 610 (Tex. 2002). The Defendant's conduct is intentional if the Defendant either desires to cause the consequences of its act or believes the consequences are substantially certain to result from its act. Toles v. Toles, 45 S. W. 3d 252, 259 (Tex. App. - Dallas 2001, pet. den.). The intended consequences of the Defendant's conduct must be emotional distress, not physical injury. Standard Fruit and Vegetable Company v. Johnson, 985 S.W.2d 62, 67-68 (Tex. 1998).

The Defendant's conduct is reckless if the Defendant knows or has reason to know of facts that create a high degree of risk of harm to another, and deliberately proceeds to act in conscience disregard of or indifference to that risk. Twyman v. Twyman, 855 S.W.2d 619, 624 (Tex. 1993). Once again, the primary risk created by the reckless conduct must be emotional distress, not physical injury. Standard Fruit at 63. In Standard Fruit, a drunk truck driver accidently struck a pedestrian in a parade. The truck driver was found not liable for intentional infliction of emotional distress because of primary risk of reckless driving is physical injury, not emotional distress. Standard Fruit at 63.

B. Defendant's conduct must be extreme and outrageous.

In order to prove an action for intentional infliction of emotional distress, Plaintiff must establish that Defendant's conduct was extreme and outrageous. Morgan v. Anthony, 27 S.W.2d 928, 929 (Tex. 2000). Whether the conduct is extreme and outrageous is a question of law. Bradford v. Vento, 48 S.W.3d 749, 758 (Tex. 2001). Only if the judge determines that reasonable people would disagree as to whether conduct is extreme and outrageous does the jury decide the issue. Texas Farm Bureau v. Sears, 844 S.W. 3d at 610.

A Plaintiff must prove conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a

civilized community." Texas Farm Bureau v. Sears, 844 S.W. 3d at 610.

Simply because a Defendant's conduct is tortuous or otherwise wrong does not make it extreme and outrageous. Bradford v. Vento, 48 S.W.3d at 758. Generally, conduct is considered extreme and outrageous when a recitation of the facts to an average member of the community would lead that person to exclaim "outrageous!" A. H. Belo Corporation v. Corcoran, 52 S.W.3d 375, 383 (Tex. App. - Houston [1st Dist.] 2001, pet. den.). In determining whether conduct is extreme and outrageous, courts often consider: (1) the Defendant's course of conduct; (2) the context of the parties' relationship; (3) whether the Defendant knew the Plaintiff was particularly susceptible to emotional distress; and (4) the Defendant's motive or intent.

C. Directed at Plaintiff.
D. Proximate cause.
E. Severe emotion distress.

In addition, the plaintiff has alleged she is entitled to the benefits of res ipsa loquitur which consists of the following elements:

A. The character of the injury must be such that it would not have occurred in the absence of negligence.
B. The instrumentality that caused the injury is shown to have been under the sole control of the Defendant.
Not only is there no evidence of this element, the evidence is to the contrary. See Exhibits 1 and 2.

IV. Elements on Which There is No Evidence to Support Plaintiff's Claims

Plaintiff has produced no evidence on the following elements of the Plaintiff's causes of action:

1. NEGLIGENCE
   A. Duty

2. DTPA
   A. Plaintiff must be a consumer.

3. BREACH OF EXPRESS WARRANTY

   A. Defendant sold or leased goods to the Plaintiff.
   B. Defendant made affirmative representation(s).
   C. Representations were the basis of the bargain.
   D. There was a breach.

E. The Plaintiff gave notice to the Defendant of the breach.

4. BREACH OF IMPLIED WARRANTY

A. Defendant sold or leased goods to Plaintiff.
B. Goods were unmerchantable.
C. Plaintiff gave notice of breach to Defendant.

5. FRAUDULENT CONCEALMENT/MISREPRESENTATION

A. Defendant made representation to Plaintiff must be false.
B. Made knowingly, recklessly.
C. Intent that Plaintiff rely.
D. Reliance.

6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

B. Defendant's conduct must be extreme and outrageous.
C. Directed at Plaintiff.
D. Proximate cause.
E. Severe emotion distress.

With respect to res ipsa loquitor:

B. The instrumentality that caused the injury is shown to have been under the sole control of the Defendant.

V. Adequate Time for Discovery

There has been adequate time for discovery in this case. The Scheduling Order in this case calls for dispositive motions to be filed by February 9, 2004.

Plaintiff has had more than an adequate time to conduct discovery in this case. However, as to date, Plaintiff has produced no evidence on the elements listed in Section 4 of this motion that create a fact issue as to the Movant's liability.

VI. Evidence

In support of this Motion, Movant relies on the pleadings and discovery filed with this Motion and on file among the papers in this suit, the annexed affidavit of Gerald L. Bolfing together with the exhibits attached thereto and same are incorporated herein by reference.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Movant, Lumen Food Corp., requests that this matter be set for hearing, with notice to all parties, and that upon hearing Movant be granted a Partial Summary Judgment that Plaintiff takes nothing from Movant; for costs and for such other and further relief, at law and in equity to which Movant may show itself justly entitled.

Respectfully submitted,

FULBRIGHT WINNIFORD,
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BY: _____
GERALD L. BOLFING
State Bar No. 02574850

ATTORNEYS FOR DEFENDANT,
LUMEN FOOD CORP.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was this day forwarded in accordance with the Texas Rules of Civil Procedure to all counsel of record, on this 9th day of February, 2004 by hand delivery.

_____
GERALD L. BOLFING

NO. 26,836-B

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STATE OF TEXAS §

COUNTY OF McLENNAN §

AFFIDAVIT

Before me, the undersigned authority, personally appeared Gerald L. Bolfing, who, being by me duly sworn, deposes as follows:

"My name is Gerald L. Bolfing. I am over 18 years of age, have never been convicted of a felony and am competent in all respects to make this affidavit.

I am a member of the law firm of Fulbright Winniford, P.C. This law firm represents Lumen food Corp. in the above styled litigation.

The attached pages, designated Exhibits 1, 2, and 3 respectively, and incorporated herein by reference, are true and correct copies of the depositions of the following persons:

1. Sharon Lee, the plaintiff.

2. Charles R. Smith, D.O., defendant.

3. Wayne Snodgrass, M.D., plaintiff's expert witness.

The foregoing is true and correct to my personal knowledge.

Further affiant sayeth not."

_____
GERALD L. BOLFING

SWORN TO AND SUBSCRIBED before me on the 9th day of February, 2004.

_____
Notary Public in and for the State
of Texas

_____
Printed Name of Notary
My commission expires: _____