COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

Nos. 98-1979 & 98-2309

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

No. 98-1979

MICHAEL COLE,

PLAINTIFF-APPELLANT,

PRIMECARE HEALTH PLAN, INC.,

PLAINTIFF,

V.

SUNNYSIDE CORPORATION, A FOREIGN CORPORATION, AND ADMIRAL INSURANCE COMPANY, A FOREIGN CORPORATION, ROYAL INSURANCE COMPANY OF AMERICA, A FOREIGN CORPORATION, MENARD, INC., A WISCONSIN CORPORATION, AND ASSOCIATED INDEMNITY INSURANCE COMPANY, A FOREIGN CORPORATION,

DEFENDANTS-RESPONDENTS,

RHEEM MANUFACTURING COMPANY AND EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, A WISCONSIN CORPORATION,

DEFENDANTS.

No. 98-2309

MICHAEL COLE AND PRIMECARE HEALTH PLAN, INC.,

PLAINTIFFS,

V.

SUNNYSIDE CORPORATION, A FOREIGN CORPORATION AND ADMIRAL INSURANCE COMPANY, A FOREIGN CORPORATION, ROYAL INSURANCE COMPANY OF AMERICA, A FOREIGN CORPORATION, MENARD, INC., A WISCONSIN CORPORATION AND ASSOCIATED INDEMNITY INSURANCE COMPANY, A FOREIGN CORPORATION,

DEFENDANTS-RESPONDENTS,

RHEEM MANUFACTURING COMPANY AND EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, A WISCONSIN CORPORATION,

DEFENDANTS-CO-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Michael Cole and Rheem Manufacturing Company (collectively "Cole") appeal from a judgment entered after the trial court granted motions for summary judgment to Menard, Inc. and Sunnyside Corporation, dismissing Cole's negligence and product liability claims,[1] and also dismissing his

[1] The provision relied on in arguing in favor of preemption provides:

> (b)(1)(A) Except as provided in paragraphs (2) and (3), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) … designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b) ….
>
> (B) Except as provided in paragraphs (2), (3), and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) … a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.
>
> (2) The Federal Government and the government of any State or political subdivision of a State may establish and continue in effect a requirement applicable to a hazardous substance for its own use (or to the packaging of such a substance) which requirement is designed to protect against a risk of illness or injury associated with such substance and which is not identical to a requirement described in paragraph (1) applicable to such substance (or packaging) and designed to protect against the same risk of illness or injury if the Federal, State, or political subdivision requirement provides a higher degree of protection from such risk of illness or injury than the requirement described in paragraph (1).

15 U.S.C.A. § 1261 historical note (1988) (Effect upon Federal and State Law, Pub. L. 94-284 § 17(a) (1976)).

claim of misrepresentation under WIS. STAT. § 100.18 (1997-98).[2] The trial court concluded that the Federal Hazardous Substance Act (FHSA) has preempted state common law tort claims. Cole claims that: (1) the FHSA applies only to products intended or suitable for household use, it does not apply to Sunnyside's five-gallon lacquer thinner, which is designed, labeled, and intended "for industrial use only," and which only reached the plaintiff through the negligence of Menards in advertising it for household use; (2) the FHSA does not preempt state common law tort claims; (3) the putative express preemptive language of the FHSA only relates to "cautionary" labeling requirements, and not other labeling requirements such as "instructions for use"; (4) preemption under the FHSA would apply only where a jury is being asked to impose a requirement beyond that required under the act, there can be no finding of preemption in this case, where the plaintiff is merely asking a jury to find that Sunnyside failed to include on its industrial container all of the instructions that it includes on its household containers; (5) the label on Sunnyside's industrial lacquer thinner container does not comply with the labeling requirements of the FHSA; and (6) he presented prima facie evidence to

[2] WISCONSIN STAT. § 100.18 provides in pertinent part:

> **(1)** No person, firm, corporation … with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, … directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase … of any real estate, merchandise, … shall make, publish, disseminate, circulate, or place before the public, … in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, … an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise … which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

support a claim against Menards and Sunnyside for fraudulent representation in advertising under WIS. STAT. § 100.18. Because there are genuine issues of material fact as to whether the labeling of Sunnyside's five-gallon container complied with the generic requirement of the FHSA, whether Sunnyside and Menards made misrepresentations under WIS. STAT. § 100.18, and whether any misrepresentations were causally connected to Cole's injuries, we reverse and remand for further proceedings.[3]

BACKGROUND

¶2 In July 1994, Cole began a home improvement project to water-seal the concrete floor of his basement. The project entailed pulling up carpet, removing the underlying tiles and their black, tar-like adhesive, and then coating the bare concrete floor with a water sealant. Cole had no difficulties removing the carpet or the tiles; however, the removal of the "black-tar" adhesive proved to be a problem.

¶3 Unsure how to proceed, Cole contacted several flooring companies and asked if they had any advice or product recommendations that would help him remove the "black-tar" adhesive. Unfortunately, none of the companies had any advice or products that they could recommend for the removal of the "black-tar." As a result, Cole resorted to experimenting with various products that he had in his garage. He tried removing the "black-tar" with a variety of products including

[3] We need not reach the question of preemption because there are material issues of fact as to whether the federal cautionary labeling requirements were met. Similarly, because of our disposition in this matter, we need not reach all of the arguments Cole raises. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 664 (1938) (only dispositive issues need be addressed).

mineral spirits, furniture stripper and lacquer thinner. He found that lacquer thinner was the most effective of these products.

¶4 On July 2, 1994, Cole went to Menards to purchase a lacquer thinner that would remove the "black-tar" adhesive. Cole asserts that he chose to shop at Menards because he had seen an advertisement for a five-gallon container of lacquer thinner offered at Menards. In the advertisement, Menards was offering a four-dollar rebate with the purchase of a five-gallon container of Sunnyside lacquer thinner. At Menards, Cole inquired about products, other than lacquer thinner, that would remove the "black-tar" adhesive and, after being given no advice about acceptable alternatives, he chose to purchase the five-gallon container of Sunnyside lacquer thinner advertised by Menards. Cole, however, did not participate in the rebate program.

¶5 The next weekend, on July 8, 1994, Cole began removing the "black-tar" adhesive. Before he began, Cole read all the instructions on the container and decided to wear a ventilator mask while working with the lacquer thinner. In addition, he opened all the basement windows and turned off and removed all of the electrical appliances in the basement. He then spread the lacquer thinner over small sections of the floor and waited for the thinner to dissolve the "black-tar" adhesive. Once the "black-tar" had dissolved, Cole would mop up the dirty material, wring it out into a bucket and then move on to clean the next small section of the floor.

¶6 At some point in this process, a fireball erupted and Cole sustained second- and third-degree burns over approximately thirty-seven percent of his body. The fire department concluded that the pilot light of Cole's water heater was the source of ignition; however, the room in which the water heater was

located showed no signs of damage caused by fire or heat. Cole, on the other hand, testified at his deposition that as he was moving his bucket to begin working on approximately the tenth small section of the floor, he heard a click behind him (which was in the opposite direction of the water heater), and he turned around and saw a half-dollar size flame mushroom out in all directions. Certified fire and explosion investigator Dean H. Bundy confirmed in a letter to counsel for defendant Rheem, that Cole's description of what occurred is consistent with a fire started by a spark of static electricity.

¶7 Cole filed suit against the manufacturer of the lacquer thinner (Sunnyside), the seller (Menards) and the manufacturer of the water heater (Rheem). He claims that his injuries are the result of the negligence of the defendants Sunnyside, Menards and Rheem. Cole also claims that the defendants Sunnyside and Menards are strictly liable because the injuries he sustained were caused by the unreasonably dangerous and defective condition of the lacquer thinner manufactured by Sunnyside and obtained at Menards. In addition, Cole amended his complaint and alleged misrepresentation under WIS. STAT. § 100.18. Cole claims that Menards' advertisement for the lacquer thinner targeted families and households, and it induced them to purchase five-gallon containers of Sunnyside lacquer thinner that were clearly labeled "for industrial use only." Cole points to the testimony of Sunnyside's executive vice president and general manager, Roger Petty, who agreed that the advertisement in question, which offered families rebates on up to three five-gallon containers of lacquer thinner, contradicted the specific warning that five-gallon containers of lacquer thinner should not be sold to families. Petty agreed that five-gallon containers of lacquer thinner should be sold only for industrial purposes, and anyone selling five-gallon containers of lacquer thinner to families would not be using ordinary care. Cole

relies on this testimony to support his claim that Menards misled him into thinking that it was appropriate to buy and use a product labeled "for industrial use only" and, Cole concludes that he was injured because he purchased a container that did not warn him of the specific hazard created by static sparks.

¶8 Sunnyside and Menards brought a motion for summary judgment, seeking an order dismissing Cole's claims of negligence and strict liability. They argued that Sunnyside's lacquer thinner was a "hazardous substance" governed by the FHSA. Further, they argued that the Sunnyside label complied with FHSA regulations and that the FHSA preempts any state common law claim which seeks to impose any more "complete" or more stringent labeling requirements on the Sunnyside product. Menards then brought a second motion, requesting the dismissal of Cole's misrepresentation claim under WIS. STAT. § 100.18. Sunnyside also supplemented its motion for summary judgment, arguing no causal misrepresentation and that Cole's claim is barred by the statute of limitations.

¶9 The trial court agreed with Sunnyside and Menards and granted their motions for summary judgment. It ruled that there were no factual disputes and summary judgment was appropriate. The trial court found that the label on Sunnyside's five-gallon container of lacquer thinner satisfied the requirements of the FHSA, and that the doctrine of preemption applied to Cole's claims. Further, the trial court found that Cole failed to show any misleading advertising under

WIS. STAT. § 100.18, or that there was any causal connection between the advertisement in question and his injuries. Cole now appeals. [4]

DISCUSSION

¶10 This case arises from a grant of summary judgment. We review motions for summary judgment using the same methodology that the trial court used. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Because the methodology is so well-known, we need not repeat it here, except to state that summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* ***id.***, 195 Wis. 2d at 496-97. As noted, we conclude that granting summary judgment to Sunnyside and Menards was inappropriate because material issues of fact exist both as to whether the label on Sunnyside's product complies with the requirements set forth under the FHSA, and whether Menards' advertisement was misleading or deceptive and causal.

¶11 In reaching this issue, we have concluded that despite the "for industrial use only" caution, the five-gallon lacquer thinner is subject to the FHSA. Cole and Rheem argue that because the FHSA only applies to products "intended or suitable for consumer use," the industrial size product used here does not fall under the FHSA's requirements. We disagree. The test to determine whether a product is subject to the FHSA is "whether under any reasonably foreseeable

[4] Rheem Manufacturing Company, the manufacturer of the hot water heater, also appeals from the trial court's grant of summary judgment to Sunnyside and Menards. Rheem was sued because the fire department linked the cause of the fire to the water heater. Rheem also filed a motion for summary judgment in the trial court, but the decision on the motion has been held in abeyance until the outcome of this appeal. Rheem's appeal was consolidated with this appeal.

condition of purchase, storage, or use the article may be found in or around a dwelling." 16 C.F.R. § 1500.3(c)(10)(i). The product here was sold in a consumer-oriented facility to consumers. This product, although labeled for industrial use, was in the "stream of commerce" and available to ordinary consumers. Thus, it was subject to the requirements of the FHSA. *Cf.* ***Christenson v. St. Mary's Hosp.***, 835 F. Supp. 498, 500 (D.C. Minn. 1993). Under these circumstances, we agree with the trial court that it was reasonably foreseeable that this product could reach an ordinary consumer.

1. The trial court erred in granting summary judgment to Menards on the negligence claim.

¶12 Cole argues that the trial court erred in ruling as a matter of law that the label on Sunnyside's lacquer thinner complied with FHSA requirements. We agree. The FHSA labeling requirements in 15 U.S.C. §§ 1261(p)(1)(E), (F) and (I) require that the label on a particular hazardous substance contain "an affirmative statement of the principal hazard or hazards," the "precautionary measures describing the action to be followed or avoided," and "instructions for handling and storage of packages which require special care in handling or storage." The label on Sunnyside's five-gallon lacquer thinner provided the following:

> **DANGER!** EXTREMELY FLAMMABLE LIQUID & VAPOR. VAPORS MAY CAUSE FLASH FIRE. VAPOR HARMFUL. MAY BE HARMFUL OR FATAL IF SWALLOWED. SKIN AND EYE IRRITANT.
>
> CONTAINS: PETROLEUM DISTILLATE, TOLUENE, ETHYL ACETATE, ISOPROPYL ALCOHOL, ACETONE.
>
> **Precautions:** Keep away from heat, sparks and flame. Vapors may ignite explosively if allowed to accumulate. Vapors may spread long distances. Do not use in unventilated area. Extinguish pilot lights and turn off heaters and non-explosion proof electrical equipment and

> all other sources of ignition during use and until all vapors are gone. If mechanical ventilation is used, it must be of explosion proof design. Do not take internally. Avoid contact with eyes or skin. Do not breathe vapor or spray mist. Do not transfer contents to unlabeled containers. Keep container closed when not in use.
>
> USE ONLY WITH ADEQUATE VENTILATION.
>
> KEEP OUT OF REACH OF CHILDREN.
>
> ….
>
> WARNING!
>
> ….
>
> This product for Industrial use ONLY.

Cole contends that this label did not comply with the FHSA because it did not include additional instructions for use, which were contained on the smaller quantities of lacquer thinner labeled for household consumer use. Menards also carried Sunnyside's lacquer thinner in quart and single gallon quantities and those labels contained different and additional instructions for use, advising users to "avoid rubbing; friction may cause static electric sparks which may ignite vapors." Cole testified during his deposition that had that instruction been on the five-gallon container, he would not have used the lacquer thinner to remove the "black-tar," and the fire would not have occurred. Further, two months after the incident in this case, Sunnyside proposed changing its label to specifically instruct against use in "confined areas such as basements or bathrooms." Cole alleges that Sunnyside knew its product should not be used in enclosed areas and that it could ignite static sparks, but failed to include these warnings on the five-gallon container.

¶13 Despite the foregoing, the trial court ruled as a matter of law that Sunnyside's label complied with the requirements of the FHSA. The trial court

erred. This claim presents issues of material fact that cannot be decided as a matter of law on summary judgment.[5]

2. The trial court erred in granting Menards summary judgment on the cause of action premised on WIS. STAT. § 100.18.

¶14 The trial court ruled as a matter of law that Menards did not violate WIS. STAT. § 100.18 because the advertisement of the five-gallon lacquer thinner was not misleading and/or that the advertisement was not causally connected to Cole's injuries. Again, we conclude that this ruling was inappropriate on summary judgment because material issues of fact exist and need to be resolved

[5] Although we do not reach the preemption issue, we note that we have previously addressed the basis for and situations where preemption is appropriate:

> The pre-emption doctrine is rooted in article VI of the United States Constitution, which is commonly referred to as the Supremacy Clause. The question of whether federal law pre-empts state law is one of congressional intent. Federal law pre-empts state law in three situations: (1) where Congress explicitly mandates pre-emption of state law; (2) where Congress implicitly indicates an intent to occupy an entire field of regulation to the exclusion of state law; or, (3) where state law actually conflicts with federal law. The defendant bears the burden of establishing pre-emption.

Miller Brewing Co. v. DILHR, 210 Wis. 2d 26, 34, 563 N.W.2d 460 (1997) (citations omitted). It is not necessary for us to decide the preemption question because a cause of action alleging that a product's label does not comply with the FHSA's requirements is not preempted. *See* ***Moss v. Parks Corp.***, 985 F.2d 736, 740 (4th Cir. 1993). Here, there are disputed issues of fact as to whether Sunnyside's lacquer thinner's cautionary label warnings comply with the FHSA. This is a question of fact to be decided by the jury and inappropriate for summary judgment rulings.

We do note that the general preemption question depends on interpretation and application of two Supreme Court cases: ***Cipollone v. Liggett Group, Inc.***, 505 U.S. 504 (1992) or ***Medtronic, Inc. v. Lohr***, 518 U.S. 470 (1996). In ***Cipollone***, the Supreme Court held that the phrase "[n]o requirement or prohibition" used in the federal act at issue required preemption of all state laws, whether the law was a positive enactment by the legislature or the common law. *See* ***id.***, 505 U.S. at 521. ***Medtronic*** conflicts with this pronouncement, holding that "requirement" refers only to a positive enactment and, therefore, does not preempt common law claims. *See* ***id.***, 518 U.S. at 485-90.

by a fact-finder. This claim involves determining what a reasonable person would have understood the Menards' advertisement to mean and whether the five-gallon version of the product was suitable for its intended target. The advertisement by Menards was published in a sales flyer in the Journal-Sentinel. The Menards' store sells to the general public, with the majority of customers being individuals engaged in home improvement-type projects. Menards also offered a rebate on the five-gallon containers, limiting it to three containers per household or family. Whether a reasonable person would believe this advertisement to mean that Menards was representing that the product as packaged would be safe for household use or use by a family, involves questions of fact. Cole testified that he saw the advertising for the rebate program and it, in part, encouraged him to go to the Menards' store. Further, whether the advertisement was a substantial factor in causing Cole's injury is a question of fact. *See* ***Wagner v. DHSS***, 163 Wis. 2d 318, 328, 471 N.W.2d 269 (Ct. App. 1991). Thus, it was inappropriate for the trial court to decide these issues on summary judgment.[6]

¶15 Based on the foregoing, we reverse the grant of summary judgment because material issues of fact exist, and we remand for further proceedings.

[6] Sunnyside argues that the statutory misrepresentation claim is barred by the three-year statute of limitations. Sunnyside raised this issue below, but the trial court did not rule on it. Sunnyside argues that because Cole purchased the product on July 2, 1994, and did not file his second amended complaint raising the statutory claim until November 14, 1997, more than three years has passed and, therefore, this claim is barred. We disagree. The basic test for whether an amendment should be deemed to relate back is the identity of transaction test, i.e., did the claim or defense asserted in the amended pleading arise out of the same transaction occurrence or event set forth in the original pleading. If this test is satisfied, relation back is presumptively appropriate. *See* ***Korkow v. General Cas. Co.***, 117 Wis. 2d 187, 196, 344 N.W.2d 108 (1984). We conclude that the statutory misrepresentation claim arises out of the same transaction as the original complaint; that is, the purchase of the lacquer thinner. Accordingly, the second amended complaint relates back to the date the original complaint against Menards was filed, December 18, 1996, and was therefore timely. We also note that the gravaman of the statutory misrepresentation claim was a print advertisement in the Journal-Sentinel, that Menards claimed never existed. Menards finally produced this ad on October 20, 1997.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.