STATE OF MICHIGAN

COURT OF APPEALS

JEANETTE MUSZYNSKI, and BRUCE MUSZYNSKI,

Plaintiffs-Appellants,

v

AUTOMOTIVE CHEMICAL CORP., CARCO, INC., BASF CORPORATION, CHEMCENTRAL CORP. a/k/a CHEMCENTRAL DETROIT, UNION OIL COMPANY OF CALIFORNIA a/k/a UNOCAL, SEIBERT OXIDERMO, INC., MINNESOTA MINING & MANUFACTURING a/k/a THREE M COMPANY, PRODUCT SOL, INC., KOCH ENGINEERING COMPANY a/k/a KOCH AUTOMOTIVE PRODUCTS, DINOL INTERNATIONAL, GAGE PRODUCTS CO., ESSEX SPECIALTY PRODUCTS, EI DUPONT DE NEMOURS & CO., PPG INDUSTRIES, INC., CHEMFIL CORP., and SHERWIN WILLIAMS CO.,

Defendants-Appellees.

UNPUBLISHED
September 17, 1996

No. 172735
LC No. 92-228231 NO

Before: Hood, P.J., and Griffin and J.F. Foley*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendants' joint motion for summary disposition. We affirm.

This is a products liability case involving the duty to warn of the potential dangers of workplace chemicals. Between May 7, 1973, and May 23, 1990, plaintiff Jeanette Muszynski[1] was employed by Ford Motor Company. Plaintiff was required to work with various solvents and chemicals manufactured and/or sold by defendants. The chemicals and solvents used by plaintiff were toxic in nature and emitted toxic fumes. As a result of her exposure to these products, plaintiff developed

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* Circuit judge, sitting on the Court of Appeals by assignment.

dementia (mental deterioration), psycho-organic syndrome, memory loss, neurological deficits, impaired intellectual functioning, breathing problems, severe headaches, and disorientation. Plaintiff also lost her ability to earn income.

The solvents and chemicals in question are, and have been, used by Ford at many facilities in significant quantities. Prior to being approved for use, each solvent or chemical was evaluated by Ford's Environmental and Occupational Toxicology Department. That evaluation included an analysis of the product's health hazard and acute toxicology. In conducting the evaluation, Ford relied, in part, on information received from defendants regarding solvents or chemicals.

In addition to the material received from defendants, Ford subscribed to various databases such as the Chemical Abstract Services ("CAS") and the National Library of Medicine ("NLM"). These subscriptions enabled Ford to access worldwide technical data and medical literature concerning ingredients of all solvents and chemicals used in Ford facilities. Also, Ford sometimes performed testing, either on its own or in conjunction with defendants, to determine the potential hazards of a product.

Since the early 1970's, Ford has been compiling toxicological data on the products used in its plants, including solvents. Ford has maintained its own database, known as the "Materials and Toxicology System," since 1981. This database documents the known hazards of the solvents and chemicals used in Ford's plants. As a result, Ford has long been aware of the known potential hazards of the solvents used and of their ingredients. Ford has drawn upon its depth of knowledge to establish its own threshold exposure limits for its employees, which is either the same or lower than those standards specified by federal regulations and by the American Conference of Governmental and Industrial Hygienists ("AGGIH").

In accordance with the Hazard Communication Standard, 29 CFR 1910.1200, Ford made available to its employees documents known as "Material Safety Data Sheets." These data sheets contained information concerning the health hazards of the chemicals and solvents to which the employees were exposed. Ford incorporated all the information it received into the fact sheets and distributed the sheets at all Ford plants.

In association with the UAW, Ford established a Joint Health and Safety Committee ("joint committee") to continuously address the health and safety of its manufacturing facilities. In connection with that program, Ford developed videotapes concerning various chemicals and solvents. These videotapes and accompanying written materials apprised Ford's employees of the potential health hazards of chemicals and solvents in the workplace. In 1985, the joint committee prepared a number of booklets that set forth the possible dangers and health hazards associated with the various chemicals to which Ford employees were exposed. The booklets were made available to all the employees. By 1990, the information was consolidated into a single document entitled "The Personal Hazcom Reference Handbook" ("handbook") and was distributed to Ford employees through Ford's "Guidelines, Responsibilities and Safe Practices Program."

The handbook specifically warned employees of the dangers associated with the use of solvents, including long-term exposure. In pertinent part, the handbook stated:

> Organic solvents dissolve the fat in your skin, making your skin dry out, scale and crack open - dermatitis Cracking increases the risk of getting skin infections and absorbing more solvent through the skin. All organic solvents affect the **nervous system**. Short-term exposure can cause headache, nausea, feeling "light headed," and eye, nose, and throat irritation. Prolonged or higher levels of exposure may cause loss of coordination (clumsiness), poor balance, feeling drunk, dizziness, drowsiness, and vomiting. Very high levels of exposure may cause passing out, sudden collapse, coma, and death. Long-term exposure to certain solvents can damage the nerves in the arms and legs. Exposures over many years at levels above the recommended limits may cause permanent changes in behavior and memory.

Ford provided this information to plaintiff on June 12, 1986. At that time, plaintiff also received hazardous chemicals training booklets. As previously noted, plaintiff continued in Ford's employment until May, 1990.

On October 9, 1992, plaintiffs filed a complaint, alleging that, due to workplace exposure to chemicals and solvents manufactured or sold by defendants, plaintiff sustained personal injuries. Plaintiffs sought recovery on the product liability theories of breach of implied warrant and negligent failure to warn. Bruce Muszynski also claimed loss of consortium. Defendants contended that, because they did not owe plaintiff a duty to warn her of a product's potential dangers, she could not establish a prima facie case of negligence or breach of implied warranty.

Defendants ultimately moved for, and the trial court granted, summary disposition in favor of defendants. Defendants argued that because Ford was a sophisticated user, there was no duty to warn the ultimate user of the product. Plaintiffs contended that because defendants failed to warn Ford of the dangers associated with long-term, low-level exposure, Ford should not be considered a sophisticated user. The trial court held that defendants were entitled to rely upon the fact that Ford was a sophisticated user and thus had no duty to warn the ultimate user.

Plaintiffs claim that the trial court erred in concluding that defendants were entitled to summary disposition on plaintiffs' negligence and breach of warranty claims on the basis of the "sophisticated user defense." Plaintiffs concede that the "sophisticated user" defense normally indicates that a defendant has no duty to warn the ultimate user, but argue that because defendants failed in their duty to warn Ford, the purchaser, of the dangers associated with their products, plaintiffs have a viable claim against defendants for failure to warn. Plaintiffs also claim that they have a viable breach of warranty claim against defendants. On the contrary, all defendants argue that plaintiffs have failed to present any evidence that defendants failed to warn Ford of the potential dangers associated with the use of their products.

On appeal, a trial court's grant of summary disposition is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The lower court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. Then, giving the benefit of any reasonable doubt to the nonmoving party, the lower court must determine whether a record might be developed which would leave open an issue upon which reasonable minds can differ. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 378; 512 NW2d 86 (1994). Summary disposition may be granted only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

Plaintiffs argue that defendants, as sellers or manufacturers of dangerous products, should have a duty to warn an employer/purchaser because, without such warnings, the employer/purchaser cannot adequately warn its employees. The question whether there exists a duty to warn is one of law for the court to decide. *Antcliff v State Employees Credit Union*, 414 Mich 624, 640; 327 NW2d 814 (1982).

It is well settled law that, where an employer/purchaser is a sophisticated user of a manufacturer's products, the employer/purchaser is in the best position to warn the ultimate user of the dangers associated with a product, thereby relieving the sellers and manufacturers from the duty to warn the ultimate user. See *Id.*; *Jodway v Kennametal, Inc*, 207 Mich App 622, 627-629; 525 NW2d 883 (1994). This is the "sophisticated user" doctrine, upon which defendants premised their motions for summary disposition.

Michigan jurisprudence has recognized the sophisticated user doctrine at least since *Antcliff, supra*, in which the Supreme Court stated:

> There are countless skilled operations such as the rigging of scaffolding, which involve otherwise non-dangerous products in potentially dangerous situations. A manufacturer of such a product should be able to presume mastery of the basic operation. The more so when, as here, the manufacturer affirmatively and successfully limits the market of its product to professionals. In such a case, the manufacturer should not be burdened with the often difficult task of providing instructions on how to properly perform the basic operation. [*Id.* at 640 (footnote omitted).]

The Supreme Court also stated that not to recognize the sophisticated user defense "would lead to demonstrably unfair and unintended results." *Id.* The holding in *Antcliffe*, however, was limited to the facts and parties of that case. *Id.* at 627. However, the sophisticated user doctrine has been further recognized and discussed by this Court in numerous opinions. The case law is consistent on this point with 2 Restatement Torts, 2d, § 388, pp.[2] Following is a sampling of the cases in which this Court has accepted and applied the sophisticated user doctrine.

In *Ross v Jaybird Automation*, Inc, 172 Mich App 603, 607; 432 NW2d 374 (1988), the plaintiffs originally brought a product liability action against the defendants for their failure to warn or instruct the plaintiff's employer regarding the installation of a coil cradle machine. The trial court found that defendants owed no duty to warn or instruct, and granted summary disposition for the defendants. In affirming the circuit court, this Court stated:

> A seller or manufacturer should be able to presume mastery of basic operations by experts or skilled professionals in an industry, and should not owe a duty to warn or instruct such persons on how to perform basic operations in their industry.

In *Tasca v GTE Products*, 175 Mich App 617, 623; 438 NW2d 520 (1988), the plaintiff alleged injury from exposure to cobalt dust at work. The defendants conceded their failure to warn either the plaintiff or his employer of the hazards of cobalt, and their reliance on the employer's knowledge of such hazards. In resolving the issue, the *Tasca* Court summarized § 388 by stating that:

> [Section] 388 imposes liability on the supplier of a product which injures the user if (1) the product is defective or dangerous, (2) the supplier has no reason to believe the user will realize its defective or dangerous condition, and (3) the supplier cannot reasonably rely on the purchaser/employer to warn the ultimate users of the product of the danger. [*Id.*]

This Court upheld summary disposition because the plaintiff's employer, as a "sophisticated user" of the defendants' products, was "in the best position" to warn the plaintiff of the danger. *Id.* at 626-627.

In *Mascarenas v Union Carbide*, 196 Mich App 240, 246-248; 492 NW2d 512 (1992), a panel of this Court acknowledged the *Tasca* Court's use of §388, and the position that a purchaser who is a sophisticated user of the manufacturer's products is in the best position to warn the ultimate user of its dangers. The *Mascarenas* panel concluded that the purchaser/employee was a sophisticated user who obviously knew of the need to protect its employees from the products, and that it was reasonable for the manufacturers to rely upon the purchaser/employer to warn the ultimate user of the hazards of the product. *Id.* at 248.

In *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 546-548; 509 NW2d 520 (1993), this Court determined that commercial enterprises that use materials in bulk must be regarded as sophisticated users. The *Aetna* Court continued by indicating that because the employer had an obligation under the Michigan Occupational Safety and Health Act to make information available to the employees that would have made the employees aware of possible dangers, the designation of sophisticated user was particularly appropriate. The Court reasoned:

> Those with a legal obligation to be informed concerning the hazards of materials used in manufacturing processes must be relied upon, as sophisticated users, to fulfill their legal obligations, thereby absolving manufacturers in some circumstances of the duty to warn the users of chemical products, where such use is in the course of employment for a

> sophisticated bulk user. Any other rule would mean that "[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so." 2 Restatement Torts, 2d, § 388, comment n, p 308. [*Aetna*, *supra* at 547-548.]

In *Jodway*, *supra* at 630-631, this Court again applied the sophisticated user doctrine, concluding that a supplier could rely upon a bulk user to be sophisticated and also could rely upon an employer to comply with federal and state law concerning safety.

In *Brown v Drake-Willock Intern, Ltd*, 209 Mich App 136; 530 NW2d 510 (1995), lv pending, in which the plaintiff sustained injury while being exposed to formaldehyde while cleaning dialysis machines, this Court stated:

> In the instant case, the dialysis machines were sold to sophisticated buyers. Indeed, dialysis machines are prescription devices, available for purchase by physicians only. Accordingly, the rationale behind the sophisticated user doctrine . . . applies in this case. Defendant manufacturers could assume that the physicians purchasing their dialysis machines would have a mastery of the basic operation of the equipment and would adequately instruct their employees. [*Brown*, *supra* at 147-148 (citations omitted).]

More recently, in *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 547-548; 536 NW2d 221 (1995), the plaintiff was involved in an accident where a hanging scaffolding manufactured by the defendant collapsed while being used by the plaintiff. This Court stated:

> The proofs established that Ness Contracting had specialized in the construction of preengineered metal buildings for the past twenty-six years. While Ness Contracting may not have used hanging scaffolding on a regular basis, its employees were trained ironworkers who were experienced in rigging hanging scaffolding. Further, it had used other types of scaffolding on numerous occasions. In short, the evidence established that the relationship between defendant Emerson Electric and Ness Contracting and its employees was similar to that observed in Antcliff. In both cases, the manufacturers that designed a product line for professional riggers dealt with professional riggers. Because Antcliff is controlling, we hold that the trial court abused its discretion in denying defendant Emerson Electric's motion for a directed verdict. [*Id*.]

The cases suggest that a duty to warn an employer/purchaser of the inherent dangers of a product does not arise in a situation where the employer/purchaser is a sophisticated user because a sophisticated user is charged with knowledge of the product. The rationale behind the sophisticated user doctrine is that the manufacturer markets a particular product to a class of professionals that are presumed to be experienced in using and handling the product. Because of this special knowledge, the sophisticated user will be relied upon by the manufacturer to disseminate information to the ultimate

users regarding the dangers associated with the products. Hence, the manufacturer is relieved of a duty to warn either. *See Jodway, supra*; *Mascarenas, supra*; *Tasca, supra*.

We are constrained to further observe, however, that despite our conclusion that a duty to warn an employer/purchaser would undermine the spirit of the sophisticated user doctrine, the record demonstrates that Ford was, in fact, warned by defendants about the hazardous propensities associated with their chemicals and solvents, and Ford, in turn, warned plaintiff about those dangers. Prior to being approved for use, each solvent or chemical was evaluated by Ford's Environmental and Occupational Toxicology Department. The review of each solvent or chemical included an analysis of its health hazards and acute toxicology. In conducting the evaluation, Ford relied, in part, upon information received from defendants. In addition to the material received from defendants, Ford also conducted its own research, including reviewing various databases, such as CAS and the NLM, and sometimes doing its own testing, in order to obtain additional information on a particular substance. Ford established its own threshold exposure limits for its employees, which were either the same or lower than the standards specified by federal regulations and by the American Conference of Governmental and Industrial Hygienists. Further, Ford compiled and distributed the information through booklets, handouts, and videotapes, which provided training regarding safety precautions and which warned employees, including plaintiff, of the dangers of short-term and long-term exposure. As a result, Ford was aware of the known potential hazards of the solvents and their ingredients. Ford drew upon its depth of knowledge to establish its own threshold exposure limits for its employees, which were either the same or lower than the standards specified by federal regulations and the AGGIH.

The information gathered by Ford was then placed into booklets and handouts, and distributed to its employees pursuant to the Hazard Communication Standard, 29 CFR 1910.1200. The information was distributed through Ford's "Guidelines, Responsibilities and Safe Practices Program," which contained a section that warned employees of the dangers of long-term exposure. Moreover, the joint committee was formed in order to continuously address the health and safety of its manufacturing facilities. In connection with that program, Ford developed videotapes concerning various chemicals and solvents to apprise the employees of the potential health hazards of chemicals and solvents in the workplace. Again, Ford knew that solvents and chemicals posed potential hazards to its employees and took affirmative steps to protect its employees from such hazards.

On June 12, 1986, Ford provided this information to plaintiff when she received the "Guidelines, Responsibilities and Safe Practices Program" booklet containing all of Ford's information regarding the effects of long-term exposure to certain solvents and chemical in the paint department. She also received other training and booklets regarding hazardous chemicals.

On the basis of the evidence presented, Ford confirmed the fact that it received information from defendants regarding the dangers of their products. Ford even conducted testing, in conjunction with defendants, on the products. Ford knew about the dangers associated with the products and warned plaintiff about their dangers, including the dangers of long-term exposure. Plaintiffs have presented no evidence showing that defendants failed to warn Ford or that Ford failed to keep her informed. There is also no evidence that defendants withheld any information about the product from

Ford. We therefore conclude that defendants were entitled to summary disposition as a matter of law on plaintiffs' failure to warn claim.

Plaintiffs also assert that they have a viable breach of warranty claim against defendants because defendants did not advise Ford of the dangers presented by their products. We disagree. This Court has held that a claim based upon a breach of implied warranty of merchantability cannot arise in a situation where, as here, a sophisticated purchaser knows of the dangerous characteristics of a product. *Jodway, supra* at 629-631. Therefore, defendants were entitled to summary disposition as a matter of law on plaintiffs' implied warranty claim.

Plaintiffs additionally argue that there are clear indications in the law which suggest that the sophisticated user doctrine would not be available to defendants because of their negligence in failing to warn Ford of the dangers presented by their products. Specifically, plaintiffs argued that the case law on the sophisticated user doctrine does not comport with 2 Restatement Torts, 2d, § 388(c). We disagree.

Subsection (c) of § 388 of 2 Restatement Torts, 2d, states that a supplier can be held liable if it fails to exercise reasonable care to inform "them" of the product's dangerous condition or of the facts which make it likely to be dangerous. Plaintiffs claim that the plural pronoun "them" indicates that the manufacturer may be held responsible for failing to warn either the ultimate user or the party to whom it originally sold the product. Again, we disagree.

A more plausible reading of § 388(c) is that "them" refers to the ultimate users, that is, "those for whose chattel is supplied," as defined in § 388(b). However, even if "them" does refer to the employer/purchaser, the employer/purchaser is still a sophisticated user who the manufacturer has reason to believe will realize the dangerous condition of the product and inform the ultimate user. Furthermore, many of the cases discussing the sophisticated user doctrine actually relied upon subsection (c) to reach the conclusion that a seller or manufacturer is relieved of any duty to warn the ultimate user of a product's danger if the employer/purchaser is a sophisticated user.

Plaintiffs also argue that the learned intermediary doctrine is analogous to this situation in that a manufacturer of a product should have a duty to warn an employer/purchaser of the harmful effects of a product just like a manufacturer of drugs has a duty to warn the physicians who prescribe the drugs of their harmful effects. However, plaintiffs' analogy is without merit. Unlike the sophisticated user doctrine, the learned intermediary doctrine is not based upon the intermediary's pre-existing knowledge of and experience with a particular drug. Rather, the learned intermediary doctrine is based upon the fact that the patients rely upon their physicians when using a drug and may not appreciate any warnings given directly by the manufacturer. *Mowery v Crittenton Hosp*, 155 Mich App 711, 719-720; 400 NW2d 633 (1986).

Plaintiffs also claim that defendants are charged under federal law with the duty to provide employers/purchasers with information regarding the character of their product. The Hazard Communications Standard set forth in 29 USC 1910,1200(a)(1), states that information concerning the

hazardous character of a product should be transmitted to the employers and employees. According to 29 CFR § 1910.1200(b)(1), chemical manufacturers must assess the hazards of the chemicals and employers must inform their employees about the chemicals in use. While the above is true, plaintiffs have failed to show that defendants violated their duty to provide employers/purchasers with information regarding the character of their product as required by federal law. Furthermore, these regulations are consistent with the sophisticated user doctrine in that they place a duty on the employer to warn its employees of the dangers associated with the products that the employees use at work. As previously discussed, in this case, defendants provided Ford with information regarding the chemicals and solvents sold to Ford, and Ford, in turn, informed its employees, including plaintiff, about those dangers.

Lastly, plaintiffs insist that this Court should revisit the line of reasoning underlying the application of the sophisticated user doctrine pursuant to Administrative Order No. 1996-4. Plaintiff claims that the cases impermissibly expanded *Antcliff, supra*, and the MIOSHA statute, and that their reasoning does not comport with the restatement of torts. Again, we disagree.

As required by Administrative Order No. 1996-4, an opinion published on or after November 1, 1990, remains controlling authority unless reversed or modified by the Supreme Court or in a special panel of the Court of Appeals. The cases discussed above, including the 1988 *Tasca* decision, do not represent a conflict of decisions within this Court. In addition, the Supreme Court has not reversed a decision on the sophisticated user doctrine by this Court. Furthermore, there is no reason for this Court to convene a special panel to decide this issue as all the cases have been decided consistently. Lastly, the sophisticated user doctrine is not premised upon MIOSHA; therefore, MIOSHA obligations are not the linchpin of the sophisticated user doctrine.

Affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley

[1] Throughout this opinion, Jeanette Muszynski will be referred to as "plaintiff," although Bruce Muszynski is also a plaintiff in this action. His claims are wholly derivative.

[2] One who supplies a dangerous product to another through a third person may or may not have a duty to warn the ultimate user of the product's dangers. The test for determining the existence of a duty in such a situation is embodied in 2 Restatement Torts, 2d, Sec. 388, pp. 300-301:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

"(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

"(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

"(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."