STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH ZIEMBO and DANIEL ZIEMBO,

Plaintiff-Appellants,

v

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

Defendant-Appellees.

UNPUBLISHED

No. 195163
Lapeer Circuit Court
LC No. 94-020613-NP

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

TAYLOR, J. (dissenting).

I dissent. I would affirm the trial court's order granting summary disposition to defendant-manufacturer Performance Coatings, Inc. (Peformance), and defendant-seller John's Lumber & Hardware Company (John's Lumber).

With reference to Performance, I would affirm because plaintiff, Daniel Ziembo, was a sophisticated user and because the warning given, to use the deck sealant Penofin "only with adequate ventilation," was neither misleading nor inadequate.

The majority holds that reasonable minds could differ on whether Performance could invoke the sophisticated-user defense because Penofin was available for sale to the public at a hardware store that served the general public such that Performance had no reason to expect plaintiff or any other customer would be a sophisticated user. The majority further states that manufacturers cannot reasonably assume its purchasers will be sophisticated users unless they limit the marketing of the product to professionals. I disagree. Where a plaintiff bought a product is not determinative of the question of whether that particular plaintiff is a sophisticated user. To suggest that limited marketing is a prerequisite to the sophisticated-user defense is to misunderstand the fundamental premise of the defense; tort law demands more of a person of above average intelligence or knowledge. 2 Restatement of Torts §12,289(2) comment m. That this is indeed the focus can be seen in *Ross v Jaybird Automation, Inc*, 172 Mich App 603, 607; 432 NW2d 374 (1988), where 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.

With this in mind, it is simply illogical to allow plaintiff, who represented himself to be a professional, to evade the sophisticated-user defense merely because the product could have been purchased by someone who was not a sophisticated user. Under the majority's analysis, a sophisticated user could transform himself into a non-sophisticated user simply by purchasing a potentially dangerous product at a general merchandise store. A whole host of products that are potentially dangerous may be purchased at general merchandise stores, e.g., chainsaws, acetylene torches, and the like. If someone makes their living using such products, they do not lose their sophisticated user status merely because they buy a potentially dangerous product from a general merchandiser and not from a company that limits its marketing to professionals. When a product is only sold to professionals or specialists such as by prescription, as in *Brown v Drake-Willock Int'l*, 209 Mich App 136, 147-148; 530 NW2d 510 (1995), this fact of limited availability supports a finding that the user is a sophisticated user but it does not ipso facto make the purchaser a sophisticated user.

The simple fact is that Performance was not obligated to warn plaintiff regarding the product because he was a sophisticated user. *Aetna v Ralph Wilson Plastics*, 202 Mich App 540, 547; 509 NW2d 520 (1993). Accordingly, Performance was properly granted summary disposition. Moreover, because the only basis for holding John's Lumber liable was on the warning issue, as there was no duty to warn, John's Lumber was also properly granted summary disposition.

The majority also holds that summary disposition was improperly granted to Performance because "a genuine issue of material fact exists regarding the *adequacy* of the warning provided by Performance." (Emphasis added). Again, I disagree. The majority has misunderstood plaintiff's argument. The appellate brief filed by plaintiffs states as follows: "Mr. Ziembo does not contend that the warnings in question were inadequate"; "This is not an inadequate warning case"; and "defendant misled plaintiff, as opposed to inadequately warning him." In short, plaintiffs never advanced the inadequacy argument. Accordingly, because there is no genuine issue of material fact that the warning was neither misleading nor inadequate, I would affirm as to Performance for this additional reason.

I also disagree with the majority's analysis of the warning itself. The majority misconstrues the actual wording and sentence structure of the warning. To be recalled is that the warning provides:

> 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.

The majority's position is that plaintiff was entitled to assume the ventilation was adequate because he used the product outside with the wind at his back where 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. The majority errs in treating the second sentence of the warning as being compound with the first sentence of the warning. The first sentence warns users to use the product "only with adequate ventilation." The second sentence talks about opening windows and doors. There is no reason to read the two sentences as being compound and it is clear to me that the portion of the second sentence mentioning windows and doors has no application here because plaintiff was using the product outdoors. However, the second sentence is relevant in that it warned the user to ensure fresh air entry so as to avoid breathing vapors and to avoid spray mist. As stated by the trial court, the two sentences indicate that one should have adequate ventilation wherever the product is used. The warning was not misleading and plaintiff does not contend that it was otherwise inadequate. *Nichols v Clare Community Hosp*, 190 Mich App 679, 683; 476 NW2d 493 (1991) (party failed to establish a genuine issue of material fact existed regarding whether the warnings were adequate). I find that the trial court properly granted Performance summary disposition with reference to the warning issue.

I would affirm.

/s/ Clifford W. Taylor