No. 09-0376

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-07-090315

JOSEPH BOYD,

Plaintiff-Appellee,

v.

LINCOLN ELECTRIC COMPANY, et al.,

Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS LINCOLN ELECTRIC COMPANY, THE BOC GROUP, INC., THE ESAB GROUP, INC., AND HOBART BROTHERS COMPANY

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I. THIS CASE PRESENTS A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a recurring and important question of product-liability law as to which the courts of appeals are in disagreement: whether the existence of disputed facts regarding the *adequacy* of a warning precludes summary judgment in a failure-to-warn case even if no reasonable jury could conclude that the allegedly inadequate warning *proximately caused* the plaintiff's injury.

In the proceedings below, the trial court set aside the question of *adequacy* of the warnings that accompany welding equipment and consumables, because it found that summary judgment for defendants-appellants Lincoln Electric Company, Linde, Inc., f/k/a The BOC Group, Inc., f/k/a Airco, Inc., The ESAB Group, Inc., and Hobart Brothers Company ("Manufacturers") was warranted on the separate element of *proximate causation.* As the court explained, even if a warning is inadequate, "it is imperative that a plaintiff show that his reliance on the inadequate warning was the proximate cause of his injury." Trial Op. at 4, Appx. at A-35. In this case, the court found, "proximate cause cannot be established and the claim must fail" because the plaintiff, Joseph Boyd ("plaintiff"), never read any warnings – despite direct instructions from his employers to do so. Id. at 6, Appx. at A-37. The Court of Appeals reversed the trial court's ruling, holding that summary judgment on plaintiff's negligence and strict liability claims was inappropriate because a dispute of fact exists concerning the adequacy of the form of the warnings – that is, adequacy in the placement or size of the warning, as opposed to its content. In the court's view, plaintiff's failure to read warnings does not "per se" rebut the presumption that an inadequate warning proximately caused an injury, because that failure could itself be due to an inadequacy in the form of the warning. App. Op. at 17, Appx. at A-20.

This Court should grant review for several reasons. First, the holding was contrary to this Court's precedents. Even proof of inadequacy in a warning cannot support a judgment for the plaintiff if he fails to show that an adequate warning would have changed his conduct. In its seminal case regarding warning causation, *Seley v. G.D. Searle & Co.* (1981), 67 Ohio St.2d 192, 21 O.O.3d 121, 423 N.E.2d 831, the Court explained that a plaintiff who proves that a warning is inadequate enjoys a presumption that the inadequacy caused his injury – the so-called "heeding presumption." Id. at 200. "[A]bsent the production of rebutting evidence by the defendant," this presumption "is sufficient to satisfy the [plaintiff's warning causation] burden." Id. However, upon the production of rebuttal evidence – i.e., evidence demonstrating that "an adequate warning would have made no difference" to the plaintiff's conduct – "the [heeding] presumption * * * is rebutted, and the required element of proximate cause * * * is lacking." Id. at 201. The result is the same whether the allegations of inadequacy relate to the form of the warning, or its content, or both. In *Freas v. Prater Construction Corp.* (1991), 60 Ohio St.3d 6, 573 N.E.2d 27, for example, the plaintiff asserted defects in both the form and the content of the warning. This Court affirmed summary judgment in favor of the defendant because it was clear from the facts that no one "could reasonably conclude that additional warnings * * * would have made a difference." Id. at 10. The teachings of these two cases merge here. Summary judgment is appropriate – even in the face of allegations of inadequacy as to the *form* of the warning – when the defendant rebuts the heeding presumption with evidence that the plaintiff was expressly directed to read the allegedly inadequate warning and failed to do so. In such a case, "an adequate warning would have made no difference," and the plaintiff has not carried his burden on proximate cause. *Seley*, 67 Ohio St.2d at 201.

Second, resolution of this issue is of public or great general interest. The Court has previously recognized the importance of providing guidance on foundational principles of product-liability law, as its decisions in *Seley* and *Freas* demonstrate. The question raised by this case is of particular importance because the rule adopted by the Court of Appeals would automatically subject defendants to trial in any case in which a plaintiff alleges inadequacies in the form of a defendant's warning, even if deposition testimony or other evidence makes clear that no warning, however given, would have changed his conduct. Such a rule would force courts, plaintiffs, and defendants to incur the costs and burdens of trial even when the plaintiff could never prevail as a matter of law. The trial court's judgment would have avoided such an extreme result and should be restored. Cf. *North v. Pa. R.R.* (1967), 9 Ohio St.2d 169, 171, 38 O.O.2d 410, 224 N.E.2d 757 (noting that this Court "should review as of public or great general interest doubtful reversals" of orders granting motions for summary judgment).

Third, the importance of resolution is heightened by the fact that the issue presented here is recurring and has resulted in an acknowledged disagreement between the Courts of Appeals – the court below expressly disagreed with the contrary reasoning of the Ninth District Court of Appeals in *Mitten v. Spartan Wholesalers, Inc.* (Aug. 16, 1989), Summit App. No. 13891, 1989 WL 95259, which affirmed summary judgment in favor of the defendant on proximate cause even though it assumed that the warning at issue was inadequate. This Court's intervention is thus required to harmonize conflicting decisions of the lower courts.

For all these reasons, the Court should grant the petition and reverse the judgment of the court of appeals.[1]

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[1] Appellants also incorporate by reference the memorandum of Appellant Deloro Stellite, presenting the question whether the lower court erred in resolving an issue – the application of

II. STATEMENT OF THE CASE AND FACTS

The trial court entered its Opinion and Order granting the Manufacturers' Motion for Summary Judgment on August 20, 2007; the Eighth District Court of Appeals journalized its Entry and Opinion reversing in part on January 9, 2009. See Appx. at A-1, A-37, A-38.

1. This is one of nearly 1,000 similar cases filed in the Cuyahoga County Court of Common Pleas in 2004 and 2005 by welders seeking to recover damages for injuries allegedly suffered as a result of using welding consumables in the workplace. Justice Francis E. Sweeney was assigned to preside over a specially-created welding fume docket. To date, plaintiffs have voluntarily dismissed all but one-quarter of the cases originally on that docket.

a. Plaintiff Joseph Boyd's multi-count Complaint alleges that certain manufacturers of welding rods, wires, and other consumables failed to adequately warn him that overexposure to manganese in welding fumes could cause undefined neurological injury. Boyd worked primarily in Pennsylvania and Ohio from 1977 until April 2004, repairing large industrial boilers at nuclear and coal-fired power plants. Boyd was typically hired out of a boilermaker union hall, working for over 50 different employers during his career. For the majority of his welding career, Boyd worked for large, sophisticated employers: Alstom Power f/k/a APComPower, Inc. f/k/a ABB Combustion Engineering, Inc.; Babcock & Wilcox Company; Enerfab, Inc.; F&B Steel, Inc.; Minnotte Contracting & Erection Corp.; and Simakas Company, Inc. f/k/a Simakas Brothers Company (collectively, "Employers"). Boyd used similar products at each jobsite, but the working conditions and nature of the work varied greatly.

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the learned intermediary doctrine – that had not yet been decided by the trial court. That issue is currently pending before this Court in *Kaminski v. Metal & Wire Prods. Co.*, No. 2008-0857.

b. A comprehensive warnings system – to which the Manufacturers and Boyd's Employers all contributed – was in place throughout Boyd's welding career to ensure that welders were informed of, and trained to deal with, job-related health hazards. Very generally, this warnings process or system consists of written warnings, safety materials, and employee training and safety programs. The Manufacturers provided product warning labels, Material Safety Data Sheets ("MSDSs"), product brochures and catalogs, and other publications conveying product warnings to purchasers of their products, including Boyd's Employers. The Employers would then convey those warnings to their employees as part of their obligation to provide their welder employees a safe work environment.

Every product and every machine Boyd alleges he used or came in contact with throughout his welding career contained a warning label. In fact, at least ten years before Boyd began welding, the Manufacturers included labels on their products and machines warning users that welding fumes may be hazardous.[2] Shortly after Boyd began welding, the Manufacturers supplemented their warning labels, instructing users to "read and understand" the MSDSs as well as their employers' safety practices for proper and safe use of the products, and referring users to the Occupational Safety and Health Act (Section 1910, Title 29, C.F.R.).[3]

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[2] A typical warning label on welding consumables and machines like those Boyd used at the beginning of his welding career stated:

CAUTION

Welding may produce fumes and gases hazardous to health. Avoid breathing those fumes and gases. Use adequate ventilation. See USA Standard 249.1 "Safety in Welding and Cutting," published by the American Welding Society.

[3] Many of the labels on the products Boyd used contained some or all of the following language:

WARNING: Protect yourself and others. Read and understand this label.

Beginning in the mid-1980s, the Manufacturers' product labels contained additional information regarding manganese and other constituents in welding fumes. For example, a 1986 Hobart warning label for its 6010 mild steel consumable – one that Boyd alleges he used regularly – stated: "WARNING: The following chemicals may be hazardous during welding: iron oxide, manganese, silicon oxide." Also, labels attached to some of the welding consumables Boyd would have used in the 1990s bore special ventilation warnings. Such labels warned:

> Fumes from the normal use of this product contain significant quantities of manganese compounds. The TLV (threshold limit value) for manganese (0.2 mg/m3) will be exceeded before reaching the 5.0 mg/m3 exposure guideline for general welding fume. Indoors, use local exhaust. Outdoors, a respirator may be required. Manganese over-exposure can affect the central nervous system, resulting in impaired speech and movement. This condition is considered irreversible. Before use, read and understand the material safety data sheet (MSDS) for this product.

At the same time, the Manufacturers' MSDSs included specific discussions about manganese and warned users of the possibility that sustained overexposure to manganese may affect the central nervous system. In short, these warnings were contained on or included with the welding consumables Boyd allegedly used throughout his welding career.

Electric shock can kill. **Fumes and gases** can be dangerous to your health. **Arc rays** can injure eyes and burn skin.

- Read and understand the Material Safety Data Sheet (MSDS), manufacturer's instructions and your employer's safety practices.
- If MSDS not enclosed, obtain from your employer.
- Keep your head out of the fumes. See section 5 of the MSDS for specific fume concentration limits.
- Use enough ventilation, or exhaust at the arc end, or both, to keep fumes and gases from your breathing zone and the general area.
- Wear correct eye, ear and body protection.

c. At his deposition, Boyd admitted that his Employers provided him with safety materials and programs, and that he attended weekly safety meetings, but claimed he never received any warnings concerning the risks of welding fumes. Boyd testified, however, that he had never reviewed the Manufacturers' warnings, even when his employers specifically informed him that MSDSs were available, that they contained important safety information, and that he should read them:

> Q. Do you recall Babcock & Wilcox telling you that MSDS sheets were available 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 & Wilcox telling you that you need to be aware of what's contained in the various MSDS sheets for the products which you are working with?
>
> A. Yes.
>
> Q. But you still didn't go read any of the MSDS sheets for any of the welding products you were working with; is that right?
>
> A. No, we never read them.

Boyd's testimony was consistent on this point – regardless of the employer, and regardless of the time period, he was generally aware that MSDSs were available, that they contained safety information, and that he was supposed to read them. But he never did.

Boyd also testified that the warnings given by the Manufacturers throughout his career provided sufficient information to alert him to the risks of welding fumes and that he would have taken precautions to avert any injury if he had ever read 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).[4]

In addition, Boyd admitted that he received newsletters stating that welding fumes "could be hazardous to your health." He also acknowledged that one of his employers provided him with employee handbooks that addressed safety but that he never read them. He also testified that, even in 1980, he "believe[d] that fumes and gases can be dangerous to [his] health," and he agreed that "throughout [his] welding career," he understood that overexposure to iron, iron oxide and manganese "was an important thing to be aware of." Yet he did not bother to read any of the available safety information despite acknowledging that it existed and despite the fact that he was familiar with and had seen "many" MSDSs for other products.

2. The Manufacturers filed several motions for summary judgment in August 2006, including one seeking to dismiss all of Boyd's failure-to-warn claims on the ground that he could

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[4] Boyd testified similarly with respect to the warning that was in place when he began welding in 1977.

not demonstrate proximate cause ("Proximate Cause Motion"). On June 26, 2007, Justice Sweeney granted the Proximate Cause Motion. The court first noted that "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[.]" See Trial Op. at 4, Appx. at A-35. The court found it especially significant that Boyd had ignored the instruction given by Babcock & Wilcox to read the MSDSs, noting that Boyd "did not read warnings regarding manganese contained in the Safety Sheets that were available to him." Id. As Justice Sweeney concluded, this testimony doomed Boyd's claims because he cannot "make a failure to warn claim citing the inadequacy of the warnings when [he] himself never saw or read the warnings." Id. at 6, Appx. at A-37. Moreover, Boyd admitted that "had he read the warnings" the Manufacturers supplied, they would have caused him to "modif[y] his behavior and, perhaps, not suffer[] the alleged injury." Id. Thus, without deciding whether any dispute of fact existed regarding the adequacy of the Manufacturers' warnings, the trial court granted summary judgment on the ground that plaintiff would be unable to prove that any alleged warning defect caused him harm.

3. Plaintiff appealed, and the Court of Appeals reversed. The court "disagree[d]" with the trial court that the adequacy of the warnings was irrelevant to the issue of causation, App. Op. at 11, Appx. at A-14, holding that "'a warning that is inadequate because it is not properly displayed can be the proximate cause of harm even if the user did not read the warning,'" id. at 17, Appx. at A-20 (quoting *McConnell v. Cosco, Inc.* (S.D. Ohio 2003), 238 F. Supp. 2d 970, 978). Finding that plaintiff had alleged such an inadequacy in the form of the Manufacturers' warnings, the court concluded that "the trial court and appellees improperly extended the 'read and heed' rule to mean that if a plaintiff admits he or she did not read any warning

accompanying a product, then a defendant has per se rebutted the presumption." Id. The court acknowledged the evidence demonstrating that plaintiff did not read MSDSs despite being instructed to do so, but did not explain why this evidence was insufficient to rebut the presumption of causation. Instead, the court simply commented that plaintiff "did not testify at deposition that he never read a MSDS during his 27-year career," and questioned whether the MSDSs provided adequate warnings regarding manganese exposure. Id. at 20, Appx. at A-23.

III. ARGUMENT

Proposition of Law: A defendant is entitled to summary judgment on proximate causation, regardless of any alleged inadequacy as to the form of its warnings, when the only reasonable interpretation of the facts is that the plaintiff would not have read any form of warning.

This Court's precedents are clear that a failure-to-warn plaintiff cannot prevail unless the jury finds both that: (1) the defendant's warning is inadequate; and (2) the inadequacy in the warning caused the plaintiff's injury. *Seley*, 67 Ohio St.2d at 199-200. The Court of Appeals erred by holding that a genuine dispute regarding the first element necessarily precludes summary judgment on the second.

In order to satisfy the first element, a plaintiff can prove inadequacy as to the form or as to the content of the warning, or both. Id. at 198. Thus, a warning with perfectly adequate content may nonetheless be proven inadequate because it was placed in an obscure position, just as an adequately positioned and sized warning may nonetheless be shown inadequate by its failure to alert a user to a danger posed by the product it accompanies.

Under Ohio's "heeding presumption," a plaintiff who proves that a warning is inadequate – and thus satisfies the first element – enjoys a presumption that the inadequacy caused his injury. Id. "[A]bsent the production of rebutting evidence by the defendant," this presumption

"is sufficient to satisfy" the second element – *i.e.*, plaintiff's warning causation burden. Id. The presumption vanishes, however, upon the production of rebuttal evidence. See id. at 200-01. And when the evidence conclusively shows that "an adequate warning would have made no difference in" the plaintiff's conduct, "the required element of proximate cause * * * is lacking," requiring a defense verdict. Id. at 201. The appellate court disregarded this framework, finding that a plaintiff can defeat summary judgment by demonstrating a dispute of fact regarding the adequacy of a warning, even where a defendant produces undisputed evidence that a different warning would not have affected the plaintiff's behavior or averted his alleged injury.

This Court has not yet directly addressed the operation of the heeding presumption on summary judgment, but the courts of appeals and the federal courts have. Until this case, these courts have had little trouble holding that summary judgment can issue for the defendant on the issue of proximate cause, even when the inadequacy of the warnings is assumed or proven. For example, in *Mitten*, 1989 WL 95259, three employee-plaintiffs appealed entry of summary judgment on their claim that inadequate warnings on chemicals caused the explosion that injured them. Relying on *Seley*, the employees argued that their inadequate warning claim "gives rise to inferences and presumptions of proximate causation" sufficient to defeat summary judgment. Id. at *1. The court rejected that interpretation of *Seley* as overbroad, noting that its "logical conclusion" would preclude summary judgment anytime a strict liability claim for failure to warn is asserted. Id. at *1-*2. Rather, the court explained, *Seley* simply holds that "[w]here no warning is given, or where the warning is inadequate, a rebuttable presumption arises that the failure to adequately warn was a proximate cause of the injured party being exposed to the product." Id. at *2. That presumption was rebutted in *Mitten* because "[e]ach injured employee testified in deposition that he either did not see or did not read the warning labels" on the

chemical containers; thus, "[t]he label warnings were not established as a cause of these employees exposing themselves to serious injury." Id. As the court further explained, "[a]n adequate warning would have made no difference in the employees' decision to expose themselves to these products" because "the employees relied on representations of the employer, not the warning labels." Id. The court rejected plaintiffs' expert's view concerning the adequacy of the warning for the same reason, explaining that "the expert does not suggest how a warning that is not read is causally connected to the employees' injuries." Id.[5] See, also, *Vermett v. Fred Christen & Sons Co.* (2000), 138 Ohio App.3d 586, 612, 741 N.E.2d 954 (plaintiff's testimony "that he never looked at the foot switch to see what may have been written on it" precluded a finding that failure to place a warning on the foot switch could have proximately caused plaintiff's injuries); *Wade v. Diamant Boart, Inc.* (C.A.6, 2006), 179 F. Appx. 352, 355-56 (affirming summary judgment on proximate cause where plaintiff "ignored the warning directing operators to read the instruction manual"; "Since Plaintiff did not read the operator's manual, he would not have been aware of any additional or more specific warnings even if they have been provided."); *Mohney v. USA Hockey, Inc.* (N.D. Ohio 2004), 300 F. Supp. 2d 556, 578 ("Even assuming arguendo that the warnings in this case, including that on the back of the helmet, were inadequate, the presumption of proximate cause is rebutted, and a claim of a failure to warn fails where the evidence directly establishes that a plaintiff did not read the warnings."), affirmed, (C.A.6, 2005), 138 F. Appx. 804.

This Court appeared to approve this treatment of proximate causation on summary judgment in *Freas*. As noted above, the *Freas* court approved the entry of summary judgment in

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[5] The Court of Appeals dismissed *Mitten* out of hand, saying only that it did "not find that court's reasoning persuasive for the instant case." App. Op. at 19, Appx. at A-22.

a case in which the plaintiff alleged defects in both the placement and the content of the warning. 60 Ohio St.3d at 9. The Court nonetheless found that no one "could reasonably conclude that additional warnings" placed on the equipment itself "would have made a difference." Id. at 10. Accordingly, "the evidence * * * fail[ed] to establish the necessary element of proximate cause for appellant's strict liability claim." Id.

In conflict with this consistent precedent, the Court of Appeals held that summary judgment was improper in this case because it identified a dispute of fact regarding the adequacy of the form of the Manufacturers' warnings. According to the Court of Appeals, the trial court had erred by "improperly extend[ing] the 'read and heed' rule to mean that if a plaintiff admits he or she did not read any warning accompanying a product, then a defendant has per se rebutted the presumption." App. Op. at 17, Appx. at A-20. The Court of Appeals explained that, at least in a case in which there is a disputed fact about the adequacy of the form of the warnings, a plaintiff's failure to read a warning cannot justify the grant of summary judgment because his failure to read the warning could be attributed to the alleged warning defect. Id.

This ruling misapplied the heeding presumption. The Court of Appeals treated the presumption as though it were a form of proof that a plaintiff would heed a warning – *even in the face of contrary evidence*. But this Court made plain in *Seley* that although the presumption is in some cases "sufficient to satisfy the [plaintiff's warning causation] burden," that presumption (and its sufficiency to fulfill plaintiff's burden on warning causation) only persists "*absent* the production of rebutting evidence by the defendant." 67 Ohio St.2d at 200 (emphasis added). When a defendant produces rebuttal evidence – as in *Seley*, *Mitten*, and this case – the presumption disappears, and the issue is then uncontroverted unless the plaintiff produces his

own evidence regarding causation. If the plaintiff fails to produce any such evidence, summary judgment for the defendant is appropriate.

That is what happened here. Defendants produced evidence that plaintiff failed to read the warnings that were made available to him, even though his employers specifically informed him that MSDSs were available and even though he knew they contained important safety information. That evidence was sufficient to rebut the presumption of causation, and plaintiff submitted no contrary evidence that his injury would have been averted if different warnings had been provided. The Court of Appeals responded that plaintiff "did not testify at deposition that he never read a MSDS during his 27-year career," and questioned whether the MSDSs provided adequate warnings regarding manganese exposure. App. Op. at 20, Appx. at A-23. It is irrelevant, however, that the plaintiff may have seen other MSDSs unrelated to welding consumables throughout his long career. The uncontroverted evidence here demonstrates that he knew that welding fumes could be dangerous, that MSDSs were available to him, that MSDSs contained important safety information, and that he should read them. But he never did. The undeniable implication from that evidence is that no welding fume warning would have caused plaintiff to alter his behavior.[6]

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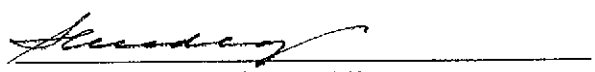
[6] Where there is a dispute over the form of a warning in a workplace setting, it makes even less sense to deny summary judgment to a manufacturer that has negated the element of proximate cause. After all, employers play an intervening role and are tasked with ensuring that warnings are properly conveyed to their employees. In this case, as discussed supra, the Manufacturers provided labels and MSDSs addressing the alleged risks from welding fumes, along with other product and safety information materials, to the Employers that purchased their products. As promulgated by OSHA and later outlined in the Hazard Communication Standard, Section 1910.1200, Title 29, C.F.R. ("Haz Comm"), the Employers were responsible for conveying those warnings to Boyd and providing Boyd with a safe work environment. Haz Comm further requires all employers to maintain all MSDSs in the workplace and to "ensure that they are readily accessible during each work shift to employees when they are in their work areas." Section 1910.1200(g)(8), Title 29, C.F.R. Employers like Babcock & Wilcox

Because plaintiff failed to produce any conflicting evidence of his own, that should have been sufficient to affirm summary judgment. Moreover, the adequacy or inadequacy of the warnings contained in the MSDSs is simply irrelevant; for present purposes, it is assumed that the warnings were inadequate and the heeding presumption was triggered. The only question is whether defendants rebutted that presumption, and as just explained, they did. Accordingly, the trial court's entry of summary judgment was proper and should have been affirmed.

IV. CONCLUSION

The opinion of the court below is unsound as a matter of precedent and policy, and creates a conflict among the lower courts. It also implicates a recurring issue of public and great general interest. This Court should therefore grant review and reverse the judgment of the Court of Appeals.

Respectfully submitted,



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specifically informed Boyd that MSDSs were available to employees to read and review, encouraged Boyd to review them, and provided safety manuals and other documents outlining safety programs.

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 20th day of February, 2009, by U.S. Mail, postage prepaid, upon the following:

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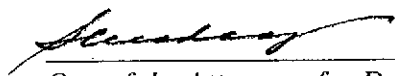

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90315

JOSEPH BOYD, ET AL.

PLAINTIFFS-APPELLANTS

vs.

LINCOLN ELECTRIC CO., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-545413

BEFORE: Cooney, P.J., Kilbane, J., and Celebrezze, J.

RELEASED: November 26, 2008

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

Plaintiff-appellant, Joseph Boyd ("Boyd"), appeals the trial court's granting of summary judgment in favor of defendants-appellees, Lincoln Electric Co., Airco/BOC, The ESAB Group, Inc., Hobart Brothers Co., and Deloro Stellite, LP. Finding some merit to the appeal, we affirm in part and reverse in part.

Boyd was employed as a boilermaker welder from 1977 until 2004. During the span of his career, Boyd worked out of his union hall at jobsites for several different employers. His work generally consisted of welding together tubes and panels on boilers. He worked with welding rods, welding wire, and other welding consumables on a daily basis. The appellees in this case are manufacturers of these welding consumables.

Welding consumables contain manganese. Manganese is a naturally occurring element and is an essential ingredient to the proper manufacture of steel because it prevents steel from cracking and falling apart when it is manufactured. *Jones v. Lincoln Elec. Co.* (7th Cir. 1999), 188 F.3d 709, 715. The heat used in the welding process causes welding fumes when the welder fuses together the metal and the rod. Id. Consequently, the fumes generated by the burning of a mild steel welding rod contain manganese. Id. At the present time, "no one denies that manganese, although essential to human health in small amounts, is poisonous in large quantities." *Clendenin Bros. v. U.S. Fire Ins. Co.*

(2006), 390 Md. 449, 889 A.2d 387, quoting, Jean Hellwege, Welding Rod Litigations Heats Up; Workers Claim Toxic Fumes Cause Illness, 40 TRIAL MAGAZINE (2004), 7, 14.

In 1967, the manufacturers began placing a product label on welding rod containers, stating that welding may produce a concentration of fumes and gases hazardous to one's health. The warning also cautioned users to avoid breathing the fumes and gases and to use proper ventilation. In 1979, the warning was updated and contained statements such as "fumes and gases can be dangerous to your health," "keep your head out of fumes" and "use enough ventilation * * * to keep fumes and gases from your breathing zone and the general area." In 1986, welding rod manufacturers added a product sticker indicating that certain chemicals, including manganese, may be hazardous. The label was updated in 1991 as follows: "Warning, the following chemicals may be hazardous during welding: Iron, manganese, silicon, titanium dioxide. Lung and nervous system damage may result from overexposure." In 1997, twenty years after Boyd began welding, some manufacturers updated their labels to warn that overexposure to manganese could affect the central nervous system, resulting in irreversible impairment to speech and movement.

Boyd began noticing hand tremors in 1999. He also experienced problems with his right arm "drawing up," left foot drop, sweating and panic attacks, and

problems with his speech and memory. His symptoms slowly and gradually progressed and became worse. In 2004, Boyd was diagnosed with manganism, or manganese-induced parkinsonism. Later that year, he filed suit against appellees seeking damages for injuries he alleged were incurred as a result of his occupational exposure to welding fumes and manganese.

Even though the welding rod containers contained warnings, Boyd testified at his deposition that he did not recall seeing any of the various warning labels. He explained that he did not have access to the containers because the welding rods would be removed from their cartons and placed in a warming oven before he would use them. Boyd would take the welding rod from the warming oven and put it in a "thermos box" to keep it warm until he was ready to use the rod.

The manufacturers also published Material Safety Data Sheets ("MSDS"), which contained more detailed safety information about their products. Boyd testified that he never saw any MSDSs that warned about the hazards of welding fumes. He also testified that he was never trained to keep his head out of welding fumes nor advised about any long term effects of exposure to manganese compounds in welding fumes. He testified that the only potential hazards he recalled being warned about were "boiler flu" and skin rashes.

The appellees moved for partial summary judgment. The trial court heard oral arguments over a three-day period in December 2006. In June 2007, the trial court granted the motion for summary judgment on counts three, four, five, six, and nine. The following month, the trial court also granted summary judgment on counts one, two, ten, and eleven of the complaint, which left only count twelve, Boyd's claim against his employers for intentional tort, pending for trial.

In granting summary judgment, the trial court found, in part that:

> "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. * * * [I]t 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." (Citations omitted.)

Boyd filed a motion for reconsideration, or, in the alternative, to immediately "certify a Civ.R. 54(B) appeal" and to stay the September 2007 trial date. He requested that the trial court reconsider its finding as to counts one

through six and nine through eleven. The trial court denied Boyd's motion for reconsideration but granted the motion to "certify a Civ.R. 54(B) appeal."

Boyd filed his notice of appeal, raising two assignments of error for our review. In his notice of appeal, Boyd stated that he was appealing the trial court's granting of summary judgment and the court's denial of his motion for reconsideration only on counts three through six and count nine. In other words, Boyd is appealing only the trial court's decision on his claims for negligence, negligence-sale of product, strict liability - misrepresentation, breach of express warranty, and aiding and abetting.[1]

We initially determined that we did not have jurisdiction to review the instant appeal because the trial court failed to include the mandatory language required by Civ.R. 54(B) in its journal entry. Boyd filed a motion for reconsideration, informing this court that he had dismissed all the employer defendants from the lawsuit, so the count for employer intentional tort was no longer pending; thus, the trial court's granting of summary judgment disposed of all the pending claims. We granted the motion for reconsideration and will now reach the merits.

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[1] Boyd voluntarily dismissed Airco/BOC from counts three through six prior to the trial court's granting of partial summary judgment.

In the first assignment of error, Boyd argues that the trial court erred in granting partial summary judgment by finding that his claims for failure-to-warn failed for lack of proximate cause.

Legal Standards

Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

> "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264, 273-274."

Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E);

Mootispaw v. Eckstein, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

Boyd bases his products liability claims on theories of both strict liability and negligence. In general, manufacturers of defective products may be held strictly liable under the Ohio Products Liability Act (R.C. 2307.71 through 2307.80). The Ohio Products Liability Act, however, has not abrogated the common law applicable to product liability claims. In other words, common law products liability actions grounded in negligence, such as the negligent failure-to warn-claims in this case, survive enactment of the Ohio Products Liability Act. See *Carrel v. Allied Prods. Corp.*, 78 Ohio St.3d 284, 1997-Ohio-12, 677 N.E.2d 795, 798-800; *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, 556 N.E.2d 1177 (holding that plaintiffs may plead both negligence and strict liability for failure-to-warn).

To recover compensatory damages under the Ohio Products Liability Act, Boyd must establish by a preponderance of the evidence that the manufacturers' welding rods were defective in some respect and that the defect was the proximate cause of his injuries. R.C. 2307.73(A). To prevail on a negligence claim, Boyd must demonstrate the traditional negligence elements of duty, breach, causation, and injury. *Hanlon v. Lane* (1994), 98 Ohio App.3d 148, 648

N.E.2d 26, 28; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 539 N.E.2d 614; see, also, *R.H. Macy & Co. v. Otis Elevator Co.* (1990), 51 Ohio St.3d 108, 554 N.E.2d 1313.

Manufacturers' Duty to Warn

Under Ohio law, it is not necessary that a manufacturer appreciate the specific nature of the hazard posed by the product to create the duty to warn; rather, to trigger the duty to warn, it is sufficient that the manufacturer have only some general awareness of the risk. *Runyon v. Briggs & Stratton Corp.* (May 5, 1989), Montgomery App. Nos. 10987 and 11185. As a supplier of welding consumables, the manufacturer had an obligation to be an expert in its product, which includes the testing and monitoring of known and possible hazards relating to its products. See *Seley v. G. D. Searle & Co.* (1981), 67 Ohio St.2d 192, 423 N.E.2d 831 (holding that a warning is adequate where, under all the circumstances, it reasonably discloses all risks inherent in the use of a product of which the manufacturer, being held to the standards of an expert in the field, knew or should have known to exist).

Boyd's claims are premised on the assertion that the appellees breached their duty by failing to properly warn him of the dangers in their welding rods and the fumes emitted when using the rods. In *Crislip*, the Ohio Supreme Court set forth a manufacturer's duty in the context of a failure-to-warn claim

premised on either negligence or strict liability. The Court, employing Sections 388 and 402A of Restatement of the Law 2d, Torts (1965), at 300-301 and 347, held that "in a products liability case where a claimant seeks recovery for failure to warn or warn adequately, it must be proven that the manufacturer knew, or should have known, in the exercise of ordinary care, of the risk or hazard about which it failed to warn. Further, there will be no liability unless it can be shown that the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public." *Crislip*, at 257.

Comment g to Section 388 explains that the duty can be discharged if the manufacturer exercises "reasonable care to give those who are to use the chattel the information which the supplier possesses, and which he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used." Id.; *Freas v. Prater Constr. Corp.* (1991), 60 Ohio St.3d 6, 8, 573 N.E.2d 27. Likewise, Comment j to Section 402A references failure-to-warn and adds, in relevant part, that:

> "[I]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. * * * Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Id.

Regarding defects due to inadequate warning, R.C. 2307.76, states in relevant part:

"(A) Subject to divisions (B) and (C) of this section, a product is defective due to inadequate warning or instruction if either of the following applies:

(1) It is defective due to inadequate warning or instruction at the time of marketing if, when it left the control of its manufacturer, both of the following applied:

(a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;

(b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm."

Other courts have found that the manufacturers of welding rods had a duty to warn welders about the hazards associated with welding rod fumes. See *Tamraz v. BOC Group Inc.* (N.D. Ohio, July 18, 2008), Case No. 1:04-CV-18948 (finding substantial evidence that excessive exposure to manganese can cause manganese-induced parkinsonism); *Elam v. Lincoln Electric Co.* (2005), 362 Ill. App.3d 884, 841 N.E.2d 1037 (noting that the record is replete with articles, scientific papers, and testimony showing a correlation between welding and parkinsonism).

Manufacturers' Breach of Duty to Warn

Again, in order to recover compensatory damages for a strict products liability claim based on a warning defect, Boyd must establish that the manufacturers' welding rods were "defective due to inadequate warning or instruction" and that this defect was the proximate cause of his injuries. R.C. 2307.73(A). Similarly, for a negligent failure-to-warn claim, Boyd "must show that the manufacturer had a duty to warn, that the duty was breached, and that his injuries proximately resulted from that breach of duty." *Hanlon*.

We note that the trial court did not consider the first prong, whether there was a warning defect in the welding rods, and instead focused solely on proximate cause in granting summary judgment. Likewise, the appellees propose that the adequacy of the warnings provided "is not material to the dispositive question of whether Boyd presented sufficient evidence to withstand summary judgment on the issue of proximate cause." We disagree. Although the issue of a warning defect did not form the basis of the trial court's summary judgment order, the existence of a warning defect is at issue in this appeal. We review the trial court's decision de novo. Thus, we are not only concerned with the trial court's reasoning supporting its decision, but also with whether Boyd set forth sufficient evidence on each element of his claims. Thus, we will

consider first whether there was a warning defect in the welding rods, and second whether such warning defect proximately caused Boyd's injuries.

Inadequate Warning

For the following reasons, we find that sufficient evidence has been introduced creating genuine issues of material fact whether the manufacturers' warnings were inadequate.

There is no dispute that, during the time period Boyd was employed as a welder, the appellees packaged their welding rods in containers or boxes containing various warnings. The mere fact, however, that there was a warning accompanying a product does not relieve a manufacturer of liability.

A warning is adequate if it reasonably discloses all inherent risks, and if the product is safe when used as directed. *Crislip,* at 255; *Seley*, at paragraph two of the syllabus; *Phan v. Presrite Corp.* (1994), 100 Ohio App.3d 195, 200, 653 N.E.2d 708. But a warning can be defective and/or inadequate based on its content or the manner in which the warning is communicated. In *Seley*, the Ohio Supreme Court stated:

> "The fact-finder may find a warning to be unreasonable, hence inadequate, in its factual content, its expression of the facts, or the method or form in which it is conveyed. The adequacy of such warnings is measured not only by what is stated, but also by the manner in which it is stated. A reasonable warning not only conveys a fair indication of the nature of the dangers involved, but also warns with the degree of intensity demanded by the nature of the risk. A warning may be found to be unreasonable in that it

was unduly delayed, reluctant in tone or lacking in a sense of urgency." Id. at 198.

Thus, "[t]he mere presence of * * * warnings that, if followed, may have been adequate does not eliminate the fact that a jury could find the existing warnings inadequate based upon their form, manner of expression, or lack of exigency." *Hisrich v. Volvo Cars of N. Am., Inc.* (6th Cir. 2000), 226 F.3d 445, 453, citing *Seley*. In fact, "an inadequate warning may make a product as unreasonably dangerous as no warning at all." *Crislip*, at 1182.

This court must consider not only the actual warning, but the method of delivery of the warning. First, as to the content of the warnings, it is undisputed that none of the warnings on the welding rod containers warned consumers of the dangers of overexposure to manganese fumes before 1997. Thus, even if Boyd had the opportunity to observe and read the warning labels, the labels would not have provided him any warning that exposure to manganese in welding fumes could cause injury to his central nervous system. It is also undisputed that the actual welding consumables did not contain a warning. Rather, the warning was placed on the bottom of welding rod containers, was written in small print, and was often not seen by the welders who used the rods.

Boyd's expert, Robert Cunitz ("Cunitz"), opined that the manufacturers' warnings were inadequate. In 1977, when Boyd began his welding career, the

warnings used the word "caution" as the initial word in the warning. Cunitz opined that only the initial word "danger" would be an appropriate word to warn of hazards involved in welding fumes. Although the warnings were later updated to state "warning" as the initial word, Cunitz suggested the words "manganese poisoning" or "poisonous fumes" should have been used to apprise a welder of any danger associated with welding fumes. Further, the warnings, although stating that adequate ventilation should be used, did not define "adequate ventilation" or otherwise explain what level should be considered dangerous. Additionally, there were no instructions on how to avoid breathing fumes or how to keep one's head or breathing zone out of the fumes.

As to the method of delivery of the warning, the evidence demonstrated that the warnings were found only on the containers in which the welding rods were packaged and in the MSDSs. Boyd testified at his deposition that it was common practice for welders to never come in contact with the containers because they would not see a welding rod until after it had been removed from its packaging and placed in a warming oven. Craig Robinson, safety manager at one of Boyd's employers, admitted during his deposition that the welders would not usually see the containers the welding consumables came in. In addition, Boyd submitted a 1967 memorandum by Lincoln Electric's chief engineer indicating that the company would put warnings only on the

containers, not on the product itself, and acknowledged that many welders using the consumables would never see the warning labels.

In *Ruth v. A.O. Smith Corp.* (N.D. Ohio, Feb. 27, 2006), Case No. 1:04-CV-18912, the court, in deciding another manganese case and discussing the same MSDSs at issue in this case, found that a jury could reasonably conclude that:

> (1) the MSDSs do not "communicate sufficient information" that the danger of exposure to manganese comes from exposure to welding fumes, and not just the welding rod itself; (2) the warnings do not explain that welding fumes contain a substantially higher percentage of manganese than do the welding rods; (3) the warning to "use enough ventilation . . . to keep fumes and gases from your breathing zone" does not "communicate sufficient information" to inform a welder how to use the welding rod safely, because "enough ventilation" is not defined; (4) the warnings did not sufficiently communicate the level and extent of the danger of inhaling welding fumes; (5) the warnings' use of a reference to a separate document -- the MSDSs -- did not serve as a sufficient mechanism to adequately and actually give notice to the intended warning recipient; and/or (5) the warnings given were inadequate in light of the defendants' history of having earlier provided welders with what a jury could conclude were grossly inadequate and possibly even misleading warnings. Id. at 5-6.

Until the late 1990's, the manufacturers' warning labels in the instant case make no mention of manganese or the possibility of neurological injury. Nor do the MSDSs mention the possibility of neurological injury during the majority of Boyd's career. Thus, during the first twenty years of Boyd's career, even if he had the reasonable opportunity to see and read a warning label, the

labels would not have provided him any warning that exposure to manganese in welding fumes could cause him to suffer serious and irreversible injuries.

We find that there was sufficient evidence before the court from which a jury could find that the appellee manufacturers breached their duty to provide the warning that a manufacturer exercising reasonable care would have provided concerning the risk of welding fumes. See R.C. 2307.76(A)(1)(b). Thus, we find that Boyd set forth sufficient evidence to withstand summary judgment as to the second prong, whether the manufacturers' warnings were inadequate and, therefore, they breached their duty to him.

Causation

The third prong requires Boyd to show that the manufacturers' defective products were the proximate cause of his injuries. The trial court opined that Boyd could not show that his reliance on the inadequate warning was the proximate cause of his injuries because he never read the warning labels on the containers of welding rods.

Although proximate cause is often a jury question, summary judgment is proper on this issue when a plaintiff has failed to meet his burden to produce evidence to challenge unfavorable evidence already in the record. See *Phan*, at 201. We find that Boyd has produced sufficient evidence to successfully

challenge the "unfavorable" fact that he did not read the warnings on the welding rod containers or in the MSDSs.

In Ohio, there is a presumption that an adequate warning, if given, will be read and heeded. This is known as the "read and heed" rule. If an inadequate warning is given, however, a rebuttable presumption arises that the failure to adequately warn was a proximate cause of the plaintiff's injuries. *Seley*, at 838. Appellees argued that this presumption was rebutted by Boyd because he admitted he did not read the warnings. We find that the trial court and appellees improperly extended the "read and heed" rule to mean that if a plaintiff admits he or she did not read any warning accompanying a product, then a defendant has per se rebutted the presumption.

The fact that Boyd did not read the warnings on the welding rod containers is undisputed; however, that is not where our analysis ends. Instead, we find that if the display of warnings is inadequate, the failure to read the warnings does not always absolve a manufacturer of liability. "Rather, a warning that is inadequate because it is not properly displayed can be the proximate cause of harm even if the user did not read the warning." *McConnell v. Cosco, Inc.* (S.D. Ohio 2003), 238 F. Supp.2d 970, 978.

To support their position, the manufacturers rely on cases that hold that when a plaintiff admits he or she did not read a warning label, proximate cause

cannot be established, and the claim fails. Each of these cases is distinguishable from the case at bar.

In *Freas,* the Ohio Supreme Court affirmed summary judgment in favor of the manufacturer when the plaintiff's decedent was killed while disassembling a crane. In *Freas,* however, the Court found that the warnings in the instruction manual were adequate and that the decedent had read and understood the instructions. Moreover, the *Freas* Court limited its holding to the specific facts of that case and specifically stated that their holding "should not be construed to stand for the proposition that warnings set forth in an instruction manual will, in all situations, be sufficient to absolve a manufacturer or liability. * * * [There will be] many situations that require a manufacturer to supply warnings on the product itself * * *."

In *Phan,* this court found that a warning on the foot switch of a power press was adequate because it was seen by employees who operated the press and because there was no other place to put such a warning where employees would have read it. We also found that the plaintiff's injury would not have occurred if he had followed the warning label. Id. Similarly, in *Mohney v. USA Hockey, Inc.* (N.D. Ohio 2004), 300 F.Supp.2d 556, the court found that the warning was adequate because the warning on the helmet provided information regarding the very risk the plaintiffs asserted was associated with the head

protection system. In addition, the court found that the warning label was in plain view, and the plaintiff saw the label hundreds of times but never read it.

Appellees also rely on *Mitten v. Spartan Wholesalers, Inc.* (1989), Summit App. No. 13891, which held that proximate cause could not be established because the plaintiffs either did not see or did not read the warning. We do not find that court's reasoning persuasive for the instant case.

Thus, the cases cited by the appellees are distinguishable because the courts found that the warnings were adequate. In the case at bar, it is not that Boyd chose not to *read* the warnings, but that he did not ever *see* the warnings due to the manufacturers' placement of the warnings on the containers of welding rods. And it appears from the evidence in the record that the manufacturers had at least some knowledge that the welders usually did not see the containers, and thus would not see the warnings. See *Elam* (finding that the evidence showed that welders seldom saw the cartons because the rods had been removed from the cartons by the time the welders used them). Moreover, Boyd is not only challenging the method of communicating the warnings, he is also challenging the actual content of the warnings.

Boyd testified at his deposition that, if he had been properly warned, he would have taken the steps necessary to protect himself. He testified that he tried to always weld safely, would have worn the best respirator available, and

always wore whatever safety equipment was supplied to him by his employers. One of Boyd's employers, Franklin Cogar, owner of F&B Steel Company, testified at deposition that Boyd was a "go-getter," a good welder, and a safe welder that adhered to safety procedures.

The appellees argue that Boyd was told to read the MSDS and failed to do so; thus, his claims must fail. We disagree. Although Boyd admitted that he did not read the MSDS while working for one employer from 2001 to 2004, he did not testify at deposition that he never read a MSDS during his 27-year career. Cunitz also opined that the manufacturers' MSDSs were too technical and not easily understood by welders. Moreover, as already discussed, the manufacturers' MSDS bulletins did not warn of the dangers of overexposure to manganese until the late 1980's. Most importantly, the evidence shows that even though some manufacturers added manganese-specific cautions to their MSDSs, the warnings remained inadequate because the manufacturers did not place these cautions on the warning labels themselves. See *Tamraz,* at 23.

We also find that the appellees have not so far produced evidence regarding the year that any of Boyd's employers would have first received a MSDS disclosing the risk of neurological injury due to manganese exposure from welding fumes or that the employers properly communicated the warnings to their employees. Whether Boyd actually saw, could have read, or could

reasonably have been expected to read and comprehend any warnings in the MSDSs is an issue of fact for the jury.

We agree with Boyd that this case is more akin to the holding in *McConnell* where the court applied Ohio law to deny summary judgment to a manufacturer of highchairs based on inadequate warnings. The plaintiff alleged that inadequate warnings on a highchair led to a child's permanent injuries. The court held that a warning that is inadequate because it is not properly displayed can be the proximate cause of harm even if the user did not read the warning. Id. "Were the law otherwise, manufacturers would be free from liability for providing any warning no matter how obscure, but would be encouraged to use obscure warnings so that consumers would still use their product despite its risks." Id. at 979-980.

In *Tamraz*, a case that is part of the federal Multi-District Litigation regarding manganese welding fumes, the court similarly held that a plaintiff may prevail on failure-to-warn claims even if he did not read the warning label that accompanied the product he used. The court found that if a plaintiff asserts that part of the reason he did not read a warning is that the defendants purposely made the label hard to find and read, through its placement and size, then he is not precluded from pursuing his failure-to-warn claim. Id. Thus, although the *Tamraz* court found it important under the facts of that case that

the plaintiff had seen the warnings, it also held that it was not necessary for him to see the warnings to set forth a failure-to-warn claim.

In *Jenisek v. Highland Group, Inc.*, Cuyahoga App. No. 83569, 2004-Ohio-4910, the plaintiff sued the manufacturer of a truck ramp after he was injured when the ramp collapsed. The trial court granted summary judgment in favor of the manufacturer and we reversed, holding in part that it was the inadequacy of the warnings that caused the plaintiff to not read them, and his claims were not barred by his failure to read the warning.

Unlike the cases cited by the trial court and appellees, the facts of the instant case could lead a reasonable jury to conclude that both the content of the warnings and the manner in which they were communicated were inadequate to warn Boyd about the risk of neurological injury due to exposure to manganese in welding fumes. Boyd could not read a warning he could not see. And even if he would have seen it, Boyd set forth sufficient evidence that the wording of the warnings was inadequate. Since Boyd offered evidence that if the warning was available and adequate he would have read it and modified his behavior, the failure to adequately warn may be found to have proximately caused his injuries. At the very least, determining the adequacy of the warnings on the welding rod containers creates a genuine issue of material fact; thus, we find that Boyd is

entitled to have a jury determine whether the inadequacy of the manufacturers' warnings was the proximate cause of his injuries.

Therefore, based on the facts presented, we hold that a warning that is inadequate in manner, content, form, or communication can be the proximate cause of harm even if the user did not read the warning.

Learned Intermediary Doctrine

Lastly, we will briefly discuss the defense of the sophisticated purchaser, or the learned intermediary doctrine. Even though Lincoln Electric, ESAB, and Hobart argue in their appellate brief only that Boyd's claims fail on the grounds that he did not read the warnings on the welding rod containers, they initially moved for summary judgment on that basis as well as the alternative theory that the learned intermediary doctrine applies. Since we review the trial court's decision de novo, and because Deloro Stellite raises the argument in its appellate brief, we will also address this argument as to all appellees.

In *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St.3d 380, 2002-Ohio-892, 763 N.E.2d 160, the Ohio Supreme Court held that "[t]he learned intermediary doctrine does not relieve the manufacturer of liability to the ultimate user for an inadequate or misleading warning; it only provides that the warning reaches the ultimate user through the learned intermediary." Thus, a manufacturer's duty can only be discharged upon providing a learned

intermediary with an adequate warning. Since we have concluded that there is sufficient evidence for a jury to decide if the warnings were inadequate, it would be premature for us to determine whether the manufacturers may use the learned intermediary doctrine as a defense. That doctrine is better left for consideration as a potential jury instruction at trial.

Therefore, we find that the trial court erred in granting summary judgment as to counts three, four, and five, and we, therefore, reverse and remand the case for trial.

Warranty

Count six of Boyd's complaint alleged that the manufacturers expressly warranted that welding products were safe, which proved to be false, and that their conduct was a producing or proximate cause of his injuries.

We note that Boyd does not address the court's granting of summary judgment as to this claim in his appellate brief. Nor can we find any support for this claim in the record. Thus, in accordance with App.R. 12 and 16, we need not address this argument which Boyd has not raised.

Therefore, we affirm the trial court's granting of summary judgment as to this claim.

Aiding and Abetting

Count nine of Boyd's complaint alleged that the manufacturers aided and abetted one another in tortiously failing to warn him of the health hazards of exposure to manganese fumes in their welding products.

Boyd brings this claim under the Section 876(b) of the Restatement of Law 2d, Torts (1979), which is titled "Persons Acting in Concert," and states, in pertinent part:

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, * * *."

According to App.R. 12(A)(2), we may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A). The appellant must include in his brief "an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 16(A).

As with his claim for breach of warranty, we find that Boyd has essentially abandoned this claim on appeal. Although it was argued separately in the lower court, Boyd fails to make any argument on appeal as to how the manufacturers allegedly acted in concert and aided and abetted one another in their tortious failure to warn him. It is not the duty of an appellate court to search the record for evidence to support an appellant's argument as to any alleged error. *State v. Anderson*, Cuyahoga App. No. 87828, 2007-Ohio-5068. Therefore, we decline to address Boyd's argument that the trial court erred in granting summary judgment on his aiding and abetting claim.

The first assignment of error is sustained as to counts three, four, and five and overruled as to counts six and nine.

Motion for Reconsideration

In the second assignment of error, Boyd argues that the trial court erred in denying his motion for reconsideration based on newly discovered evidence as to counts three through six.

Pursuant to Civil Rule 54(B), a trial court's order or decision is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Accordingly, an interlocutory order, such as a partial granting of summary judgment, is subject to a motion for

reconsideration. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105.

An appellate court reviews a trial court's decision regarding a motion to reconsider the trial court's previous interlocutory order under an abuse of discretion standard. *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 535, 706 N.E.2d 825. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

Since we sustained Boyd's first assignment of error as to counts three, four, and five, we need not address whether the trial court erred in denying his motion for reconsideration on these counts because the issue is now moot. As to Boyd's motion for reconsideration on count six, his claim for breach of warranty, we do not find that the trial court abused its discretion. None of Boyd's "newly discovered facts," which in this case arose from twenty-nine depositions from which Boyd attempted to file excerpts with his motion, deal with Boyd's claim for breach of warranty.[2]

Therefore, the second assignment of error is overruled.

---

[2]We need not review whether the depositions were properly filed or should have been considered by the trial court.

Accordingly, the trial court's granting of summary judgment is affirmed as to the claims for breach of express warranty (count 6) and aiding and abetting (count 9) and reversed as to the claims for negligence and strict liability (counts 3, 4, and 5). Case remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Colleen Conway Cooney

COLLEEN CONWAY COONEY, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

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.

Justice Francis E. Sweeney
June 26, 2007

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AUG 20 2007

GERALDE. FUERST, CLERK
By _____ Deputy

THE STATE OF OHIO } SS.
Cuyahoga County }

I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.

HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Entry and Opinion CV-545443

NOW ON FILE IN MY OFFICE.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 20 DAY OF August A.D. 20 07

GERALD E. FUERST, Clerk

By _____ Deputy

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.	)	**ORDER**
Lincoln Electric Co., et al.,	)	
Defendants.	)	

Plaintiff's Motion for Reconsideration is denied. Plaintiff's Motion, in the Alternative, to Immediately Certify a Civ. R. 54(B) Appeal and Stay the September 17, 2007 Trial Until Appeals of This Court's Decisions are Completed is granted.

Plaintiff's Motion to Extend the Due Date for Plaintiff's Briefs in Opposition to the Employer Defendants' Motion for Summary Judgment is granted. Plaintiff's Briefs in Opposition are due ten (10) days from the date of the filing of this order.

IT IS SO ORDERED.

Francis E. Sweeney
Justice Francis E. Sweeney
July 23, 2007

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AUG 20 2007
GERALD E. FUERST, CLERK
By _____ Deputy

THE STATE OF OHIO
Cuyahoga County, SS.
I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL Order CV 545413
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 20
DAY OF August A.D. 2007
GERALD E. FUERST, Clerk
By _____ Deputy