STATE OF MICHIGAN

COURT OF APPEALS

KIM WHITE, as Personal Representative of the ESTATE OF CRAIG WHITE,

Plaintiff-Appellant,

v

VICTOR AUTOMOTIVE PRODUCTS INC, BARJAN PRODUCTS LLC, BARJAN LLC, and BELL AUTOMOTIVE PRODUCTS INC,

Defendants-Appellees.

UNPUBLISHED
May 18, 2010

No. 286181
Livingston Circuit Court
LC No. 07-023144-NP

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

K. F. KELLY, J. (*dissenting*.)

I disagree with my colleagues' conclusion that the trial court's grant of summary disposition in this matter was premature. In my view, defendants had no duty to warn of dangers associated with another manufacturer's product. Further, assuming for the sake of argument that such a duty existed, running the engine of a car in a small, enclosed space, such as a garage, is an obvious material risk to a reasonably prudent product user and would be especially obvious to a person like decedent whose employment involved servicing and repairing engines. I would affirm the trial court.

I. FACTUAL BACKGROUND

The facts in this matter are not in dispute and I do not repeat them here. I would emphasize, however, that decedent was experienced in repairing, servicing, and testing motors of various types. Before his death in 2005, he was self-employed for several years as a mechanic and handyman. His resume indicates that he "service[d] and repair[ed] . . . marine inboard & outboard motors, all boat systems (on-site and home based)." Decedent also had prior experience in 2001 "repair[ing]/winterizing [water boat] motors," and jobs titles of his previous employment dating back to 1994 imply that his jobs were connected to the technical aspects of marine motors.

II. ANALYSIS

Plaintiff contends, and the majority agrees, that a question of fact exists whether the danger of carbon monoxide poisoning associated with running a car in a closed garage was obvious under MCL 600.2948(2). I disagree. This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Where, as here, a defendant moves for summary disposition under the theory that it owes no duty to warn because the danger is obvious, a court must decide as a threshold matter whether reasonable minds could differ with respect to whether the danger is open and obvious. *Glittenberg v Doughboy Recreational Indus*, 441 Mich 379, 398; 491 NW2d 208 (1992). "If reasonable minds cannot differ on the 'obvious' character of the product-connected danger, the court determines the question as a matter of law." *Id*. at 398-399. If, however, reasonable minds could differ, the obviousness of risk is a question for the jury to decide. *Id*. at 399.

In product-liability actions, a defendant's duty to warn of dangers is governed by MCL 600.2948(2). That provision provides:

> A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

In other words, "a manufacturer has no duty to warn of a material risk associated with the use of a product if the risk: (1) is obvious, or should be obvious, to a reasonably prudent product user, or (2) is or should be a matter of common knowledge to a person in the same or a similar position as the person upon whose injury or death the claim is based." *Greene v AP Prod, Ltd*, 475 Mich 502, 509; 717 NW2d 855 (2006). "[A] 'material risk' is an important or significant exposure to the chance of injury or loss." *Id*. at 510. However, a defendant is not required to warn of specific dangers that could result from the risk. *Id*.

I would note at the outset that the harm decedent suffered was a direct result of running the car's engine in an enclosed space, and not the result of following the directions for, and using, the muffler wrap. It is undisputed that the muffler wrap did not create the carbon monoxide; rather, the vehicle produced the carbon monoxide and decedent's misuse of the vehicle in an enclosed space resulted in the ultimate harm. Consistent with these facts, plaintiff never alleged that the muffler wrap itself was dangerous or defective; rather, plaintiff alleged that decedent's harm was caused by the carbon monoxide. Defendants, however, have no duty to warn of dangers present in other manufacturers' products. "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Brown v Drake-Willock Int'l*, 209 Mich App 136, 145; 530 NW2d 510 (1995) citing *Spaulding* v *Lesco Int'l Corp*, 182 Mich App 285, 290; 451 NW2d 603 (1990). Thus, summary disposition for defendants on this basis would have been proper.

The trial court, however, dismissed plaintiff's action by finding that the hazard would be obvious to the reasonably prudent person and that decedent was even more knowledgeable of the associated risks than the general public. Contrary to the majority, I find no error in the trial court's decision. Moreover, even assuming that the trial court's reasoning was in error, it

nonetheless reached the right result given the foregoing. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.") (citation and quotation marks omitted).

A. REASONABLY PRUDENT PRODUCT USERS

The risk of carbon monoxide poisoning resulting from running a car's engine in an enclosed space is obvious to *a reasonably prudent* user of a car. See *Hanlon v Lane*, 98 Ohio App 3d 148, 154-155; 648 NE2d 26 (1994) (it is common knowledge that carbon monoxide is a toxic, potentially lethal, odorless and colorless gas); *Schiro v American Medical Response Services*, 719 So 2d 597, 600 (La App 1998) ("It is common knowledge that a vehicle's engine exhaust pipes emits carbon monoxide, that carbon monoxide is poisonous and that running vehicle engines in enclosed areas is dangerous."); and *Beans v Entex*, 744 SW2d 323, 325 (Tx Ct App 1988) (asphyxiation due to carbon monoxide inhalation in an unventilated area is an open and obvious danger).[1]

In fact, plaintiff even *concedes* that "most [people] recognize a general knowledge that breathing automotive exhaust poses a health risk." Assuming the muffler wrap killed decedent, which it did not, plaintiff's claim falls on this admission alone. See *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990) (indicating that a party's factual admissions are binding); MRE 801(d)(2). Moreover, even if plaintiff had not made this admission, plaintiff has failed to meet her burden of showing that the danger of carbon monoxide is not obvious to a reasonably prudent product user. Plaintiff points to the fact that over a hundred people in Michigan die per year from carbon monoxide poisoning. However, it cannot be inferred from this fact that the danger of car exhaust is covert. Nor does the affidavit of plaintiff's expert support her position—the affiant concludes that because many Americans have died from carbon monoxide poisoning and because the gas cannot be seen or smelt, that the danger of carbon monoxide is not apparent to a reasonably prudent consumer of a muffler wrap. Again, this evidence does not show that reasonably prudent consumers are unaware of the risks posed by running a car in an enclosed space.

The majority, however, contends that the trial court erred by granting summary disposition because defendants produced no evidence indicating that a reasonably prudent user of the muffler wrap would know that auto exhaust contains carbon monoxide. This conclusion is legally erroneous—the burden of proof in a products liability case is on the plaintiff, not the defendant. See *Moody v Chevron Chem Co*, 201 Mich App 232, 237; 505 NW2d 900 (1993). In addition, their conclusion blatantly ignores plaintiff's admission that it is "general knowledge" that automotive exhaust poses a health risk. I would conclude that the danger of breathing exhaust fumes containing carbon monoxide is obvious to a reasonably prudent user of a car and that the trial court did not err by concluding the same.

---

[1] The absurdity of the majority's conclusion is demonstrated by an analogous example, i.e., requiring defendants to warn users of the muffler wrap against the danger of a vehicle's exhaust in an enclosed space is akin to requiring them to warn against using the muffler wrap under water, as such a use could cause drowning.

B. PERSONS IN SAME OR SIMILAR POSITIONS

Moreover, the risk associated with idling an automobile engine in an enclosed space is a matter of common knowledge to a person in the same or a similar position as decedent. In *Hutchinson v Tambasco*, 309 Mich 597, 604; 16 NW2d 87 (1944), our Supreme Court stated:

> We take notice of the fact that it is common knowledge among persons whose employment is closely connected with operations around automobiles in enclosed places such as garages that carbon monoxide gas is expelled through the exhaust of a running motor and even small portions of the gas mixed with air are poisonous and may cause a person who inhales such gas to collapse.

Here, decedent's resume explicitly states that he repaired, serviced, and winterized marine motors. This evidence reflects that he had at least some employment history that would have involved, by implication, knowledge that an engine produces exhaust and that such exhaust was an occupational hazard. Viewing this evidence in a light most favorable to plaintiff, it compels the conclusion that the risks associated with engine exhaust involved when repairing, servicing, and winterizing motors would be common knowledge to decedent and those similarly situated. Thus, in my view, the trial court did not err by granting summary disposition on this basis.

Despite the lack of any evidence showing that decedent did not possess such knowledge, the majority contends that decedent's resume does not include enough details regarding his job responsibilities and, consequently, that a juror could view the matter differently to conclude that decedent lacked common knowledge of exhaust associated with engine repair. I simply fail to see how this supposed question of fact exists. The resume plainly states that decedent repaired and serviced engines. The obvious and natural inference is that decedent had knowledge, or should have had knowledge, of the dangers of carbon monoxide associated with his work. Any other inference would be nonsensical; a reasonable juror could reach no other conclusion. In my view, no question of fact exists with regard to decedent's knowledge. Thus, I agree with the trial court that defendants did not have a duty to include carbon monoxide warnings on the muffler wrap package.

I would affirm.

/s/ Kirsten Frank Kelly