

TO: Mr. Satch From TA

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

FILED
1987 OCT 20 AM 11:43

MARY A. DENDINGER, Executrix,)
etc., et al.,)

Plaintiffs,)

-vs-)

CHRYSLER PLASTIC PRODUCTS)
CORP., et al.,)
Defendants.)

No. C 87-7117

MEMORANDUM and ORDER

CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

* * * *

WALINSKI, J.

This matter is before the Court on defendant Shintech, Inc.'s ("Shintech") motion for summary judgment and various oppositions and replies thereto. The Court heard oral arguments on September 28, 1987. Jurisdiction is predicated upon diversity of citizenship, 28 U.S.C. §1332.

This action was originally brought as two separate actions by Herman A. Dendinger ("Dendinger") and Fred A. Wallace ("Wallace"). The suits were remanded to state court, consolidated, and then removed back to federal court. Both Dendinger and Wallace have died since they brought their suits. Plaintiffs in this action are now the personal representatives of the Dendinger and Wallace estates.

FACTS

For purposes of considering summary judgment, the facts are viewed in a light most favorable to plaintiffs. Dendinger and Wallace both worked at Chrysler Plastic Products

UCC 079453

Corporation's ("Chrysler") Sandusky, Ohio facility, Dendinger from May, 1968 to October, 1980 and Wallace from October, 1972 to April, 1978. Chrysler's Sandusky facility produced vinyl coated fabrics for automotive and non-automotive uses.

Dendinger and Wallace both worked in and around the "ink room," where the inks, or dyes, for the vinyl coatings were made. The inks were produced by heating various compounds and colors together in a base of polyvinyl chloride ("PVC") resin. In its delivered state, PVC is a white granular substance. When PVC is heated, it produces vinyl chloride ("VC"), an invisible gas, to which Dendinger and Wallace were both exposed. VC is one of the few chemical substances proven to cause cancer in humans and no safe levels of VC exposure have ever been scientifically proven. Allegedly as a result of their exposure to VC gas, Dendinger died of cancer on April 2, 1986 at age 48, and Wallace died of cancer on July 23, 1985, at age 36.

Defendant Shintech sold 184,440 pounds of PVC resin to Chrysler in 1977, 361,820 pounds in 1979, and 1,229,300 pounds in the first four months of 1980. Shintech delivered the PVC in railroad hopper cars. The cars were labeled "PVC CONTAINS VINYL CHLORIDE. VINYL CHLORIDE IS A CANCER SUSPECT AGENT." The bills of lading for the shipments contained the same warning. Shintech also sent Chrysler detailed technical data sheets which described in detail the physical and chemical properties of the PVC resin. Plaintiffs contend, however, that

UCC 079454

(3)

Shintech did not send these data sheets to Chrysler until after Dendinger and Wallace stopped working at Chrysler.

- Chrysler received warnings from other PVC resin suppliers as early as 1974 concerning the dangers posed by VC gas. (Chrysler Response to Plaintiffs' First Set of Interrogatories No. 8). Chrysler also received in 1974 a copy of the Occupational Safety and Health Administration's ("OSHA") proposed standards for PVC exposure. (Chrysler Response to Request to Produce No. 9). Thereafter, Chrysler instituted a monthly survey program of VC gas and distributed a bulletin to its employees entitled "What Every Employee Should Know About Polyvinyl Chloride." (Chrysler Response to Request to Produce No.13).

Plaintiffs allege that Shintech is liable in strict tort liability as well as negligence for the injuries to and deaths of Dendinger and Wallace. Plaintiffs contend that strict liability applies here because Shintech sold the PVC resin to Chrysler without adequately warning either Chrysler or its employees of the resin's potential dangers. Plaintiffs also claim that Shintech was negligent in selling the PVC to Chrysler without adequately warning either Chrysler or its employees. Defendant Shintech moves for summary judgment in its favor on plaintiffs' claims.

UCC 079455

9

DISCUSSION

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. United States v. Articles of Device, 527 F.2d 1008, 1011 (6th Cir. 1976); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. Smith v. Pan Am World Airways, 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or

defenses." Celotex Corp. v. Catrett, 106 S.Ct 2548, 2553 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett, 106 S.Ct. at 2553.

Plaintiffs contend that under §402A of the Restatement (Second) of Torts (1965),¹ the PVC resin was in a defective condition when Shintech delivered it to Chrysler because it was unreasonably dangerous to Chrysler's employees, including Dendinger and Wallace. The cause of the unreasonable danger, plaintiffs argue, was Shintech's alleged failure to

¹Ohio law follows §402A of the restatement with regard to strict liability in tort. See Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977); Krosky v. Ohio Edison Co., 20 Ohio App. 3d 10, 484 N.E.2d 704 (1984).

adequately warn either Chrysler or its employees of PVC's potential hazards. See Restatement (Second) of Torts §402A comment j.

Section 402A reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the use or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Sub-section (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In Krosky v. Ohio Edison Co., 20 Ohio App. 3d 10, (1984), the operator of a dump truck was severely burned when he raised the truck's bed and it came in contact with overhead electrical wires. The jury found that the dump truck was an unreasonably dangerous product because its manufacturer failed to give any warnings that the truck's body conducted electrical current. Id. at 13, 484 N.E.2d at 707.

One of the reasons the dump truck in Krosky was a defective product was that neither the user of the truck nor

UCC 079458

his employer could have been expected to know of the truck's potential danger absent a manufacturer's warning. As the Ohio Court of Appeals noted, "the dump truck was dangerous to an extent beyond that which would be contemplated by the ordinary user possessing knowledge common to other similar users." Id.

In the case sub judice, the material facts are undisputed. Shintech warned Chrysler of PVC's dangers on the train cars and the bills of lading. Chrysler was aware prior to Shintech's shipments of PVC's hazardous propensities in that it was a sophisticated and constant user of PVC resin, it worked closely with OSHA to control PVC dust in its plant, and it received warnings from other PVC suppliers. In Krosky, the court noted that "the defective condition is the result of the lack of any warning on an unreasonably dangerous product," 20 Ohio App. 3d at 13, 484 N.E.2d at 707 (emphasis added). The PVC could not have been a defective product in Chrysler's hands because Chrysler had already received numerous warnings of its dangers. Therefore, plaintiffs cannot recover against Shintech for strict liability in tort.

Plaintiffs also claim that Shintech negligently failed to warn either Chrysler or its employees, including Dendinger and Wallace, of PVC's dangers. Section 388 of the

UCC 079459

Restatement (Second) of Torts² states that a seller is negligent

when the seller, having reason to know that its product is likely to be dangerous for its intended use and having no reason to believe that the intended user will realize its dangerous condition, nevertheless fails to exercise reasonable care to inform the user of the dangerous condition

Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 177 (3d Cir. 1976). Comment n to §388 concerns a seller's negligence for failing to adequately warn third party users, as opposed to the direct purchaser, of the product's dangerous propensities. It states in pertinent part:

Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.

. . . .

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing.

²Ohio law follows §388 of the restatement with regard to the duty of a manufacturer of a dangerous product to warn others of its dangerous propensities. See Adams v. Union Carbide Corp., 737 F.2d 1453, 1456 n.1 (6th Cir.), cert. denied, 469 U.S. 1062 (1984).

9

The issue of whether a supplier owes a duty to its purchaser's employees to warn them of a product's hazards was addressed by the Sixth Circuit in Adams v. Union Carbide Corp., 737 F.2d 1453 (6th Cir.), cert. denied, 469 U.S. 1062 (1984). In Adams, the plaintiff worked for General Motors Corporation ("GMC") on its automobile seat cushion assembly line. The plaintiff came into frequent contact with a chemical used in the production of the cushions, toluene diisocyanate ("TDI"). TDI was a known cause of respiratory ailments.

The supplier of the TDI in Adams shipped it in bulk to GMC either by tank trucks or rail tank cars and transferred it into GMC's storage tanks. The supplier kept GMC fully informed of TDI's dangerous propensities and furnished GMC with guidelines to minimize personnel exposure. GMC, however, failed to inform plaintiff of TDI's danger or protect plaintiff from it. Plaintiff sued the supplier, charging it negligently failed to warn plaintiff of TDI's health hazards.

In affirming the district court's summary judgment for the supplier, the Sixth Circuit in Adams stated that "it was reasonable for [the supplier] to rely upon GMC to convey the information about the hazardous propensities of TDI to its employees within the context of comment n of the restatement" Id. at 1457. The court noted that the supplier acted reasonably "in light of GMC's duty to safeguard its employees' health and" the comprehensive information concerning TDI's use conveyed by the supplier. Id. Numerous other courts have

UCC 079461

(10)

reached similar results where an employer who was fully informed of a product's hazards failed to pass warnings on to its employees. See, e.g., Millhouse v. General Tire and Rubber Co., 9 Ohio App. 3d 203, 459 N.E.2d 623 (1983) (supplier not liable where it contracted to have its TDI tank cars cleaned but cleaning company failed to pass supplier's warnings on to its employees); Reed v. Pennwalt Corp., 22 Wash. App. 718, 591 P.2d 478, appeal dismissed, 93 Wash. 2d 5, 604 P.2d 164 (1979) (supplier of a caustic soda reasonably expected that its vendee had a safety program to inform and protect its employees against hazards vendee knew of); Jones v. Hittle Serv., Inc., 219 Kan. 627, 549 P.2d 1383 (1976) (propane gas manufacturer fulfilled its duty to consumers by verifying that its distributor was adequately trained and informed of the hazardous characteristics of the gas).

In the present case, Chrysler was fully informed of the dangers posed by the VC gas. Shintech warned Chrysler of VC's carcinogenic propensities on Shintech's railroad cars and bills of lading. Chrysler also received warnings from OSHA and its other PVC suppliers. Even though the hazardous resin was necessary to Chrysler's manufacturing process, plaintiffs have alleged no facts which should have made Shintech question whether Chrysler would adequately warn or protect its employees. Chrysler was a sophisticated user of PVC and the PVC was not so dangerous as to make it unusable. Furthermore, Shintech's access to Chrysler's employees was limited because

UCC 079462

(11)

it shipped the PVC in bulk. ✓ Therefore, this Court finds that Chrysler was adequately warned of PVC's dangers and that Shintech reasonably relied on Chrysler to warn its employees of those dangers.

Accordingly, it is

ORDERED that defendant Shintech's motion for summary judgment is granted.


SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio.
October 19, 1987

UCC 079463