***This decision has been edited from the original.***

148 A.D.2d 851
Supreme Court, Appellate Division, Third Department, New York.

Dora TRIVINO, Individually and as Parent and Natural Guardian of Erika Trivino, an Infant, Appellant–Respondent,
v.
JAMESWAY CORPORATION, Defendant and Third–Party Plaintiff–Respondent–Appellant;
Megas Manufacturing, Inc., Third–Party Defendant and Fourth–Party Plaintiff–Respondent;
Avtex Fibers, Inc., Fourth–Party Defendant–Respondent.

March 23, 1989.

Before KANE, J.P., and CASEY, MIKOLL, YESAWICH and MERCURE, JJ.

**Opinion**

****124** CASEY, Justice.

Cross appeals from an order of the Supreme Court (Williams, J.), entered December 16, 1987 in Sullivan County, which partially granted defendant's motion for summary judgment dismissing the complaint, dismissed the third-party and fourth-party complaints . . . .

Plaintiff purchased cosmetic puffs and children's pajamas from a store owned by defendant in the Town of Liberty, Sullivan County, to make a Halloween costume for her eight-year-old daughter similar to one she had seen in a magazine. Plaintiff glued the cosmetic puffs all over the exterior of the pajamas, creating the appearance of a coat of white fur. While wearing the costume, plaintiff's daughter leaned over the electric stove in her house and the costume ignited, causing severe permanent injuries to the child. Plaintiff, individually and on behalf of her daughter, sued defendant; defendant impleaded the manufacturer of the cosmetic puffs, who in turn impleaded the manufacturer of the rayon fibers used in the puffs.

Defendant moved for summary judgment dismissing the complaint and all cross claims against it. . . . Supreme Court granted defendant's motion in part by dismissing plaintiff's claims based upon the cosmetic puffs . . . . Plaintiff and defendant have cross-appealed.

Plaintiff's cause of action against defendant based upon the cosmetic puffs is based upon the theory that defendant breached its duty to warn customers of the flammable nature of the cosmetic puffs. Supreme Court held that defendant had no duty to warn in these circumstances since plaintiff's use of the cosmetic puffs was an unforeseeable misuse. While we agree that plaintiff's use of the cosmetic puffs was a misuse in the sense that it was outside the scope of the apparent purpose for which the puffs were manufactured, we cannot agree that plaintiff's misuse was unforeseeable as a matter of law. There is a duty to warn of dangers associated with reasonably foreseeable misuse (*McLaughlin v. Mine Safety Appliances Co.*, 11 N.Y.2d 62, 226 N.Y.S.2d 407, 181 N.E.2d 430; *Howard Stores Corp. v. Pope*, 1 N.Y.2d 110, 150 N.Y.S.2d 792, 134 N.E.2d 63). "The question of foreseeability is one for the court ***853** when the facts are undisputed and but one inference can be drawn; it is for the jury when varying inferences may be drawn" (*Juiditta v. Bethlehem Steel Corp.*, 75 A.D.2d 126, 132, 428 N.Y.S.2d 535, citing *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 345, 162 N.E. 99). As we said in *Vinogradov v. Clicquot Club Co.*, 55 A.D.2d 489, 492, 391 N.Y.S.2d 18), "[f]oreseeability depends upon the peculiar facts and circumstance of each case". Based upon the peculiar facts and circumstances of this case, we are of the view that varying inferences may be drawn as to whether plaintiff's use of the cosmetic puffs was reasonably foreseeable and, therefore, the issue is for the jury, not the court (*see, Heller v. Encore of Hicksville*, 53 N.Y.2d 716, 439 N.Y.S.2d 332, 421 N.E.2d 824, *revg.* 76 A.D.2d 917, 429 N.Y.S.2d 258; *see also, Holtslander v. Whalen & Sons*, 70 N.Y.2d 962, 525

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N.Y.S.2d 793, 520 N.E.2d 512, *modfg.* 126 A.D.2d 917, 510 N.Y.S.2d 937 on concurring in part and dissenting in part mem of Levine, J.; *Cruz v. New York City Tr. Auth.*, 136 A.D.2d 196, 526 N.Y.S.2d 827).

Defendant also relies upon the principle that "[t]here is no duty to warn against a condition that can be readily observed by the reasonable use of senses" (*Olsen v. State of New York*, 30 A.D.2d 759, 291 N.Y.S.2d 833, *affd.* 25 N.Y.2d 665, 667, 306 N.Y.S.2d 474, 254 N.E.2d 774). Nor is there any "necessity to warn a customer already aware—through common knowledge or learning—of a specific hazard" (*Lancaster Silo & Block Co. v. Northern Propane Gas Co.*, 75 A.D.2d 55, 65, 427 N.Y.S.2d 1009). Plaintiff apparently ****125** believed the cosmetic puffs were made of cotton, and defendant contends that since the danger of cotton burning when exposed to flame is open and obvious, there was no need to warn plaintiff about that danger (*see*, *Brech v. J.C. Penney Co.*, 8th Cir., 698 F.2d 332, 334). In *Heller v. Encore of Hicksville* (*supra* ), however, the Court of Appeals reversed the Second Department's holding that, as a matter of law, the defendant hairdresser was not negligent in failing to warn plaintiff not to smoke while undergoing a hair treatment which involved the placement of absorbent cotton in the plaintiff's hair. The Second Department's holding was based, in part, on the evidence in the record which revealed that the cotton used in the process was no more flammable than ordinary absorbent cotton and that the injured plaintiff knew that absorbent cotton was flammable. Accordingly, it is apparent that the Court of Appeals has rejected an argument virtually the same as that advanced by defendant herein. It is also significant that in the case at bar the cosmetic puffs were not made of cotton, as plaintiff thought, but were 100% rayon which, according to evidence in the record, has different characteristics than cotton. For these reasons, we conclude that defendant is not entitled to summary judgment on the issue of its failure to warn in regard to the cosmetic puffs. Since the sole ***854** basis for the dismissal of the third-party and fourth-party complaints was Supreme Court's ruling on defendant's motion for summary judgment against plaintiff, it follows that those complaints must be reinstated. . . .

Order modified, on the law, without costs, by reversing so much thereof as partially granted defendant's motion and dismissed the third-party and fourth-party complaints; motion denied in its entirety and the third-party and fourth-party complaints are reinstated; and, as so modified, affirmed.

KANE, J.P., and MIKOLL, YESAWICH and MERCURE, JJ., concur.

**All Citations**

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