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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WILLIAM KEITH JOHNSON, Plaintiff and Appellant, v. AMERICAN STANDARD, INC., Defendant and Respondent.	B179206 (Los Angeles County Super. Ct. No. BC287442)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Metzger Law Group, Gregory A. Coolidge, and Peter F. Klein for Plaintiff and Appellant.

Munger, Tolles & Olson, Jeffrey L. Bleich, Kathleen M. McDowell, and Blanca F. Young for Defendant and Respondent.

In this products liability case, defendant and respondent American Standard moved for summary judgment in part based on the legal principle which other jurisdictions have termed the sophisticated user doctrine. (See, e.g., *Crook v. Kaneb Pipe Line Operating Partnership, L.P.* (8th Cir.2000) 231 F.3d 1098, 1102; *Strong v. E.I. DuPont de Nemours Co., Inc.* (8th Cir.1981) 667 F.2d 682, 687; *Mayberry v. Akron Rubber Machinery Corp.* (N.D.Okla.1979) 483 F.Supp. 407, 413; *Littlehale v. E. I. DuPont de Nemours & Co.* (S.D.N.Y.1966) 268 F.Supp. 791, 798, and the cases collected therein.) We hold that the doctrine is part of California law. That is, we hold that a manufacturer cannot be liable to a sophisticated user of its product for failure to warn of a risk, if a sophisticated user should reasonably know of that risk.

Trial Court Proceedings

Plaintiff and appellant William Johnson is an EPA certified HVAC (heating, ventilation, and air conditioning) technician who worked on commercial systems. He sued a number of manufacturers of air conditioning equipment, including American Standard, a number of chemical manufacturers, and a number of chemical suppliers, alleging that he was injured by the phosgene gas which was created during the ordinary maintenance and repair of commercial air conditioning systems.

The causes of action against American Standard were negligence, strict liability for failure to warn, and strict liability for design defect under the consumer expectations test. The factual allegations were that Johnson was injured while repairing refrigerant lines which were part of an evaporator manufactured by American Standard's Trane Division, in the air conditioning system at Bank of America's Del Amo branch. Specifically, Johnson alleged that he was injured by the phosgene gas created when he brazed (brazing is a form of welding) refrigerant lines containing R-22 refrigerant.

In each cause of action, Johnson's theory was that American Standard knew that harmful phosgene gas would be created when its evaporator was serviced, but failed to provide an adequate warning. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002.) In Johnson's view, a warning would be adequate if it informed users

that brazing refrigerant lines can result in creation of phosgene, that phosgene inhalation can result in potentially fatal lung disease, that phosgene can be detected through its fresh-cut-grass smell, changes in flame color during brazing, or physical symptoms like burning eyes or shortness of breath, and that users should wear respiratory protection while brazing and stop brazing on detection of phosgene.

American Standard moved for summary judgment on two grounds. In reliance on *Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357 and *Garman v. Magic Chef, Inc*. (1981) 117 Cal.App.3d 634, it contended that it had no duty to warn about the dangers of refrigerant, which was another manufacturer's product. American Standard also raised the sophisticated user doctrine and sought summary judgment on the ground that it had no duty to warn because the risk was within the professional knowledge of HVAC installers and repairers, citing *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930 and *Fierro v. International Harvester Co*. (1982) 127 Cal.App.3d 862. The trial court granted the motion on both grounds. Because we affirm under the sophisticated user doctrine, we need not and do not address the alternate ground.

Discussion

The sophisticated user doctrine

Under California law, "manufacturers are strictly liable for injuries caused by their failure to give warning of dangers that were known to the scientific community at the time they manufactured and distributed the product." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1108.) The sophisticated user doctrine holds that "there is ordinarily no duty to give warning to members of a profession against generally known risks. 'There need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession.' 4 Shearman & Redfield, Negligence § 656 (Rev. ed. 1941); see *Rosebrock v. General Elec. Co*., 236 N.Y. 227, 237-238, 240-241, 140 N.E. 571, 574, 575 (1923); *McDaniel v. Williams*, 23 App.Div.2d 729, 257 N.Y.S.2d 702 (1st Dep't 1965); *Parker v. State*, 201 Misc. 416, 105 N.Y.S.2d 735, 741 (Ct.Cl. 1951), aff'd, 280 App.Div. 157, 112 N.Y.S.2d 695 (3d Dep't 1952); cf., *Marker v. Universal Oil Prod.*

Co., 250 F.2d 603 (10th Cir. 1957); *Kappa v. E. I. Du Pont De Nemours & Co.*, 57 F.Supp. 32 (E.D.Mich.1944); *Morocco v. Northwest Eng'r Co.*, 310 F.2d 809, 810 (6th Cir. 1962); *Jamieson v. Woodward & Lothrop*, 247 F.2d 23 (D.C.Cir.), cert. denied, 355 U.S. 855, 78 S.Ct. 84, 2 L.Ed. 63 (1957); *Sawyer v. Pine Oil Sales Co.*, 155 F.2d 855 (5th Cir. 1946); *Stottlemire v. Coward*, 213 F.Supp. 897 (D.D.C.1963)." (*Littlehale v. E. I. DuPont de Nemours & Co.* (S.D.N.Y.1966) 268 F.Supp. 791, 798.)

"[W]here the danger or potentiality of danger is known or should be known to the user, the duty (to warn) does not attach." (*Mayberry v. Akron Rubber Machinery Corp.* (N.D.Okla.1979) 483 F.Supp. 407, 413.)

There was no question but that Johnson was a sophisticated user of commercial HVAC systems, for purposes of the doctrine. The undisputed facts were that under Federal law, HVAC technicians who work on commercial equipment must be certified by the EPA with "universal" certification, which is granted after an exam. They are "trained professionals." Most HVAC technicians also have some kind of trade or professional training. Johnson had universal certification and had completed a one year course of study in HVAC systems at ITT Technical Institute.

The parties do disagree on whether the sophisticated user doctrine is, or should be, part of California law. We find that it arguably has been California law, and that it should be. "This rule of the 'sophisticated user' is no more than an expression of common sense as to why a party should not be liable when no warnings or inadequate warnings are given to one who already knows or could reasonably have been expected to know of the dangers . . . ." (*Crook v. Kaneb Pipe Line Operating Partnership L.P.* (8th Cir.2000) 231 F.3d 1098, 1102.)

Courts which have adopted the doctrine often cite section 388 of the Restatement Second of Torts, which says that suppliers of chattels can be liable to users of those chattels "if the supplier [¶] (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and [¶] *(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, . . .* " [Emphasis added.] Comment k to Clause (b) explains that "One who supplies a chattel to

others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character . . . if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved."

"Subsection (b) . . . has been interpreted to mean that there is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product. See *Martinez v. Dixie Carriers, Inc*., 529 F.2d 457, 464-65 (5th Cir. 1976); *Madrid v. Mine Safety Appliance Co.*, 486 F.2d 856, 860 (10th Cir. 1973); *Lockett v. General Electric Co*., 376 F.Supp. 1201, 1208-09 (E.D.Pa.1974), aff'd, 511 F.2d 1394 (3d Cir. 1975); *Bryant v. Hercules, Inc.*, 325 F.Supp. 241, 247 (W.D.Ky.1970). Other courts . . . have stated substantially the same position, although without explicit reference to the Restatement. See *Kerber v. American Mach. & Foundry Co.*, 411 F.2d 419 (8th Cir. 1969); *Thibodaux v. McWane Cast Iron Pipe Co*., 381 F.2d 491, 495 (5th Cir. 1967); *Hopkins v. E. I. DuPont De Nemours & Co*., 212 F.2d 623, 625 (3d Cir.), cert. denied, 348 U.S. 872, 75 S.Ct. 108, 99 L.Ed. 686 (1954); *Littlehale v. E. I. DuPont de Nemours & Co.*, 268 F.Supp. 791, 798 (S.D.N.Y.1966), aff'd, 380 F.2d 274 (2d Cir. 1967)." (*Strong v. E.I. DuPont de Nemours Co., Inc.* (8th Cir.1981) 667 F.2d 682, 687.)

Thus, for example, in *Strong*, the Court found that the sophisticated user doctrine was part of Nebraska law, and that under that doctrine, manufacturers of natural gas pipe and pipe connectors had no duty to warn a natural gas utility with high duty of care, or the utility's employee, of well known gas line dangers. Similarly, *Antcliff v. State Employees Credit Union* (1982) 327 N.W.2d 814, applying the doctrine under Michigan law, found that a scaffolding manufacturer had no duty to give safe rigging directions to a professional painter experienced in rigging techniques. *Akin v. Ashland Chemical Co*. (10th Cir. 1998) 156 F.3d 1030, 1037 found no duty under Oklahoma law to warn a purchaser as knowledgeable as the United States Air Force of the potential dangers of low-level chemical exposure. These are but examples. The cases are many.

As Johnson argues, no California court has squarely adopted the doctrine, but in our view, it is a natural outgrowth of the rule that there is no duty to warn of known risks or obvious dangers. For instance, in *Bojorquez v. House of Toys, Inc., supra,* 62 Cal.App.3d 930, one of the cases American Standard relies on, the Court of Appeal found that neither the retailer or wholesaler of slingshots had a duty to warn that a slingshot can be dangerous, holding that "the seller does not need to add a warning when 'the danger, or potentiality of danger is generally known and recognized.' For example, it is unnecessary to warn persons of the dangerous nature of alcohol (Rest.2d Torts, § 402A, com. j; *Barth v. B. F. Goodrich Tire Co*. [1968] 265 Cal.App.2d 228, 245.) Is the potential danger of a slingshot generally known? Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly. (See *Morris v. Toy Box* [1962] 204 Cal.App.2d 468, 472 [bow and arrow].) There is no need to include a warning; the product is not defective because it lacked a warning; there is no cause of action in strict liability." (*Id*. at pp 933-934; compare *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 772 [public not chargeable with knowledge that the pressure of carbonation in a sparkling wine is such that a plastic cork will eject itself within seconds when the wire seal is removed, at high speeds, with no pressure on or twisting of the cork and no agitation of the bottle's contents].)

Further, it may fairly be argued that the sophisticated user doctrine has been applied, albeit without being named. In *Fierro v. International Harvester Co., supra,* 127 Cal.App.3d 862, International Harvester sold a skeletal truck (engine, cab, and chassis) to a packing company, Luer. Luer installed a refrigerator unit on the chassis. Five years later, a tire blew, the truck hit a guardrail, gas spilled from the fuel tanks, and there was an explosion. During trial, plaintiff suggested that International Harvester had a duty to warn Luer that attaching a power cable from the refrigerator unit to the battery might create a fire hazard.

The Court said "Since the issue of failure to warn was never pleaded and plaintiffs offered no evidence on the subject, we conclude that the issue was never properly raised and that no instruction thereon was warranted. In any event, there was nothing about the

International unit which required any warning to Luer. A sophisticated organization like Luer does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition. [Citation.]" (*Fierro v. International Harvester Co., supra,* 127 Cal.App.3d at p. 866.)

Based on *Fierro*, the Northern District has opined that California courts would permit the sophisticated user doctrine. (*In re Related Asbestos Cases* (N.D.Cal.1982) 543 F.Supp. 1142, 1151.)[1] We think the Northern District had it right.

Johnson's argument on this point is by a kind of negative analogy to the sophisticated intermediary doctrine. Under that doctrine, a manufacturer can be absolved of its duty to warn a consumer if there has been an adequate warning to an intermediary. (See, i.e., *Stevens* v. *Cessna Aircraft Co.* (1981) 115 Cal.App.3d 431; *Groll v. Shell Oil Co.* (1983) 148 Cal.App.3d 444.) Johnson argues that this means that a manufacturer cannot be absolved of the duty to warn *unless* there has been a warning to an intermediary. We do not agree. We see nothing in the law surrounding the sophisticated intermediary doctrine which affects the duty of a manufacturer to warn a sophisticated user of its product of the risks associated with the use of that product.

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[1] There is, perhaps, one case to the contrary, *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d 1601, 1623. There, a plaintiff subject to an environmental clean up order sought indemnity from its chemical suppliers, in part on a failure to warn theory. On demurrer, the Court of Appeal allowed the cause of action, finding, inter alia, that the "mere fact that [plaintiff] uses the chemicals in a business enterprise, as opposed to being a citizen consumer, does not relieve the chemical suppliers of the duty to warn. (See *Martinez v. Dixie Carriers, Inc.* (5th Cir. 1976) 529 F.2d 457, 466; *Beede Waste Oil* [*Corp.*] *v. Recycling Industries, Inc.* (D.Mass. 1982) 533 F.Supp. 484.) Indeed, it can be the defendant's duty to demonstrate a user has sufficient expertise to be charged with the knowledge of risks associated with a particular product. (*Hall v. Ashland Oil Co.* (D.Conn. 1986) 625 F.Supp. 1515, 1521.) Additionally, a user's knowledge as to some dangers associated with a product does not relieve a supplier of the duty to warn of other dangers unknown to the user. (*Billiar v. Minnesota Mining and Mfg. Co.* (2d Cir. 1980) 623 F.2d 240, 245.)" (*Id*. at p. 1623.) To the extent that *Selma Pressure Treating* hold that the sophisticated user doctrine has no place in California law, we disagree.

Having held that the sophisticated user doctrine is part of California law, we now must determine whether American Standard was entitled to summary judgment[2] on the theory that there was no duty to warn because the danger at issue was one generally known to members of the profession, one which Johnson "could reasonably have been expected to know" (*Crook v. Kaneb, supra,* 231 F.3d at p. 1102), or, to cast it in the Restatement's terms, whether American Standard had "reason to expect" that HVAC technicians would know of the risk.

American Standard's evidence on the knowledge of sophisticated users was from the declaration of Greg Guizado,[3] an operations manager at its Trane division, a page from the EPA's web site concerning certification of commercial HVAC technicians, an excerpt from Johnson's study guide for the EPA test, the Material Safety Data Sheet on R-22, and evidence that under California law, employers and refrigerant manufacturers are required to warn of the dangers of refrigerant.

Guizado declared that he had worked in the heating and air conditioning industry for 28 years. In his training, he learned that when refrigerant is heated it can decompose into toxic byproducts including phosgene, that a green brazing flame is an indication that phosgene is present, and that phosgene can be deadly. All the HVAC technicians he hired knew that phosgene can be produced when an air conditioning unit is brazed, and Guizado included that information in Trane's on-the-job training. In his experience, "the notion that phosgene can be produced when brazing is performed on air conditioning

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[2] American Standard's summary judgment motion argued that the sophisticated user doctrine applied to all causes of action in the complaint. Given that Johnson's theory was the same in each cause of action -- product liability through failure to warn -- we agree.

[3] Johnson objected to this evidence on the ground that Guizado had no personal knowledge of what most HVAC technicians knew. The trial court overruled the objection, which Johnson renews on appeal. We agree with the trial court. The statements were based on Guizado's personal knowledge, and were limited to that knowledge.

systems that have not been completely evacuated and flushed of refrigerant is widely known among HVAC technicians."[4]

The EPA web site page is titled "Overview of Issues on EPA Certification Test," and it notes, under "Safety," "decomposition products of refrigerants at high temperatures."[5] Johnson's study guide for the EPA certification exam includes a section headed "Refrigerants and Safety." It reads "The safety of refrigerants is high, IF they are properly handled. Technicians should follow some simple rules . . . . Refrigerant in contact with high heat can form hydrochloric and hydrofluoric acids as well as phosgene gas. Never heat a cylinder with a torch."

The Material Safety Data Sheet for R-22 says, inter alia, "may decompose during contact with flames, heating elements, and in combustion engines releasing irritating, toxic, and corrosive gases," and, under "Conditions to Avoid," read "flames, extremely hot metal surfaces, heating elements, combustion engines, . . . " (Only EPA certified technicians may purchase R-22 refrigerant.)

Finally, American Standard established that under the California Code of Regulations, employers are required "to provide information to their employees about the hazardous substances to which they may be exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training" (Cal. Code Regs., tit. 8, § 5194, subd. (b)(1)), manufacturers must "obtain or develop a material safety data sheet for each hazardous

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[4] Under EPA regulations, technicians must evacuate refrigerant from a system before brazing. It was undisputed that residual refrigerant will remain in the lines after the refrigerant is evacuated, and that phosgene gas can be created when refrigerant lines containing residual amounts of R-22 refrigerant are brazed.

[5] Johnson objected to the request on hearsay, relevance, and other grounds. He renews his arguments on appeal. We do not see that the trial court erred in admitting the document, but find it of limited relevance. For one thing, we cannot tell from the exhibit when this topic became part of the EPA exam.

substance they produce . . ." and "[e]mployers shall have a material safety data sheet for each hazardous substance which they use." (Cal. Code Regs., tit. 8, § 5194, subd. (g)(1)).)

Johnson's evidence took the form of his own deposition testimony and that of three former co-workers, all trained, certified HVAC technicians.[6] Reginald Brown testified he learned in training that refrigerant must be taken out of a unit before brazing to avoid explosion and to avoid having refrigerant "dispersed into your face . . . consuming your oxygen in your lungs . . ." but that he had never heard of phosgene until Johnson was hurt. He did not know what phosgene gas was or how it was created or that it could cause lung disease or death. From his experience, he knew that refrigerant and heat create a distinctive smell, which "you just didn't want to inhale." If you smelled it, you "step[ped] away for a minute."

Wayne Blue knew that phosgene was a World War One nerve gas, and remembered some reference in training to the fact that phosgene is created if R-22 is heated. He too believed that refrigerant was evacuated from an air conditioning system prior to brazing to avoid explosion, and did not know that residual refrigerant remained in the lines.[7]

David Myatt, at one time Johnson's supervisor, testified that he knew from other technicians that it was harmful to take in large dose of phosgene gas, so that "there's

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[6] American Standard objected to the facts Johnson proposed based on this evidence, contending that the issue was what it could objectively expect a trained HVAC technician to know, not the subjective knowledge of individual HVAC technicians. The trial court sustained the objections. We agree with Johnson that the ruling was error. The knowledge of four certified HVAC technicians is relevant to a determination of what HVAC technicians should have known.

[7] Guizado agreed that residual refrigerant will remain in the lines and that brazing those lines can result in the formation of phosgene gas.

nothing in your lungs except that," and you "black out or something because you can't breathe," but did not know that lower level exposure could cause lung disease.

Johnson's testimony was that he did not learn in training or on-the-job training that phosgene gas could be created when refrigerant lines were brazed, or that phosgene could cause lung damage. He never heard of phosgene gas until he got sick. He did not know that phosgene smelled like fresh cut grass. When he smelled fresh cut grass, while working on the Del Amo system, he did not stop or take any precaution, but enjoyed the smell. He also testified that if he had known that phosgene could be created when refrigerant lines are brazed and that phosgene can cause lung disease, he would have asked for safety equipment and walked off the job if it was refused.

He had read the MSDS for R-22, but understood the reference to toxic gases to refer to short-term harm, the reference to corrosive gases to refer to dirty gases, and the warning about hot metal as warning to avoid heating metal, not a warning to avoid heating R-22. He had never been given any training on how to read a MSDS.

We see in these facts undisputed evidence that HVAC technicians could reasonably be expected to know of the hazard of brazing refrigerant lines. Guizido's declaration established that HVAC technicians can reasonably be expected to know that when refrigerant is heated it can decompose into toxic byproducts including phosgene. Two of the deposition excerpts Johnson proffered are to the same effect. Brown and Bluw knew that refrigerant and heat create a distinctive smell which "you just didn't want to inhale," and that phosgene, a nerve gas, is created if R-22 is heated.

Moroever, it was undisputed that the EPA required HVAC technicians to understand the decomposition products of refrigerants at high temperatures, "the study guide informed users that refrigerant in contact with high heat can form dangerous substances, and the Material Safety Data Sheet for R-22 informed technicians that the product can decompose when in contact with heat, releasing toxic gases."

Johnson's evidence to the contrary amounts to no more than an assertion that he (and perhaps Myatt) did not know of the danger, but given the other evidence, this does not create a triable issue of fact on whether American Standard could reasonably expect

that that HVAC technicians would know of the risk. The sophisticated user doctrine will always be employed when a sophisticated user should have, but did not, know of the risk. Otherwise, the issue would be actual knowledge and causation.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.