STATE OF MICHIGAN

COURT OF APPEALS

LARRY BEARUP,

Plaintiff,

and

DALE PARKER, JAMES WALLACE, CHESTER NETHING, CHERYL SCHUPPLER, SANDRA THEDFORD, Personal Representative of the Estate of RONNIE THEDFORD, WILLIAM SPOHN, DEANATRIS ARMSTRONG, Personal Representative of the Estate of RETINA HARRISTON, and BETTY ROBINSON,

Plaintiffs-Appellants,

and

ROBERT A. MARSAC,

Intervening Plaintiff,

v

GENERAL MOTORS CORPORATION, CINCINNATI MILACRON, d/b/a CINCINNATI MILACRON MARKETING, PRODUCTS DIVISION, and CASTROL INDUSTRIAL, INC.,

Defendants,

and

QUAKER CHEMICAL CORPORATION,

Defendant-Appellee.

UNPUBLISHED
October 23, 2008

No. 272654
Genesee Circuit Court
LC No. 99-066364-NO

LARRY BEARUP, DALE PARKER, JAMES WALLACE, CHESTER NETHING, CHERYL

SCHUPPLER, SANDRA THEDFORD, Personal Representative of the Estate of RONNIE THEDFORD, WILLIAM SPOHN, DEANATRIS ARMSTRONG, Personal Representative of the Estate of RETINA HARRISTON, and BETTY ROBINSON,

Plaintiffs-Appellees,

and

ROBERT A. MARSAC,

Intervening Plaintiff,

v

No. 272666
Genesee Circuit Court
LC No. 99-066364-NO

GENERAL MOTORS CORPORATION, CINCINNATI MILACRON, d/b/a CINCINNATI MILACRON MARKETING, PRODUCTS DIVISION, and CASTROL INDUSTRIAL INC.,

Defendants,

and

QUAKER CHEMICAL CORPORATION,

Defendant-Appellant.

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the sophisticated user doctrine does not apply to plaintiffs' negligence claims other than those premised on a failure to warn theory of liability. Furthermore, because record evidence reveals that defendant Quaker Chemical Corporation may have possessed actual knowledge regarding its draw compounds' defects, the circuit court should consider whether the sophisticated user doctrine applies to plaintiffs' failure to warn and breach of warranty claims.

I. The Claims Contained in Plaintiffs' Amended Complaint

Plaintiffs are former employees of General Motors Corporation (GM). Plaintiffs' amended complaint alleges that Quaker manufactured and supplied GM with chemical products, including draw compounds, and that Quaker "entered into contracts to monitor" the use of the chemicals at GM's metal fabrication plant. Plaintiffs also assert that Quaker provided services

"to help [GM] in the administration" of the chemicals. Plaintiffs' complaint pleads three distinct causes of action against Quaker: negligence, breach of warranty, and strict liability.

Plaintiffs' negligence claim avers that Quaker breached a duty to warn of the hazards of the draw compounds, and additionally raises 10 other distinct allegations of negligence. According to the amended complaint, Quaker failed to:

> a. … make certain that proper guards and ventilation were installed and maintained to prevent short and long term exposure to metal working fluids and their aerosols and mist.
>
> b. … protect Plaintiff's [sic] from continuous exposures, excessive use and over exposure to metal working fluids and their aerosols [and] mist.
>
> c. … monitor and . . . control effectively the presence and growth of bacteria, mold and fungus and other biological contaminates in the metal working fluids to which plaintiff's [sic] were exposed.
>
> d. … manage and coordinate the dumping, cleaning and refilling of the areas which supplied the fresh metal working fluids to the various machines and areas of the plant in which they were used.
>
> e. … warn Plaintiff's [sic] of the adverse health affects [sic] or hazards associated with the chronic use and exposure to metal working fluids and their aerosols and mists when it knew and/or should have known of such affects [sic] and hazards presented by exposure to metal working fluids particularly used in unsafe concentrations in poorly ventilated areas without respirators.
>
> f. . . . provide metal working fluids that were safe or fit for the reasonably foreseeable uses despite its' [sic] expressed/implied warranties and permitting or directing or allowing dangerous and hazardous metal working fluids to flow or to be pumped or used in Plaintiff's [sic] work areas.
>
> g. … provide Plaintiffs and necessary personnel protective equipment including, but not limited to respirators.
>
> h. … investigate whether the metal working fluids it manufactured, distributed and supplied to General Motors would be used in such a way as to have a dangerous toxic impact on Plaintiffs.
>
> i. … hire, train and supervise properly qualified competent persons to carry out the responsibilities at the Defendant General Motors Metal Fabricating Plant at all times material to this proceeding. . . .

Quaker sought summary disposition of all of plaintiffs' negligence claims based on the sophisticated user doctrine, and the majority applies the doctrine to conclude that the circuit court should have granted summary disposition of all of plaintiffs' claims, including those that have nothing to do with Quaker's failure to warn of the dangers of its chemicals.

II. The Limits of the Sophisticated User Doctrine

In Michigan, the sophisticated user doctrine is a creature of statute. In MCL 600.2947(4), the Legislature has provided,

> Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action *for failure to provide an adequate warning* if the product is provided for use by a sophisticated user. [Emphasis supplied].

"An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). In *Roberts*, our Supreme Court explained that "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id.* In ascertaining legislative intent, we "must give effect to every word, phrase, and clause in a statute." *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004) (internal quotation omitted). "The Court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Id.* (internal quotation omitted). This Court must avoid any construction of the statute that would render a statutory provision nugatory or surplusage. *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006).

By its plain and unambiguous terms, the statutory sophisticated user doctrine applies only to product liability claims "for failure to provide an adequate warning." Plaintiffs' complaint includes failure to warn allegations that potentially remain subject to summary dismissal pursuant to MCL 600.2947(4), in the absence of a statutory exception. However, the other negligence allegations pleaded in plaintiffs' amended complaint do not qualify as failure to warn claims, including those arising from Quaker's obligations to "monitor" and administer the chemicals.

Quaker's involvement in monitoring and servicing the administration of the draw compounds is established by deposition testimony filed in response to its motion for summary disposition. For example, Arthur Helmstetter, a Quaker employee, described Quaker's chemical management services as "assist[ing] General Motors in making sure that the chemical is functioning as it's designed," and "monitor[ing] concentration." Another Quaker employee, Katherine Coughenour, averred in an affidavit, "Quaker technicians have been assigned to GM Metal Fab on a part-time basis, and their role was principally to test GM's draw compounds for concentration and integrity and to make recommendations to GM as necessary." The record evidence supports plaintiffs' claims that Quaker undertook duties besides simply supplying the chemicals.

The majority holds that the sophisticated user doctrine applies to Quaker's monitoring and management of the chemicals, explaining in the lead opinion,

> In *Irrer*,[1] the defendant also provided chemical management services, and that court still concluded that the statutory sophisticated user doctrine applied. More importantly, our Supreme Court has ruled that Michigan's tort reform legislation has displaced the common law. *Greene*, *supra*.[2] Therefore, the statutory sophisticated user doctrine applies irrespective of whether defendant provided chemical management services under contract. [*Ante* at 16.]

In *Irrer*, the district court granted the defendant Milacron's motion for "partial summary judgment on Plaintiff's failure to warn claims." *Id*. at 678. The district court's opinion simply does not address whether the sophisticated user doctrine barred claims other than those involving a failure to warn. *Greene*, too, is purely a failure to warn case. The first sentence of the Supreme Court's opinion states, "In this case we consider the scope of a manufacturer's or seller's duty to warn of product risks under MCL 600.2948(2)." *Greene*, *supra* at 504. The plaintiff in *Greene* alleged that the defendants had breached their duty to warn of a product's hazards, and that they also breached an implied warranty by failing to adequately label the product as toxic. *Id*. at 506. These allegations indisputably qualify as failure to warn claims, and do not implicate other forms of negligence.

In this case, the circuit court denied Quaker's motion for summary disposition regarding the sophisticated user doctrine, and did not specifically address whether the doctrine would apply to the other theories of negligence pleaded in plaintiffs' complaint. The lead opinion reversing the circuit court's sophisticated user doctrine ruling provides only cursory treatment of the remaining negligence claims, and wholly ignores the statutory language clearly and unambiguously limiting application of the sophisticated user doctrine to failure to warn claims. In my view, summary disposition of plaintiffs' claims that do not involve a failure to warn theory are not subject to dismissal under the sophisticated user statute. Therefore, I would remand for further proceedings regarding plaintiffs' other negligence claims.

III. Quaker's Actual Knowledge of a Product Defect

Plaintiffs additionally argue that the sophisticated user doctrine does not apply in light of MCL 600.2949a, which provides,

> In a product liability action, if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product, then sections 2946(4), 2946a, 2947(1) to (4), and 2948(2) do not apply. [Footnote omitted.]

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[1] *Irrer v Milacron, Inc*, 484 F Supp 2d 677 (ED Mich, 2007).

[2] *Greene v A P Products, Ltd*, 475 Mich 502; 717 NW2d 855 (2006).

This statutory exception limits the sophisticated user doctrine, § 2947(4). According to the unambiguous language of § 2949a, the sophisticated user doctrine does not apply to the instant case if the court determines that (1) Quaker had "actual knowledge" that the draw compounds were defective, (2) a "substantial likelihood" existed that the draw compounds' defects would cause the injuries that plaintiffs allege, and (3) Quaker "willfully disregarded" that knowledge in distributing the product to GM.

The lead opinion observes that "the language used in MCL 600.2949a requires the defendant to have 'actual knowledge that the product was defective,' not actual knowledge that a product is so dangerous that it is defective." *Ante* at 22. According to the majority, Quaker's actual knowledge regarding dangers and "adverse health effects" of the draw compounds does not equate to knowledge that the products qualified as defective. *Id*. The lead opinion therefore concludes that "plaintiffs did not establish an issue of fact under MCL 600.2949a regarding whether defendant had actual knowledge that its draw compounds were defective." *Id*. at 23.

I respectfully disagree with the majority's interpretation of the term "defective." When used in a product liability action, the term "defective" refers to inadequate warnings as well as to deficiencies in design or manufacture. The Restatement 3d, Torts: Products Liability, defines "categories of product defect" as follows:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, *or is defective because of inadequate instructions or warnings.* A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) *is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings* by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. [*Id*., § 2, p 14 (emphasis supplied).]

"It is commonly accepted that inadequate warnings alone can constitute a product defect, whether the theory be implied warranty or strict liability in tort." *Smith v E R Squibb & Sons, Inc*, 405 Mich 79, 89; 273 NW2d 476 (1979). In my view, the majority interprets the term "defective" too narrowly, and dispenses far too summarily with plaintiffs' contention that Quaker possessed actual knowledge that the draw compounds contained inadequate instructions or warnings.

The record evidence includes statements made by several of Quaker's employees could potentially satisfy the requirements of § 2949a. The circuit court did not address this issue because it concluded that the term "defect" did not apply to inadequate warnings. I would remand to the circuit court for consideration of whether Quaker had actual knowledge of inadequate warnings, and whether plaintiffs can otherwise demonstrate the requirements of § 2949a.

IV. The Statute of Limitations

The lead opinion opines that plaintiffs' discovery doctrine claims are governed by *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), but declines to further analyze the statute of limitations issue because it holds that "summary disposition was proper on a different basis." *Ante* at 13. I agree with the lead opinion that *Trentadue* precludes plaintiffs from utilizing the discovery doctrine to extend the time for filing all claims except breach of warranty.[3] However, in my view, at least some of the plaintiffs filed timely claims notwithstanding the inapplicability of the discovery doctrine.

The period of limitation in a product liability action is three years. MCL 600.5805(13). This three-year period "runs from the time the acclaim accrues," which is defined as "the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. To determine whether the statute of limitations has expired, the circuit court must first identify both "the wrong upon which the claim is based," and the date the "wrong" was done. Our Supreme Court has explained that this calculation is intended to yield "the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently." *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995); see also *Trentadue*, *supra* at 388 ("The wrong is done when the plaintiff is harmed rather than when the defendant acted.") (internal quotation omitted). After determining the date on which the plaintiff sustained the injury underlying a claim, the circuit court must determine whether the plaintiff filed a lawsuit within three years of that date.

Plaintiff Dale Parker allegedly suffers from disabling occupational asthma. He worked at GM until 1998, and filed this lawsuit approximately a year later. Medical records supplied by Parker indicate that his occupational asthma was not diagnosed until 1998. The record does not reflect when the injury that produced the asthma occurred. The circuit court found,

> In 1989 Mr. Parker indicated that he was experiencing a loss of smell. In 1992 Mr. Parker's doctor issued a restrictive note saying that Mr. Parker should not work around fumes. Mr. Parker reported that when he left the plant or went on vacation he felt much better and felt that his injury was plant related. Therefore, Mr. Parker's SOL ran in 1995.

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[3] MCL 600.5833 provides, "In actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered."

If the injury Parker claims in this case relates to his loss of smell, the circuit court correctly analyzed the applicable statute of limitations. But if Parker's claim derives from his occupational asthma, the fact that he lost his sense of smell in 1989 does not define when he sustained the harm to his lungs that caused his asthma.

Plaintiff Ronnie Thedford suffers from pulmonary fibrosis, which was diagnosed in April 1997, clearly within three years of this lawsuit's filing date. The circuit court focused on the fact that in 1967, Thedford "reported to his physician that he thought his respiratory conditions were caused by workplace exposures to fumes." This observation does not resolve the legal question when "the wrong [was] done" that is the subject of Thedford's claims for damages . If exposure to Quaker's chemicals had caused Thedford's pulmonary fibrosis by 1967, the circuit court correctly analyzed the date of accrual. Because the circuit court employed a discovery rule analysis rather than applying the plain language of MCL 600.5827, however, I would remand for reconsideration of the applicable date of accrual for each plaintiff, based on proper statutory criteria.

/s/ Elizabeth L. Gleicher