

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 84-7854

Herman A. Dendinger, et al	)	<u>MEMORANDUM IN SUPPORT OF MOTION</u>
	)	<u>OF DEFENDANT SHINTECH, INC.</u>
	)	<u>FOR SUMMARY JUDGMENT.</u>
Plaintiffs	)	
vs.	)	Ellis F. Robinson (7425)
	)	Attorney for Defendant,
Chrysler Plastic Products	)	Shintech, Inc.
Corporation, et al.,	)	Ritter Boesel, Robinson & Marsh
	)	610 United Savings Building
Defendants	)	Toledo, Ohio 43604
	)	(419) 241-3213

INTRODUCTION

The Plaintiffs in their Complaint allege that Herman A. Dendinger (Dendinger) was employed by Chrysler Plastic Products, Inc. (Chrysler), during the periods of August 9, 1968 to October 1980 (Paragraph 4, First Amended Complaint).

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During the period of his employment it is alleged that Dendinger was exposed to unsafe levels of carcinogenic substances "including polyvinyl chloride resin (hereinafter referred to as PVC) and vinyl chloride monomer" (hereinafter referred to as VCM) as a result of which he received serious bodily injury.

Although the language of the First Amended Complaint appears to indicate carcinogenic substances other than PVC and VCM, in fact, the only claims thus far made in the case relate to PVC and VCM and the only product supplied by Shintech to Chrysler was PVC which contains small quantities of VCM.

From the discovery response made by this Defendant as well as the other Defendants, certain facts are uncontroverted: (1) PVC contains VCM. (2) VCM has for a number of years been known as a cancer suspect agent. (3) Chrysler was fully aware of the cancer hazards of PVC and VCM at least as early as 1974, (4) Shintech made shipments of PVC to Chrysler during the period of Dendinger's employment in 1977, 1979 and 1980, (5) Shintech gave Chrysler written warnings of the cancer suspect character of its PVC shipments. Based upon these facts Shintech's motion for summary judgment should be granted for the reasons set forth below.

STATEMENT OF FACTS

During the 12 year period of Dendinger's employment Shintech made several bulk shipments of PVC.

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Each bill of lading for PVC shipped by Shintech to Chrysler stated:

"Polyvinyl Chloride Contains Vinyl Chloride
Vinyl Chloride Is A Cancer-Suspect Agent"

In addition, Shintech placed at the unloading aperture of each rail car shipment a warning which states: Polyvinyl Chloride contains Vinyl Chloride. Vinyl Chloride is a cancer suspect agent. (Shinetch Interrogatory 14, Response to Request for Production 11(c)).

Shintech's warnings were not singular. Similar warnings were given by other PVC suppliers, as shown by their answers to interrogatories: Uniroyal as early as April 1, 1978, Conoco from 1976 through 1979, Diamond Shamrock, 1974 to 1982. In addition, in 1974 Firestone, B. F. Goodrich and Diamond Shamrock each wrote special letters to Chrysler warning that PVC is a cancer suspect agent. Copies of these letters were produced by Chrysler in response to Plaintiffs First Set of Interrogatories No. 8.

Not only did Chrysler receive warnings of the VCM hazard from the suppliers, it was already well aware of the risk to its employees. In May of 1974 OSHA issued proposed standards for PVC exposure, a copy of which is included in Chrysler's response to request for production of documents No. 9. In April of 1974 Chrysler instituted a monthly survey program of vinyl chloride gas (VCM) and in a report of that program dated November 11, 1974 described warnings to be used in its plant which stated that PVC contains VCM which is a cancer-suspect agent. (Chrysler Response to Request for Documents No. 24). In addition Chrysler had prepared and distributed to its employees a notice describing the hazards of both PVC and VCM in a bulletin entitled: "What Every Employee Should Know About Polyvinyl Chloride." This bulletin, although undated, was obviously prepared sometime after 1974 and before 1976. (Chrysler's Response to Request for Production of Document No. 13).

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It is clear from the record that not only had Shintech as well as other suppliers given specific warnings to Chrysler that PVC contains VCM which is a cancer suspect agent. It is also clear from the record that Chrysler was a sophisticated buyer of PVC and was well aware of the cancer hazard of this product to its employees.

STATEMENT OF LAW AND ARGUMENT

CHRYSLER HAD BEEN MADE AWARE OF THE DANGERS OF VCM AND PVC FROM BOTH THE ADEQUATE WARNING LABELS PROVIDED BY DEFENDANT SHINTECH AND FROM DETAILED INFORMATION FURNISHED BY OTHER MANUFACTURES WHO SUPPLIED CHRYSLER WITH THE CHEMICAL SUBSTANCES. CHRYSLER WAS WELL AWARE OF THE HAZARDS. THEREFORE, DEFENDANT SHINTECH HAD NO ADDITIONAL DUTY TO WARN CHRYSLER'S EMPLOYEES OF SUCH HAZARDS, AND IS NOT LIABLE FOR INJURIES SUSTAINED BY SUCH EMPLOYEES FOR FAILURE TO DO SO.

The basic issue in this case is whether a manufacturer of a known hazardous substance in bulk who supplies the substance to a customer can be held liable to an employee of that customer for injuries resulting from the use of the substance where the customer was fully aware of its hazards and the manufacturer gave adequate warnings to the customer of its hazards.

The manufacturer of many products used in an industrialized society frequently require large quantities of chemicals which are known to be hazardous. A list of such chemicals would include chlorine gas, sulfuric acid, hydrochloric acid, nitroglycerin and a large number of other chemically produced materials which may be less well known. Such a list could include, (PVC) which may not be generally known to be hazardous, but is clearly known in the industry to be a cancer suspect agent. Suppliers of these substances must necessarily rely upon the expertise and knowledge of their customer to properly handle the material and to use care to protect the general public and employees from the hazards these substances present, particularly where the customer is accustomed to use the product, has and would be expected to have sophisticated knowledge of this product and in fact had such knowledge.

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The law on this subject was discussed in detail in a case decided by the Supreme Court of Kansas, Younger v. Dow Corning Corporation, 202 Kan. 674 451 P.2d 177 (1969). That case involved an action by an injured employee of Beech-Aircraft Corporation, who in the course of his employment was required to spray an allegedly dangerous chemical compound on jig parts. The headnotes by the reporter and the court respectively are as follows:

1. If manufacturer of a product which is potentially hazardous to health gives adequate warning of such potential hazard by label or otherwise, to its immediate vendee, manufacturer has no additional duty to warn vendee's employees of such hazards, and is not liable in a negligence action to such employees for failure to do so.

2. Where industrial user defendants' chemical compounds had adequate warning from labels on product of the potential health hazards that might arise from using the products without ventilation or from breathing the vapors of such products over prolonged periods, manufacturers had no additional duty to warn user's employee of such hazards, and could not be held liable to employees in a negligence action for failure to do so.

3. Manufactures of chemical chemical compounds had ever right to anticipate that industrial user to whom products had been supplied would pass on manufacturers' warnings that products were potentially hazardous to health to employees who were assigned task of using products in their work, and that proper precautionary measures would be taken by user to make use of products safe for its employees, all in accordance with particular duty of user to do so.

Syllabus by the Court

The manufacturer of a product which is potentially hazardous to health and who gives adequate warning of such potential hazard, by label or otherwise, to its immediate vendee, an industrial user, has no additional duty to warn the vendee's employee of such hazards, and is not liable in a negligence action to such employee for failure to do so, upon the facts and circumstances set set forth in opinion.

In Adams v. Union Carbide Corporation, 737 F.2d 1453 (6th Circuit, 1984), the Plaintiff, an employee of General Motors Corporation, alleged that Union Carbide failed to adequately warn GMC employees of the dangerous propensities of a hazardous chemical supplied by Union Carbide. A Motion for Summary Judgment in favor of the supplier was granted and the decision was sustained on appeal. The Court of Appeals agreed with the Trial Court's finding that the suppliers discharges its duty to warn employees of the customer by relying on the customer to disseminate the warning given by the supplier to the customer.

Based upon the foregoing, it is clear that Shintech is free from any liability whatsoever. In accordance with the facts in the Younger case, Shintech gave an adequate warning to Chrysler of the presence of the hazardous substance and the character of the hazard by placing warnings on the shipments of PVC made. Furthermore, like the bulk manufacturer in Younger, Shintech had every right to rely on upon the expertise of its customer and anticipate that Chrysler, being well aware of the danger of PVC and VCM, would pass on the warnings to its employees especially since it was Chrysler's duty to do just that. Therefore, Shintech had no additional duty to warn Chrysler's employees of such hazards, and is not liable to Plaintiffs for failure to do so. It cannot be said that the warnings were not effective for the Exhibits supplied by Chrysler in Response to the Plaintiff's Interrogatories and Requests for Production of Documents clearly reveal that Chrysler had extensive knowledge of the character of the substance they were using and its possible hazard and in fact had acted upon this knowledge by warning and protecting it's employees. The adequacy of Chrysler's warning and safety program is a matter between Chrysler and its employees and is outside the control of the supplier.

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In Martinez v. Dixie Carriers, Inc., 526 F. 2d 457 (5th Circuit 1976) the widow of a shore-based worker, who was overcome by noxious fumes while stripping a barge brought an action against both the barge owner and the manufacturer of the hazardous petrochemical mixture that had been transported by the barge. The trial court concluded that the employer should bear 75 percent of the damages and the manufacturer of the petrochemical 25 percent. The manufacturer successfully appealed; the Appellate Court found that the entire liability rested with the employer. In the interest of brevity we quote two of the head notes prepared by the reporter.

"4. Where in view of limited marketing of petrochemical that had been transported by barge manufacturer could reasonably anticipate that only professionals familiar with precautions necessary for safe handling of benzene and similar petrochemical substances would come in contact with or otherwise handle barge cargo, stripping crew had been made aware of nature of liquid residue to be stripped from barge, warnings provided by manufacturer in form of benzene warning card and product identification card should have been adequate to apprise crew members of hazards and thus manufacturer was not liable for death of shore-based worker who was overcome by noxious fumes while stripping barge for negligent failure to warn.

7. In determining whether manufacturer was strictly liable for death of shore-based worker, who was overcome by noxious fumes while stripping barge, for lack of adequate warning, adequacy of manufacturer's warning could not be evaluated apart from knowledge and expertise of those who could reasonably be expected to use or otherwise come in contact with product that had been transported by barge as it proceeded along intended marketing chain, and thus manufacturer was entitled to rely on professional expertise of those who could reasonably be expected to come in contact with product and tailor warnings accordingly."

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Martinez emphasizes the rule that where employees who routinely handle hazardous chemicals and are made aware of the nature of the chemicals, then the bulk manufacturer is entitled to rely on the knowledge of the employees of the potential risk of the chemicals when giving warning with the chemicals. Shintech had provided warnings of the hazards relative to its product but even more important Chrysler was already well informed as to the characteristics of the product it was using and the safety hazards to its employees and had given notice to its employees of the hazard.

CONCLUSION

There is no genuine issue of material fact as to the allegations directed against Shintech, Inc. Shintech clearly identified the product and the character of the risks the product presented to Chrysler's employees. Chrysler was a major user of the product and was fully aware of the risk. There is simply nothing further that Shintech could or should have done and it was not negligent.

A review of the relevant case law clearly establishes that Shintech is not liable to the Plaintiffs and its motion requesting Summary judgment in its favor is proper and should be granted.

Respectfully Submitted,

Ellis F. Robinson
Attorney for Defendant
Shintech, Inc.

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