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Cox v. Georgia
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Court Paper

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Wanda Gail Cox, Executrix
of the Estate of Michael
Wayne Cox,

Plaintiff,

vs.

Georgia Gulf Corporation,
Conoco, Inc., Tenneco, Inc.,
Sumitomo Corporation of
America, Formosa Plastics
Corporation U.S.A., Teneco
Oil Company, Occidental
Chemical Corporation, Union
Carbide Corporation, Occidental
Electrochemicals Corporation,
Diamond Shamrock Refining and
Marketing Company, and The
B. F. Goodrich Company,

Defendants.

C.A. No. 8:88-1399-3
(Wrongful Death Action)

C.A. No. 8:88-1400-3
(Survival Action)

DEFENDANT, SUMITOMO
CORPORATION OF AMERICA'S
ANSWERS TO RULE 16(B)
INTERROGATORIES

9/1/88

Pursuant to Rule 16(b) of the Federal Rules of Civil
Procedure, Defendant, Sumitomo Corporation of America, respect-
fully submits the following Answers to Interrogatories propounded
by the Court:

Interrogatory (a) IF THE DEFENDANT IS IMPROPERLY
IDENTIFIED, GIVE ITS PROPER IDENTIFICATION AND STATE WHETHER OR
NOT YOU WILL ACCEPT SERVICE ON AN AMENDED SUMMONS AND COMPLAINT
REFLECTING THE INFORMATION FURNISHED BY YOU IN ANSWER HERETO.

Answer: Defendant is properly identified.

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Interrogatory (b) FURNISH A DETAILED FACTUAL BASIS FOR THE DEFENSES YOU ASSERT IN YOUR ANSWER.

Answer: Sumitomo Corporation of America does not manufacture or package PVC resin: it is simply a broker. Sumitomo had no business with Stauffer's Anderson plant from 1978 to 1980 and 1983 to 1986. In 1981, it brokered less than one percent of Stauffer's resin to Plaintiff's employer. In 1982, it brokered only twenty percent of Stauffer's supply. The factual basis for the First Defense is that Plaintiff cannot prove that this PVC caused her husband's injuries. Plaintiff's decedent was laid off by Stauffer Chemical Company from 1982 to 1985. Therefore, the amount brokered by Sumitomo in 1982 (only one million pounds) would have been used by 1985, when Plaintiff's decedent returned to work.

Our Third Defense is based on contributory negligence. In failing to wear protective clothing and failing to heed warnings on bags of polyvinyl chloride, Plaintiff's decedent contributed to his own demise. Plaintiff's decedent admitted in deposition that he saw warnings on bags of polyvinyl chloride that stated that the chemical caused cancer.

As a Fourth Defense, Defendant asserts that Plaintiff's decedent assumed the risk of any health problems caused by polyvinyl chloride. Before he died of cancer, Plaintiff's decedent admitted that he read warnings of the chemical's cancer causing potential that were printed on bags of polyvinyl

chloride. Even so, he continued to expose himself to the chemical.

For a Fifth Defense, Defendant, a bulk supplier of polyvinyl chloride, asserts that it is not liable because Stauffer Chemical Company is a sophisticated, knowledgeable industrial purchaser and, therefore, Sumitomo had no duty to warn Plaintiff's decedent. Furthermore, Stauffer was a manufacturer of PVC resin at the time in question. Therefore, they had much greater knowledge of the chemical propensities than Sumitomo, a mere broker.

Next, Defendant submits that the manufacturer's warning was adequate. First, the purchase order from Shintech to Stauffer contained a warning which stated that polyvinyl chloride contains vinyl chloride which is a cancer suspect agent. Second, Stauffer Chemical Company, decedent's employer, was a manufacturer who was well aware of the danger; Defendant had no further duty to warn the employees.

This defendant had no control over plaintiff's decedent's employer; hence, this defendant had no control over plaintiff's decedent's working conditions. Under federal and state law, the employer of plaintiff's decedent was responsible for the safety of the work place and its employees.

This defendant further denies that it failed to give adequate warnings or to market the product because, as broker, it had not chance to label or market. This defendant is informed and believes that the manufacturer that supplied the PVC to the

plaintiff's decedent's employer complied with all applicable laws and regulations regarding warnings, product identification, and information which must be given to purchasers.

Next, the federal laws and regulations cited below, including the OSHA standards, preempt in position of any liability under South Carolina statutory or common law with respect to vinyl chloride product warnings or working conditions.

Finally, if necessary, this defendant is prepared to present evidence on the issue of causation, including the apparent exhaustion of the supply of PVC brokered by this defendant, and the low levels of exposure experience by the plaintiff's decedent.

Interrogatory (c) DESCRIBE IN DETAIL ALL LAWS, ACTS HAVING THE FORCE AND EFFECT OF LAW, CODES, REGULATIONS AND LEGAL PRINCIPLES, STANDARDS, AND CUSTOMS OR USAGES, WHICH YOU CONTEND ARE APPLICABLE TO THIS ACTION.

1. Plaintiff must prove defendant actually caused the injury.

Plaintiff cannot prove that PVC supplied by Sumitomo caused his injury. Sumitomo did not sell PVC resin to Stauffer's Anderson plant from 1978 to 1980, or from 1983 and 1986. The only sales occurred in 1981 and 1982; Plaintiff's decedent was laid off in 1982. Sumitomo's records show only one hundred seventy thousand pounds in 1981 and one million pounds in 1982 were supplied; Stauffer's records show that their total purchases

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in 1981 was seventeen million in 1982 and five million pounds in 1982. In an action for strict liability, the plaintiff must have proof sufficient to show not only that the product was defective, but also that the defect was a direct and efficient cause of plaintiff's injury. Livingston v. Nolan Corp., 293 S.C. 521, 362 S.E.2d 16 (1987). The unequivocal law of South Carolina is that in any action claiming injury from a product, the plaintiff must show a causal connection between the defendant and that product; proof connecting the defendant with the instrumentality of the alleged defect is necessary regardless of the theory upon which plaintiff relies. Ryan v. Eli Lilly & Co., 514 F.Supp. 1004 (D.S.C. 1981). Furthermore, where the cause of plaintiff's injury may be reasonably attributed to an act for which the defendant is not liable, Plaintiff has failed to carry the burden of establishing that his injuries were the proximate result of defendant's negligence. Messier v. Adickes, 251 S.C. 268, 161 S.E.2d 845 (1960); Baughman v. General Motors Corp., 780 F.2d 1131 (4th Cir. 1986). Since there is at least a 80% chance that PVC supplied by a company other than Sumitomo caused injury to Cox, plaintiff cannot sufficiently prove that the injury was proximately caused by Sumitomo.

2. Contributory negligence is a matter of law; therefore, the issue is appropriate for summary judgment.

Where the evidence admits of but one reasonable inference, the question of contributory negligence becomes a matter of law for the determination of the court. Rogers v. Atlantic Coast

Line R. Co., 222 S.C. 66, 71 S.E.2d 585 (1952); Gillespie v. Ford, 222 S.C. 46, 71 S.E.2d 596 (1952); Republic Textile Equip. Co. of South Carolina, Inc. v. Aetna Ins. Co., 293 S.C. 381, 360 S.E.2d 540 (1987).

3. Plaintiff was contributorily negligent.

In failing to heed warnings on bags of PVC and failing to wear protective clothing, Cox contributed to his own demise. A manufacturer is entitled to assume that warnings given will be heeded. Ferebee v. Chevron Chem. Corp., 736 F.2d 1529 (D.C. Cir. 1984). When a consumer fails to read or listen to understandable warnings, the manufacturer cannot be held liable. Walker v. Merck & Co., Inc., 648 F.Supp. 931 (M.D. Ga. 1986). Liability for failure to warn in a products liability case may result only where there is sufficient evidence that warning might have made a difference. Overpeck v. Chicago Pneumatic Tool Co., 634 F.Supp. 638 (E.D. Pa. 1986).

4. Plaintiff assumed the risk of the danger of PVC.

Before he died of cancer, Cox admitted that he read warnings of the chemical's cancer causing potential that were printed on the bags of PVC. A plaintiff is precluded from recovery if he knows of a specific defect eventually causing his injury and voluntarily proceeds to use the product with knowledge of danger caused by the defect. Davis v. R.H. Dwyer Indus., Inc., 548 F.Supp. 667 (D. Pa. 1982). Under South Carolina law, a plaintiff who goes into danger with knowledge of conditions assumes the consequences, and even though there be negligence on the part of the defendant, if the plaintiff suffers a hurt to which his

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negligence contributed as a proximate cause, without which it would not have occurred, he is barred from recovery. Rilcard v. J.C. Penny Co., Columbia Div., 233 F.Supp. 133 (D.S.C. 1964).

Finally, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section. Restatement (Second) of Torts §402 A comment n (1977). If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds to unreasonably make use of the product and is injured by it, he is barred from recovery. Id.

5. Defendant, a bulk supplier of PVC, is not liable to Stauffer Chemical Co. because Stauffer is a sophisticated purchaser with knowledge of the danger of PVC.

The Fourth Circuit recognizes the availability of a sophisticated user/bulk supplier defense in a negligent failure to warn claim. Goodbar v. Whitehead Bros., 591 F.Supp. 552 (W.D. Va. 1984), aff'd sub nom. Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985) (no supplier duty to warn where affidavits proved that employer knew of risks of inhaling silica dust, knew of disease of silicosis, and was aware of proper dust control methods). The defense is also allowed in a failure to warn claim asserted on the grounds of strict liability under Restatement (Second) Torts §402A (1965). Higgins v. E.I. DuPont de Nemours, Inc., 671 F.Supp. 1055 (D. Md. 1987) (summary judgment granted on plaintiff's negligent and strict liability failure to warn claims).

In the Fourth Circuit, a bulk supplier is not liable, either in negligence or strict liability, for supplying a dangerous product to a knowledgeable industrial purchaser without warning the ultimate users of the product. See also Brooks v. Medtronic, Inc., 750 F.2d 1227 (4th Cir. 1984) (manufacturer of prescription drug only has duty to warn physician who acts as learned intermediary between manufacturer and consumer); Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809 (9th Cir. 1974) (supplier who furnishes chattels need only warn technicians or engineers who direct the use of the chattels; supplier has no duty to warn those who simply follow directions of the engineers or technicians); Antcliff v. State Employees Credit Union, 414 Mich. 624, 327 N.W.2d 814 (1983) (scaffold manufacturer absolved of duty to warn employee users where painting company buying scaffold was an expert user); In re Related Asbestos Cases, 543 F.Supp. 1142 (N.D. Cal. 1982) (sophisticated user defense allowed); Younger v. Dow Corning Corp., 202 Kan. 674, 451 P.2d 177 (1969) (warning, by label or otherwise, given to immediate vendee is sufficient; manufacturer has no additional duty to warn vendee's employees).

6. Although strict liability applies, Sumitomo had no control over the warnings as the product went directly from the manufacturer to Stauffer.

See Agricultural Servs. Ass'n, Inc. v. Ferry-Morse Seed Co., Inc., 551 F.2d 1057 (6th Cir. 1977) (Buyer, acting merely as a conduit for seller in delivering seed to consumer, is entitled to full indemnity from seller); Walker v. Stauffer Chem. Co., 19

Cal. App. 3d 669, 96 Cal. Rptr. 803 (Dist. Ct. App. 1971)
(manufacturer and supplier of bulk sulfuric acid, not having
control over subsequent compounding, packaging or marketing of
item need not bear responsibility for injury to ultimate
consumer); Groll v. Shell Oil Co., 148 Cal. App.3d 444, 196 Cal.
Rptr. 52 (Dist. Ct. App. 1983).

7. The manufacturer's warning was adequate.

Where adequate warning is given by manufacturer to an
immediate vendee, the manufacturer's duty to warn the vendee's
employees of dangers related to chemical exposure is satisfied.
Younger v. Dow Corning Corp., 202 Kan. 674, 451 P.2d 177 (1969);
Walker v. Stauffer Chem. Corp., 19 Cal. App.3d 669, 96 Cal Rptr.
803 (Dist. Ct. App. 1971) (manufacturer and supplier of bulk
sulfuric acid has no duty to warn ultimate consumer).

8. Stauffer Chemical's negligence in failing to adequately
supervise, train, warn, and protect its employee is a superceding
cause which relieves Defendant Sumitomo of liability.

In connection with the issue of proximate cause, a defendant
in a strict liability case may assert the affirmative defense
that negligence of plaintiff's employer constituted a superceding
cause which relieves defendant of strict liability. In re
Related Asbestos Cases, 543 F.Supp. 1142 (N.D.Cal. 1982).

Furthermore, each employer shall furnish to its employees a place
of employment which is free from recognized hazards that are
causing or likely to cause death or serious physical harm.

Section 41-150-80(1), South Carolina Code (1976, as amended); 29
U.S.C. Section 654. Also, the Occupational Health and Safety

Administration has issued requirements for the control of employee exposure to vinyl chloride and has mandated specific warning language. 29 C.F.R. Section 1910.1017. The Occupational Health and Safety Administration has also issued requirements that employers evaluate hazards in the work place and communicate those findings to its employees. 29 C.F.R. Section 2910.1200.

Interrogatory (d) IF YOU CONTEND THAT SOME OTHER PERSON OR LEGAL ENTITY IS, IN WHOLE OR IN PART, LIABLE TO THE PLAINTIFF OR DEFENDANT IN THIS MATTER, STATE THEIR FULL NAME, ADDRESS, AND TELEPHONE NUMBER AND DESCRIBE IN DETAIL THE BASIS OF SAID LIABILITY.

Answer: Shintech, Inc.
5618 East Highway 332
Freeport, Texas 77541
(409) 233-7861

Sumitomo seeks indemnification from Shintech, Inc. from any judgment against Sumitomo. Sumitomo acted merely as a broker in this sale and had no control over the product or warnings. The polyvinyl chloride was shipped directly from Shintech's plant to Stauffer Chemical. In a products liability action, a non-negligent professional seller is entitled to indemnity from the actual manufacturer of a defective product.

Interrogatory (e) STATE THE FULL NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ALL LAY WITNESSES WHOSE TESTIMONY YOU MAY USE AT THE TRIAL OF THIS CASE, AND DESCRIBE THE ISSUES TO WHICH THAT TESTIMONY WILL RELATE.

Answer: (a) Barbara Cohen
Sumitomo Corporation of America
345 Park Avenue
New York, New York 10154
(212) 207-0732

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Barbara Cohen will testify that she received orders from Stauffer for PVC resin; that she placed these orders with Shintech, Inc. of Freeport, Texas; and that Shintech shipped the resin directly Stauffer in South Carolina.

(b) H. Uno
Sumitomo Corporation of America
11-1 Kandanishi-ki-cho, 3 Chome, Chiyoda-Ku
Tokyo, Japan

Mr. Uno will testify regarding the relationship between Stauffer and Sumitomo, and the relationship between Shintech, Inc. and Sumitomo. He will testify regarding the knowledge Sumitomo had of the dangerousness of PVC resin, along with the sophistication of Stauffer.

Interrogatory (f) IDENTIFY BY FULL NAME, ADDRESS, AND TELEPHONE NUMBER EACH PERSON WHOM YOU EXPECT TO CALL AS AN EXPERT WITNESS AT THE TRIAL OF THIS CASE, AND, AS TO EACH EXPERT SO IDENTIFIED, STATE THE SUBJECT MATTER ON WHICH HE IS EXPECTED TO TESTIFY, THE SUBSTANCE OF THE FACTS AND OPINIONS TO WHICH HE IS EXPECTED TO TESTIFY, AND A SUMMARY OF THE GROUNDS FOR EACH OPINION.

Answer: None known at this time.

Interrogatory (g) SET FORTH THE NAMES AND ADDRESSES OF ALL INSURANCE COMPANIES WHICH HAVE LIABILITY INSURANCE COVERAGE RELATING TO THE MATTER ALLEGED IN THE COMPLAINT, THE NUMBER OR NUMBERS OF SAID POLICIES, THE AMOUNT OF LIABILITY COVERAGE PROVIDED IN EACH POLICY, AND THE NAMED INSURED IN THE SAME.

Answer: Chubb Group of Insurance Companies
3565 Piedmont Road
Atlanta, Georgia 30363-1001

Federal Policy No.: 7300-74-04/095. Liability:

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\$1,000,000.00 product liability. Insured: Sumitomo Corporation of America.

Interrogatory (h) OUTLINE IN DETAIL THE DISCOVERY YOU ANTICIPATE YOU WILL PURSUE IN THIS CASE AND STATE THE TIME YOU ESTIMATE IT WILL TAKE YOU TO COMPLETE EACH ITEM OF SAME, ALONG WITH AN EXPLANATION OF HOW YOU COMPUTED SAID TIME.

Answer: Defendant anticipates taking the depositions of Shintech corporate officials, Wanda G. Cox (Executrix of Plaintiff's estate), Plaintiff's economic expert and expert doctors. Officials of J.P. Stevens Corp. and Dunlop Sporting Goods, companies that employed Plaintiff in jobs involving chemical exposure, will be deposed. In addition, depositions of co-defendants will be taken in order to determine warning and packaging information as well as known dangers at the time of shipment. Stauffer Chemical officials, safety inspectors and employees will also be deposed. Interrogatories, Requests for Production and Requests for Admissions will be sent. It is anticipated that this discovery will continue for approximately six months to nine months.

Interrogatory (i) DO YOU WISH THIS CASE TO BE TRIED JURY OR NONJURY?

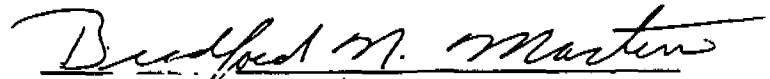
Answer: Defendant wishes this case to be tried by nonjury.

Interrogatory (j) IF THE DEFENDANT IS A PARTNER, A PARTNERSHIP, A SUBSIDIARY, OR AN AFFILIATE OF A PUBLICLY OWNED CORPORATION, LIST THE IDENTITY OF THE PARENT CORPORATION, AFFILIATE, PARTNER, OR PARTNERSHIP AND THE RELATIONSHIP BETWEEN IT AND THE NAMED PARTY. IF THERE IS A PUBLICLY OWNED CORPORATION OR A HOLDING COMPANY NOT A PARTY TO THE CASE THAT A HAS A

FINANCIAL INTEREST IN THE OUTCOME, LIST THE IDENTITY OF SUCH CORPORATION AND THE NATURE OF THE FINANCIAL INTEREST.

Answer: Sumitomo Corporation of America is a wholly owned subsidiary of Sumitomo Shoji Kaisha, Limited.

Respectfully submitted,



Bradford N. Martin
Attorney for Defendant,
Sumitomo Corporation of America

LEATHERWOOD, WALKER, TODD & MANN
100 E. Coffee Street
Post Office Box 87
Greenville, South Carolina 29602
(803) 242-6440

September 1, 1988

SUMITOMO CORPORATION OF AMERICA

BY: _____

SWORN TO BEFORE me this

_____ day of September, 1988.

Notary Public of South Carolina
My Commission Expires: _____