IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

In Re: Welding Rod Civil Actions Products Liability Litigation	)	JUSTICE FRANCIS E. SWEENEY
Joseph Boyd, et al.,	)	Case No. 545413
Plaintiffs,	)	
v.	)	**ENTRY AND OPINION**
Lincoln Electric Co., et al.,	)	
Defendants.	)	

I. INTRODUCTION

The current litigation arises from a complaint filed by the above-captioned Plaintiff alleging that he is suffering from manganese-induced parkinsonism caused by his exposure to welding rod fumes during his career as a boilermaker from 1977 until mid-2004. Plaintiff has asserted causes of action for, among other things, conspiracy, fraud, fraudulent concealment, failure to warn, failure to test, aiding and abetting, and negligent performance of a voluntary undertaking.

For the foregoing reasons, Defendants' Motion for Summary Judgment on Counts Three, Four, Five, Six, and Nine is granted.

II. LAW AND ARGUMENT

A. Standard of Review

Summary judgment may be granted only when it is demonstrated:

> " *** (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against

> whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor."

Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64; Civ.R. 56(E). When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. Dresher v. Burt (1996), 75 Ohio St.3d 280. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing there is a genuine issue of material fact. Civ.R. 56(E); Riley v. Montgomery (1984), 11 Ohio St.3d 75. A material fact is one that would affect the outcome of the suit under the applicable substantive law. Needham v. Provident Bank (1986), 110 Ohio App.3d 817, citing Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242.

B. Failure to Warn

The fundamental question before the Court is whether Defendants failed to adequately warn Plaintiff of the possible dangers of inhaling welding rod fumes, and if that failure was the proximate cause of Plaintiff's alleged injury.

Under Ohio law, a warning is adequate if it reasonably discloses all inherent risks, and if the product is safe when used as directed. *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251; *Seley v. G.D. Searle Co.* (1981), 67 Ohio St.2d 192. However, "an inadequate warning may make a product as unreasonably dangerous as no warning at all; ***." *Crislip*, 52 Ohio St.3d 251. "A plaintiff asserting strict liability claims based on failure to provide adequate warnings not only must convince the fact finder that the warning provided is unreasonable, hence inadequate, but he also must establish the

existence of proximate cause between the [product] and the fact of the plaintiff's injury." *Seley*, 67 Ohio St.2d at 199-200. In *Seley*, the Ohio Supreme Court adopted a two-step approach to analyzing the issue of proximate cause: whether the lack of an adequate warning contributed to a plaintiff's use of a product; and, whether the use of the product constituted a proximate cause of a plaintiff's injury. *Id.*, at 200.

The Court believes that Defendants have provided enough evidence to demonstrate that, during the period of time when Plaintiff was employed as a welder, warning labels were attached to the Defendants' products, and Material Safety Data Sheets were available to the Plaintiff and his co-workers for review by the mid-1980's. Thus, the Court must now turn to an analysis of whether the warnings provided by the Defendants through labels and Safety Sheets were inadequate and the proximate cause of Plaintiff's injury.

Plaintiff argues that the inadequacy of the warnings and Safety Sheets is evident by way of the testimony of several corporate representatives, as well as by pointing out the alleged insufficiency of the information conveyed in the Safety Sheets. Plaintiff points to the testimony of F&B Steel president, Mr. Cogar, who stated that even after reading a Safety Sheet he was uncertain as to what possible harms were caused by welding rod fumes. (Deposition of Mr. Cogar, pp. 94-96). Plaintiff also points to the testimony of one corporate representative that seemed to reflect that the Safety Sheets were not updated often enough, and, therefore, may have contained information that was not current. (Deposition of Mr. Sloan, pp. 34-35). Further, Plaintiff also argues that at at least one location, Plaintiff and his co-workers would have been unable to directly read the warning labels on boxes because they were not allowed access to them. (Deposition of Mr. Robinson, pp. 127-129).

In making his case that the information within the Safety Sheets did not sufficiently communicate the possible dangers of welding rod fumes, Plaintiff points to the opinion of United States District Court Judge Kathleen O'Malley in *Ruth v. A.O. Smith Corp., et al.*, Case No. 1:04 CV 18912. In that opinion, Judge O'Malley found at the summary judgment stage of the litigation that, "on the evidence so far adduced," she could see where a jury might reasonably conclude that the Safety Sheets did not communicate sufficient information and were inadequate.

While this Court recognizes that the central issue herein is whether the warnings were adequate, it is because of the facts specific to this case that the Court is compelled to initially glean over the first prong of the analysis and focus more closely on the issue of proximate causation. As earlier stated, in a failure to adequately warn claim, it is imperative that a plaintiff show that his reliance on the inadequate warning was the proximate cause of his injury. If a plaintiff is unable to do so, his claim fails.

In the instant case, Plaintiff has clearly testified that he neither saw nor read any of the warning labels or Safety Sheets that he claims were inadequate. In his deposition, Plaintiff admitted that he did not read the labels on the cans of welding products or welding machines:

> Q. At any time since you began welding in 1977, did you ever see a precautionary label on any welding consumables that stated, quote, welding may produce fumes and gases hazardous to health, avoid breathing these fumes and gases, use adequate ventilation, see USAS Z49.1. Safety in Welding and Cutting published by the American Welding Society?
>
> A. No, I did not.

(Deposition of Mr. Boyd, p. 90).

Plaintiff further testified that he did not read warnings regarding manganese contained in the Safety Sheets that were available to him:

Q. Do you recall Babcock & Wilcox telling you that MSDS sheets were available to for you to read and review?

A. Yes.

Q. Did you actually go and read and review any MSDS sheets?

A. No, sir.

Q. Do you recall Babcock and Wilcox telling you that you need to be aware what's contained in the various MSDS sheets for the products which you were working with?

A. Yes.

Q. But you still didn't go and read any of the MSDS sheets for any of the welding products you were working with; is that right?

A. Yes.

(Deposition of Mr. Boyd, pp. 122-123)

Finally, Plaintiff conceded that had he read the warnings accompanying various welding products he used throughout his career, he would have heeded them:

Q. [Beginning in 1979, Defendants began to use a label which said:] Read and understand this label. Fumes and gases can be dangerous to your health. Read and understand the manufacturer's instructions and your employer's safety practices. Keep your head out of the fumes. Use enough ventilation, exhaust at the arc, or both, to keep the fumes and gases from your breathing zone and general area . . . [D]o you recall seeing that on any container of welding consumables throughout your working career?

A. No, sir.

Q. If you had seen those words on a container of welding consumables, would you have performed your work as a welder differently than you did?

A. Yes, I would have.

Q. And what would you have done differently, sir?

A. Requested for the safety precautions, whatever it took?

Q. To avoid the fumes and gases?

A. (Nodding affirmatively).

(Deposition of Mr. Boyd, pp. 92-93).

Defendants make a convincing argument that it is difficult for Plaintiff to make a failure to warn claim citing the inadequacy of the warnings when Plaintiff himself never saw or read the warnings. The fact that Plaintiff never saw or read the warnings is made even more important because Plaintiff testified that he would have abided by the warnings had he seen or read them. Thus, had he read the warnings, he would have modified his behavior and, perhaps, not suffered the alleged injury.

Defendants point to sufficient case law to demonstrate that when a plaintiff testifies that he or she did not read a warning label, proximate cause cannot be established and the claim must fail. *Phan v. Presrite Corporation* (1994), 100 Ohio App.3d 195 (8th Dist. 1994); *Mohney v. USA Hockey, Inc.* (2004), 300 F. Supp.2d 556 (N.D. Ohio 2004); *Mitten v. Spartan Wholesalers, Inc.* (1989), 1989 WL 95259 (9th Dist. 1989).

III. CONCLUSION

Accordingly, Defendants' Motion for Summary Judgment on Counts Three, Four, Five, Six, and Nine is granted.

IT IS SO ORDERED.

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Justice Francis E. Sweeney
June 26, 2007