

+

Lit
Cox
Court
Papers

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

WANDA GAIL COX,
Executrix of the Estate of
Michael Wayne Cox,

Plaintiff,

v.

GEORGIA GULF CORPORATION,
et al.,

Defendants.

RECEIVED
UEC 13 1988

12-9-88

CIVIL ACTION NOS.
8:88-1399-3 (Wrongful Death Action)
8:88-1400-3 (Survival Action)

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Defendants, Georgia Gulf Corporation, Conoco, Inc., Occidental Chemical Corporation, Union Carbide Corporation, Occidental Electrochemicals Corporation, Tenneco, Inc., Tenneco Oil Company, and the B.F. Goodrich Company, have moved the court for an order granting summary judgment. The defendants' motion for summary judgment is based on the grounds that they had no duty to warn the plaintiff's decedent of potential cancer hazards associated with the product they supplied for the reason that the decedent's employer, Stauffer Chemical Company, was a major manufacturer, supplier, and knowledgeable user of PVC resin.

The plaintiff contends that the defendant suppliers are liable for failure to warn Michael Wayne Cox of the potential hazards of residual VC in PVC resin because it has not been shown that the decedent's employer knew of these hazards. This claim is clearly unsupportable in the face of the undisputed facts of record that Stauffer was a sophisticated user of PVC resin.

UCC 079745

X

Stauffer was a major PVC manufacturer, supplier, and fabricator. It has been operating PVC fabrication plants since the 1930's. Stauffer also operated a PVC resin plant in Delaware City, Delaware, beginning in 1966, which produced 160 million pounds of PVC a year. Twenty percent of the resin it produced was consumed by its own fabrication plants, including the plant in Anderson, with the rest sold to customers on the open market. (Exhibit 1(B), p. 13)

Stauffer representatives participated in the OSHA hearings which set the mandatory VC warnings, labels, and exposure limits. (Exhibit 1(A)). After much research, Stauffer submitted to the Department of Labor its own proposed permanent standards for the manufacture of PVC resin products. (Exhibit 1(B)). The two individuals directly responsible for the health and safety of Michael Wayne Cox, the corporate medical director and the Anderson plant manager, both admitted extensive knowledge of the potential hazard associated with residual VC in PVC resin and products. The corporate medical director, Dr. Herbert Northrop, kept abreast of medical literature regarding the health risk of residual VC and passed that information on to Stauffer fabrication plants, including the Anderson plant where Cox was employed.

The Anderson plant manager, Clifford Gandis, was also thoroughly familiar and knowledgeable about potential hazards associated with VC in the plant's fabrication processes. That knowledge was acquired by him through his 25 years in the PVC industry, through the corporate office, through material safety data sheets regularly received from suppliers, and through publications of the PVC trade association, The Society of the Plastics Industry. He was also aware of the OSHA regulations that set the permissible standards of exposure to VC. The exposure standards provided the most protective measures that could have been afforded to fabrication workers, like Cox. (See, Plaintiff's Response Brief, Exhibit D, p. 35,893).

X

The applicable law regarding the defendants' duty to warn was stated in *Goodbar v. Whitehead Brothers*, 591 F. Supp. 552 (W.D. Va. 1984), *aff'd*, *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985) and *Higgins v. E. I. DuPont deNemours & Co., Inc.*, 671 F. Supp. 1055 (D. Maryland 1987): When an employer is knowledgeable as to dangers associated with a product, the suppliers can reasonably rely on the employer to protect his employees. That is, when the supplier has reason to believe that the purchaser of the product will recognize the dangers associated with the product, no warnings are mandated.

Contrary to plaintiff's assertions, Cox was aware of the potential cancer hazard associated with PVC resin. Cox testified that he saw and read the cancer hazard warnings on the bags of PVC. In fact, he stated that he never saw bags which did not contain a cancer warning. (Exhibit 2).¹ The plaintiff contends that the warning should have been detailed and highly specific to Cox's situation. That is, the warning should have specifically stated that there was a cancer hazard from residual VC monomer released from the film made from PVC resin while processing that film through a laminating machine. Clearly, requiring such a warning is ridiculous. To provide such a warning would require each of the dozen or so outside suppliers to visit the Anderson plant to monitor each of the numerous operations in the Stauffer plant (and re-monitor each time a change in processing occurs) with a view to determining the level, if any, of residual VC exposure involved in each operation. Then, each supplier would have been required to communicate its own long, detailed, operation-by-operation warning in place of the required OSHA warning, and monitor Stauffer management's communication of such duplicative, confusing, and possibly inconsistent warnings to each of Stauffer's employees, who like Cox, would not routinely come in contact with labelled containers of PVC resin.

¹This Exhibit is being offered for the purpose of this motion only. The defendants are not in any manner stipulating to or admitting the admissibility of the Cox deposition for any other purpose.

Stauffer's PVC fabrication processes included calendering, extrusion, printing, coating, laminating, and pressure sensitive adhesive applications. Their products include flexible and rigid forms, sheetings, and coated fabrics. (Exhibit 1(B), p. 13). It is untenable to require product suppliers to tailor specific warnings with respect to each of these varied processes, not only for Stauffer, but for each of their industrial customers.

Plaintiff's suggested warning requirement is totally unsupported by any of the authorities cited by plaintiff and is at war with common sense. For obvious reasons, no court or regulatory agency has required that a product supplier devise hundreds or thousands of variations of a product hazard warning, tailored to each of the multitudinous industrial processes in which the product is used.

In fact, in the case of the particular product involved in this case, OSHA specifically considered and rejected the possibility of a more detailed warning requirement. On page 39,895, the preamble to the permanent OSHA VC standard, which plaintiff attaches as Exhibit D to her response memo, OSHA explains the rationale for requiring a short and direct warning:

The proper application of most protective measures requires an amount of training and indoctrination that cannot easily be conveyed on a sign or label. Also, the variety of measures that could be prescribed would result in an 'unwieldy or excessively detailed legend.' Consequently, the required message on signs and labels will not include information on precautions, relevant systems, etc. The addition of suitable information by the employer would be permitted, providing that it does not detract in any way from the required statement. (emphasis added).

As the language quoted above makes clear, the OSHA-prescribed warning which the defendants provided, was established in 1974 (five years prior to Cox's employment with Stauffer), not as a minimum requirement, but rather as the only permissible warning which could be provided by a PVC supplier. The type of warning advocated by plaintiff would have therefore been in violation of the regulatory requirement as an "unwieldy or excessively detailed legend."

The defendant suppliers clearly cannot be in the position of being damned if they do comply with regulatory requirements, and damned if they do not. In the context of the express warning language imposed for PVC products under the 1974 OSHA standard, defendants' warnings which complied with that standard, communicated to both Cox and the employer, must be deemed reasonable as a matter of law.

CASES CITED BY PLAINTIFF IN SUPPORT OF HER RESPONSE

The plaintiff urges the court to reject the sophisticated user/bulk supplier defense to the strict liability failure to warn claim. She attempts to dismiss as trivial two cases, one by a district court in the Fourth Circuit, which have recognized the sophisticated user defense to a strict liability claim. *Higgins v. E.I. DuPont deNemours*, 671 F. Supp. 1055 (D. Md. 1987); *Dendinger v. Chrysler Plastics Products Corp.*, C-87-7117 (slip op. W.D. Ohio 1977). The *Dendinger* case was decided on facts almost identical to those of the present case, and is deserving of the respect entitled to a federal district court opinion. The *Higgins* case, of course, specifically recognizes the applicability of the defense to strict liability failure to warn claims.

The plaintiff urges the court to ignore the sophisticated user/bulk supplier defense due to "overwhelming authority" in the Third and Ninth Circuits, a smattering of district court opinions, and a few state court opinions. The plaintiff relies upon *Russo v. Abex Corp.*, 670 F. Supp. 206 (E.D. Mich. 1987) to support the proposition that the sophisticated user defense is not available to bulk suppliers. The court in *Russo* specifically pointed out that it is necessary to distinguish between suppliers of asbestos-containing products and bulk suppliers of raw asbestos. The suppliers of asbestos in its bulk raw form, as opposed to suppliers of products on which labels could be placed, could not have given a warning that would have reached the ultimate users. The court conceded that the bulk suppliers would be entitled to assert the sophisticated user defense. The *Russo* court withheld allowing the sophisticated user defense as applied to bulk supplier defendants because "the facts and circumstances regarding defendants' delivery of asbestos to the employers here

X

has not yet been determined." *Id.* at 209. However, in the instant case, the facts and circumstances of defendants' bulk delivery of PVC resin to Stauffer are undisputed. The court cited *Goodbar v. Whitehead Brothers.*, 591 F. Supp. 552 (W.D. Va. 1984) *aff'd*, *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985), for the proposition that when a supplier delivers in bulk -- unpackaged railroad car lots or truckloads -- the employer would be in a better position to warn since the supplier had no packages on which to place warnings and no direct access to employees. *Russo*, 670 F. Supp. at 209.

It is interesting to note that plaintiff implicitly recognizes, by failing to discuss, the fact that it was not feasible for the defendant suppliers to have warned Cox because of the way the bulk PVC resin was shipped, stored and used in the Anderson plant. By the time the resin reached Cox, it was already processed into a film. Plaintiff also ignores the fact that the bags of PVC resin were labelled with a warning, a OSHA-mandated cancer warning of which the decedent was aware.

Several of the cases relied upon by the plaintiff apply strict liability theories because the product in question was defective due to the defendants' failure to warn. "This type of defect does not technically involve a defect in defendants' product. Rather, it involves the determination that the product is not safe in the absence of adequate warnings of the dangers inherent in its use." *Menna v. Johns-Manville Corp.* 585 F. Supp. 1178, 1183 (D. N.J. 1984). These cases involved a complete failure to warn, including warnings directed to the employer. In addition, several cases have recognized that the imposition of liability under strict liability principles will not attach if the giving of warnings is infeasible or economically prohibitive such as when a bulk supplier has no packages on which to place warning labels and has no direct access to employees. *Brown v. Caterpillar Tractor Co.*, 741 F.2d 656 (3d Cir. 1984) (defective bulldozer); *Russo*, 670 F. Supp. at 209; *Menna*, 585 F. Supp. at 1184; *cf. Whitehead v. St. Joe Lead Co., Inc.*, 729 F.2d 238 (3d Cir. 1984) (warning labels would have been feasible and inexpensive).

X

Plaintiff mischaracterizes "bulk" supplier in at least two of the cases cited to support its proposition that the sophisticated user defense is not available for bulk suppliers. In both *Neal v. Carey Canadian Mines*, 548 F. Supp. 357 (E.D. Penn. 1982) *aff'd*, *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985) and *Hammond v. North American Asbestos Corp.*, 454 N.E. 2d 210 (Ill. 1983), raw asbestos was supplied in individually packaged bags which were opened and used by the plaintiff's employees. Defendants could have placed warning labels on the bags, but did not do so. While the defendants in these cases supplied raw asbestos, they did not supply in "bulk", that is, unpackaged railroad car lots or trucks. See *Goodbar*, 591 F. Supp. at 552. In *Whitehead v. St. Joe Lead Company, Inc.*, 729 F.2d 238 (3d Cir. 1984), the supplier did not warn the employer at all. *Jackson v. Coast Paint and Laquer Co.*, 499 F.2d 809 (9th Cir. 1974), was limited to its specific facts. The case involved burns to employees which resulted from the igniting of paint fumes. The court found that the paint was sold in individual cans which could have been labelled with adequate warnings. The court found that the manufacturer/supplier had a duty under § 402A to warn the ultimate consumer. Part of this finding was based on the fact that due to the nature of the product, a warning to the ultimate consumer could readily be given.

Olencki v. Mead Chemical Co., 507 A.2d 803 (N.J. Supp. 1986) involved the supplying of a chemical developer in small bottles that could have included a warning label. In *Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893 (Penn. 1975) (helicopter crash), the sophisticated user defense was not raised although this was a 402A strict liability case. Plaintiff's reliance on *Todalen v. United States Chemical Co.*, 424 N.W.2d 73 (Minn. App. 1988) to support its proposition concerning the sophisticated user defense in relation to strict liability is misplaced in that *Todalen* is a tort action for negligence.

The sophisticated user/bulk supplier defense is entirely appropriate in both strict liability and negligent failure to warn cases. *Higgins*, 671 F. Supp. at 1060. Contrary to plaintiff's assertion, the Fourth Circuit did not reject the sophisticated user/bulk supplier defense in *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985). Rather, the Fourth

X

Circuit simply held in *Oman* that the facts did not give rise to the sophisticated user/bulk supplier defense. In *Oman*, the products were in the form of packages of asbestos rope, cloth, sheets, sections or cement. *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981) at 246. The *Oman* court simply held that the burden placed on the manufacturers to place a warning on these packages was not great. *Oman*, 764 F.2d at 233.

CONCLUSION

There can be no dispute that Stauffer, the decedent's employer, had extensive knowledge of the potential cancer hazards of residual VC in both its production and fabrication plants. It has been shown that this knowledge was possessed by the two individuals with direct responsibility for insuring the health and safety of the Anderson fabrication plant workers, including Mr. Cox. Stauffer received this knowledge from a variety of sources, including material safety data sheets received from its various suppliers.

Clearly, the defendants had no duty under any theory of liability to provide warnings of potential hazards that were already known. Therefore, there is no genuine issue of material fact and these defendants are entitled to summary judgment as a matter of law.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART

By: Mary Lou Hill
Donald A. Cockrill
Mary Lou Hill

Attorneys for Defendants

December 9, 1988

One Thousand East North Street
Post Office Box 2757
Greenville, South Carolina 29602
(803) 242-1410