

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH ZIEMBO and DANIEL ZIEMBO,

Plaintiffs-Appellants,

v

JOHN'S LUMBER & HARDWARE COMPANY
and PERFORMANCE COATINGS, INC.,

Defendants-Appellees.

UNPUBLISHED

July 25, 1997

No. 195163

Lapeer Circuit Court

LC No. 94-020613-NP

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Plaintiffs Daniel (plaintiff) and Elizabeth Ziembo¹ appeal as of right from an order granting summary disposition to defendants John's Lumber & Hardware Company (John's Lumber) and Performance Coatings, Inc. (Performance) and dismissing plaintiffs' claims in their entirety. We reverse and remand for further proceedings.

I

An employee of General Motors, plaintiff began operating a part-time business called All Weather Deck Therapy in 1992. One of plaintiff's first customers was Charles Bellestri, who hired plaintiff to power wash and seal his exterior wood deck. The following spring, Bellestri again contacted plaintiff because he was dissatisfied with the condition of the deck. Plaintiff agreed to power wash the deck for no charge if Bellestri would pay plaintiff to reseal it. Bellestri agreed, and offered to supply the sealant because of his dissatisfaction with the product plaintiff initially used.

Bellestri purchased a sealant called Penofin on the advice of an employee at John's Lumber. The instructions on the product container included the following warning:

Use only with adequate ventilation. To avoid breathing vapors or spray mist, open windows and doors or use other means to ensure fresh air entry during application and drying. If you experience eye watering, headaches or dizziness, increase fresh air or respiratory protection (NIOSH/MSHA TC 23C or equivalent) or leave the area.

Close container after each use. Avoid contact with eyes, skin and clothing. Wash thoroughly after handling.

Bellestri was supplied with a copy of a brochure that was prepared by Performance, which manufactured Penofin. The brochure contained marketing information but no warnings or instructions for use of the product.

Approximately one-half hour after he began sealing Bellestri's deck using Penofin, plaintiff halted his work because he was offended by the strong smell of the product's fumes. Plaintiff obtained two paper masks from other contractors working on the premises and plaintiff then resumed spraying the deck. Plaintiff kept the wind at his back while he worked.

Plaintiff claimed that he suffered injuries to his skin and respiratory system as a result of his use of Penofin, and alleged that Performance was responsible for these injuries because it breached its duty to warn and/or provide adequate instructions for the safe use of the product. Plaintiff also alleged that John's Lumber was responsible for damages caused by the product that it sold and that it breached its duty to ensure that the manufacturer's product information was distributed to purchasers.

Defendants filed a joint motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that plaintiff was a sophisticated user who was not owed a duty to warn or to provide adequate instructions, and that the retailer provided all applicable warnings and information to the purchaser of the product. After a hearing on the matter, the circuit court granted defendants' motion. In doing so, the court did not rely on plaintiff's possible status as a sophisticated user. Rather, the court held that, as a matter of law, the warning was adequate for any user, casual or sophisticated.

II

Plaintiffs first argue that the circuit court erred by granting summary disposition to defendants on the basis that the warning on the product container was adequate as a matter of law. We agree, and find that a genuine issue of material fact exists regarding the adequacy of the warning provided by Performance.

Under Michigan law, the manufacturer of a product has a duty to warn of dangers associated with the intended uses or reasonably foreseeable misuses of its product. *Portelli v IR Const Products, Co*, 218 Mich App 591, 598-599; 554 NW2d 591 (1996). This standard of care includes "the dissemination of such information, whether styled as warning or instructions, as is appropriate for the safe use of its product." *Antcliff v State Employees Credit Union*, 414 Mich 624, 638; 327 NW2d 814 (1983). Such information must be adequate, accurate, and effective. *Id.* The question of whether the information meets this test is generally one for the jury. *Gutowski v M & R Plastics & Coating, Inc*, 60 Mich App 499, 507; 231 NW2d 456 (1975). Indeed, it is only where the evidence would not allow a reasonable juror to find the information inadequate, inaccurate, or ineffective that the question may be resolved as a matter of law. *Zettle v Handy Mfg*, 998 F2d 358, 363 (CA 6 1993).

We have carefully reviewed the record in the present case, and are convinced that the question of the adequacy of the information on the Penofin should be submitted to a jury. The warning advised users to use the product “only with adequate ventilation” and to “open windows and doors or use other means to ensure fresh air entry during application and drying” of the Penofin. In light of these recommendations, a reasonable juror could conclude that plaintiff, who used the product outside, with the wind at his back, was entitled to assume that the ventilation was “adequate.”

The circuit court determined that the warning fully and adequately informed users of Penofin of the dangers associated with its use and how to avoid them. We find that, based on the facts before us, it is not clear that all reasonable jurors would draw the same conclusion. A genuine issue of material fact remains regarding the adequacy of the Penofin warning label; thus, summary disposition was inappropriate. MCR 2.116(C)(10). Plaintiffs have a right to have a jury resolve this controversy.

III

Plaintiffs next argue that summary disposition was inappropriate because a genuine issue of material fact exists as to whether plaintiff was a sophisticated user, thus relieving Performance of its duty to warn of the dangers of Penofin. We agree.

The sophisticated user doctrine is an exception to a manufacturer’s general duty to warn. The doctrine is based on the following rationale:

[T]he 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 product. Hence, the manufacturer is relieved of a duty to warn. [*Portelli, supra* at 601.]

Limited marketing of the product to professionals is required for the manufacturer to reasonably be able to assume that its purchasers will be sophisticated users of their product. See, e.g., *Antcliff, supra* at 640 (“the manufacturer affirmatively and successfully limit[ed] the market of its products to professionals”); *Portelli, supra* at 601 (product “was marketed by catalog only to construction industry and design professionals”); *Brown v Drake-Willock Intern, Ltd*, 209 Mich App 136, 147-148; 530 NW2d 510 (1995) (dialysis machines are prescription devices, available for purchase by physicians only, and thus were sold to sophisticated buyers).

In the present case, Penofin was available for sale at a local hardware store that served the general public, and Performance arguably had no reason to expect that Bellestri, plaintiff, or any other customer would be a sophisticated user of its product. On the other hand, plaintiff testified that he held himself out to the public as a professional in the field of deck sealing and cleaning, and that he believed himself to have the skill and expertise necessary to perform these services. Plaintiff may, under such circumstances, be charged with special knowledge of the product and be presumed to be experienced in using and handling it. Consequently, we find that reasonable minds could differ on the question of

whether Performance may invoke the sophisticated user defense. Therefore, summary disposition was inappropriate. MCR 2.116(C)(10).

IV

Plaintiffs also contend that John's Lumber, as retailer of the product, should be held liable for the defective warning contained on the product. Both a manufacturer and seller are generally liable for failure to warn purchasers or users of its product about dangers associated with intended uses and foreseeable misuses. *Ross v Jaybird Automation, Inc.*, 172 Mich App 603, 606; 432 NW2d 374 (1988). The standard of care required of a seller is that of a reasonably prudent seller under the existing circumstances. *Blanchard v Monical Machinery Co.*, 84 Mich App 279, 285; 269 NW2d 564 (1978). If the product warning on the Penofin is determined to be defective, a question of fact will remain as to whether John's Lumber was negligent in selling the product with the warning.

V

The order of the circuit court granting defendants' motion for summary disposition and dismissing plaintiffs' claims is reversed, and this matter is remanded to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Myron H. Wahls

¹ Plaintiff Elizabeth Ziembo's claims were derivative in nature. Throughout this opinion, "plaintiff" will refer solely to Daniel Ziembo.