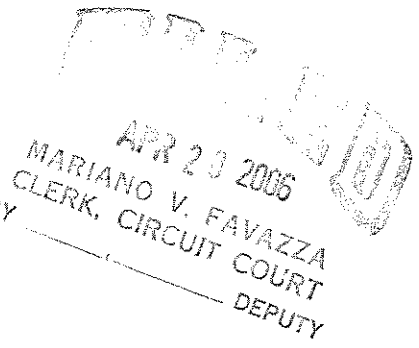
MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)



LEROY HUNT, et ux.,	)	
	)	
Plaintiffs,	)	
	)	No. 052-9419
v.	)	Div. 18
	)	
AIR PRODUCTS & CHEMICALS, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiffs seek damages from defendants on account of alleged exposure to manganese through fumes generated by welding equipment. Defendants have filed motions to dismiss some or all counts of the petition. The Presiding Judge has directed that pretrial matters in the various "welding fume cases" pending in this Circuit be addressed by him. He has made an exception for motions to dismiss counts III and IV of the petition in this case. The focus of this Court's memorandum, therefore, will be counts III and IV. However, to provide guidance for the parties in their eventual trial preparation, the Court will summarize all counts of the petition and indicate its view of the viability of all counts, with the proviso that the Presiding Judge may take a different view with regard to certain counts than does this Court. This Court's orders will be confined to counts III and IV.

Count I of the petition seeks damages against defendants BOC/AIRCO, ESAB, Hobart Brothers, Lincoln Electric, Praxair, Thermadyne, and Union Carbide, alleging that they manufactured or sold

welding products to which plaintiff Leroy Hunt was exposed. Count I pleads a claim for relief on established theories of strict products liability, including product defect and failure to warn.

Count II seeks damages from the same defendants, alleging products liability based on negligent design and negligent failure to warn. Count II likewise states a claim under established principles.

Count V of the petition seeks damages from defendants BOC/AIRCO, ESAB, Hobart Brothers, Lincoln Electric, Praxair, Thermadyne, and Union Carbide, for negligence in supplying welding products without warning of the hazards associated with their use. Count V appears to the Court to state a claim.

Count VI of the petition seeks damages from defendants Lincoln Electric and Miller Electric on strict products liability theories of product defect and failure to warn, in connection with the manufacture or sale of welding machines. This count likewise states a claim.

Count VII is a claim for loss of consortium by plaintiff Loretta Hunt, based on the alleged injuries to her spouse.

Count III seeks damages from defendants Air Products & Chemicals, Allegheny Technologies, A.O. Smith, BOC/AIRCO Deloro Stelite, Dow Chemical, ESAB, Eutectic Corp., General Electric, Hobart Brothers, Illinois Tool Works, Lincoln Electric, Metropolitan Life, Miller Electric, Praxair, Sandvik, Select Arc, Stoody, Thermadyne, Union Carbide, and Westinghouse. The theory alleged in count III is one of conspiracy. Count IV seeks damages from the same defendants on a theory labeled by plaintiffs as "negligence--undertaking through trade association."

In considering a motion to dismiss, the Court is to assume the truth of all *well-pleaded* allegations of fact. Conclusions and immaterial allegations may be disregarded. The petition is construed liberally, and the plaintiff is entitled to the benefit of all reasonable inferences. However, the petition is also taken as a whole, and the facts alleged must be sufficient to show an entitlement to relief. Rule 55.27(a)(6), Mo.R.Civ.P.; *Prenger v. Baumhoer*, 914 S.W.2d 413 (Mo.App.W.D. 1996); *Scher v. Sindel*, 837 S.W.2d 350 (Mo.App.E.D. 1992). Although the courts often parrot the phrase that a petition is considered in an "almost academic manner," the critical question is whether the petition alleges facts that, if true, would entitle the plaintiff to relief.

Plaintiffs allege that Leroy Hunt was exposed to hazardous welding fumes that caused him injury. The petition alleges exposure to specific products manufactured or sold by specific defendants. Petition, Ex. A. Counts III and IV are ingenious attempts to ensnare in the net of tort liability not only the entire welding product industry but also other companies having no contemporary connection with the manufacture or sale of welding products themselves, and nothing to do with products to which plaintiff Leroy Hunt was exposed, but presumably having substantial net worth (e.g., General Electric). This ensnarement is to be accomplished by converting the activities of lawful trade associations into tortious conspiracies, or by expanding the boundaries of liability for negligence to embrace anyone who participates in a trade association or other trade group that studies

product safety, develops warning labels, publishes controversial literature on product hazards, and lobbies regulatory bodies.

Count III of plaintiffs' petition herein attempts to turn membership in the National Electrical Manufacturers Association (NEMA) and the American Welding Society (AWS) into membership in a conspiracy to kill and maim. Even considered in an "almost academic" manner, the count is specious at best. Carried to its logical conclusion, it would raise serious constitutional issues under the First and Fourteenth Amendments to the federal constitution, and similar issues under counterpart provisions of the Missouri constitution. However, because no claim is stated under established common law principles and the Rules of Civil Procedure, there is no necessity to address the constitutional aspect.

The crux of count III appears in ¶¶8 and 21 of the petition:

> 8. Defendants, through their designated representatives in the trade organizations, knowingly agreed to unlawful conduct and a voluntary undertaking, the purpose and effect of which was to conceal, misrepresent and otherwise fail to advise welders of the risk of brain damage from welding fumes.
>
> * * *
>
> 21. Using the trade organization committees as their instrumentalities in furtherance of the undertaking and agreement described above, Defendants committed numerous overt and tortious acts which included fraudulently and negligently misrepresenting, concealing, suppressing and omitting material information regarding the health effects of welding fumes and precautionary measures as specifically alleged below.

The other allegations of count III describe various activities allegedly designed to conceal welding fume hazards and prevent the promulgation of adequate warnings. The specific conduct alleged includes the formation of committees to study the hazards of welding and to underwrite and publish (mostly false) research on those

hazards, the use of advertising in trade publications to deny or camouflage hazards, withholding funds from research projects that were "not in the economic interest" of the defendants, proposing warning labels that were false and misleading, subsidizing scientific research and publications that were "intended to support the industry defense position," and communicating with various public agencies to oppose regulatory measures designed to reduce exposure to hazardous fumes in welding.

The essential elements of a claim of civil conspiracy are an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means. The facts alleged must show that the minds of the parties met with regard to the object to be accomplished, that one or more unlawful acts were in fact committed, and that, as a result of the conspiracy, plaintiff suffered damage. *Gettings v. Farr,* 41 S.W.3d 539 (Mo.App. 2001); *Kansas City Downtown Minority Dev. Corp. v. Corrigan Associates, L.P.,* 868 S.W.2d 210 (Mo.App.W.D. 1994); *Chmieleski v. City Products Corp.,* 660 S.W.2d 275 (Mo.App. 1983). The unlawfulness of a conspiracy may be found in either the end sought or the means used, and is not limited to criminal conduct. *Lyn-Flex West, Inc. v. Dieckhaus,* 24 S.W.3d 693 (Mo.App. 1999).

In an era of mass tort litigation, it is obvious that consideration of the plaintiffs' allegations in an "academic manner" could lend the authority of the Court to what is little better than an attempt to extort money from companies that happened to join a trade association and engage in conduct to be expected of such an association: promotion of the economic interests of the members. The

allegations of plaintiffs' petition must be read as a whole. Plaintiffs claim that Leroy Hunt was injured by exposure to products manufactured or distributed by some of the defendants. None of the allegations of the petition alleges that the "conspiracy defendants" entered into an agreement to manufacture or sell dangerous products. The allegations pertain exclusively to an alleged agreement to conceal or misrepresent the hazards of welding fumes. Apparently concealment and misrepresentation are at once the unlawful object of the conspiracy and the unlawful means of achieving it.[1] However, the mere publication of false information, or the concealment of the truth, however immoral, is not necessarily an unlawful act entailing legal liability. It is difficult to conceive of an actionable conspiracy to conceal or misrepresent the hazards of a product without an agreement to engage in or promote the actual enterprise of making and distributing the dangerously defective product. Any amount of false and misleading information can be injected into the marketplace without incurring liability. The misrepresentation or concealment must cause identifiable injury to the plaintiff. Here, count III wholly fails to allege any relationship between the conspiracy and plaintiff's actual injury.

Plaintiffs' reliance on the thread of membership in trade associations is patently insufficient to establish an actionable conspiracy. Obviously, defendants enjoy a constitutional right to form and maintain trade associations. Defendants likewise enjoy a

[1] Plaintiffs do not even attempt to allege an agreement to use unlawful means to market safe products.

constitutional right to disseminate information. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The dissemination of false information to the public as a whole simply is not actionable, absent a statute, unless the ingredients of defamation, fraudulent misrepresentation, or negligent misrepresentation are present, together with actual injury. Here, plaintiffs allege many actions by defendants to conceal or misrepresent the hazards of welding fumes. There are no allegations, however, that these actions independently caused any harm to the plaintiffs.

Plaintiffs' allegation of an agreement to misrepresent or conceal hazards of welding fumes is not enough to show an actionable conspiracy. The allegations must show an agreement to do an unlawful act or a lawful act by unlawful means, plus injury. Assuming defendants agreed to conceal or misrepresent the hazards of welding fumes generally, the petition must also show that defendants' actions pursuant to the agreement caused harm to the plaintiff directly. Because the petition fails to allege that the defendants who manufactured or distributed the products that harmed the plaintiffs did so *in furtherance of the conspiracy's objective*, no claim is stated in count III.

The claim of negligence alleged in count IV is likewise meretricious. Count IV alleges that the defendants named in that count assumed a duty to exercise reasonable care for the safety of persons using welding products "because Defendants delegated such responsibility which was assumed by" the health and safety committees

created under the auspices of the trade associations NEMA and AWS. The allegations of Count IV are replete with conclusions about the "duty" of the defendants to exercise due care in investigating and warning about the health hazards of welding fumes.

There is no liability for negligence without breach of a legal duty. The existence of a legal duty is generally a function of foreseeability, but not always. Even if a duty exists, its breach must be the proximate cause of the plaintiff's injury. E.g., *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151 (Mo.banc 2000); see also *Hoffman v. Union Electric Co.*, 176 S.W.3d 706 (Mo.banc 2005).

The question of duty is a question of law. A duty can be imposed by statute, assumed by contract, or imposed by common law. Absent a statute, ordinance, or express contract, the courts determine the existence of a duty by considering (1) whether society finds the interest claimed by plaintiff to be worthy of protection, (2) the foreseeability of harm and degree of certainty that the protected person suffered injury, (3) the moral blame society places on the conduct, (4) the prevention of future harm, (5) the costs and the ability to spread the risk of loss, and (6) the economic burden on the actor and the community. See *Hoffman v. Union Electric Co.*, supra; *Bowan v. Express Medical Transporters, Inc.*, 135 S.W.3d 452 (Mo.App.E.D. 2004).

Count IV pleads no duty imposed by positive law or express contract. Thus, if members of a trade association are to be liable for negligence in failing to warn of the hazards of welding fumes, the duty must be found in the common law. No doubt plaintiffs' interest

in being aware of the hazards of welding fumes is worthy of protection, and conduct intended to conceal such hazards is blameworthy. However, the cost-benefit analysis is something else again. One needs only to take note of the disastrous consequences of asbestos litigation, see, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); "The Great Asbestos Scam," *The Wall Street Journal*, April 10, 2006, p. A18, to know that a court should tread warily in imposing broad duties, and correlative liabilities, on companies for marketing products that may have been hazardous but also had great economic utility. This is particularly true when the claim pleaded, if viable, would fasten liability on entities that had nothing whatever to do with the specific product that injured the plaintiff, but would impose liability based primarily on guilt by association.

Missouri has firmly rejected the "market share" theory of products liability and requires that the plaintiff plead and prove that the defendant's product caused the claimed injury. See §537.760, RSMo 2000 & Supp.; *Hagen v. Celotex Corp.*, 816 S.W.2d 667 (Mo.banc 1991); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo.banc 1984). Where the plaintiff suffers injury from exposure to a toxin from products manufactured or sold by multiple defendants, the plaintiff must plead and prove, at a minimum, that each defendant's product was a substantial factor in causing injury. *Bennett v. Rapid American Corp.*, 816 S.W.2d 677 (Mo.banc 1991); see also *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo.banc 1993)("but for" causation essential to liability).

To allow a products liability claimant to predicate a negligence claim against a defendant based solely on the defendant's membership and activities in a trade association is to permit an end-run around the products liability limiting principles adumbrated above. Indeed, it would do more: it would impose liability by association on companies that had nothing to do with manufacturing or marketing the specific product that caused the alleged injury.

Despite the conclusions alleged in the petition, defendants cannot be said to have assumed any duty to plaintiffs by engaging in debate, research, advertising, and lobbying activities through a trade association. Nothing in the petition alleges that the defendants ceded the right to control their manufacturing and marketing decisions to NEMA or AWS, nor are there allegations that any defendant was contractually or otherwise obligated to follow NEMA or AWS standards in providing product warnings. Moreover, there are no allegations that plaintiffs knew of or relied in any respect on the statements or publications of NEMA or AWS. Indeed, the crux of the products liability counts of the petition is that defendant manufacturers wholly failed to warn plaintiff Leroy Hunt of any hazards in connection with welding fumes.

Count IV is likewise deficient as a matter of law in failing to plead any facts allowing the inference that the conduct of the defendants caused any injury to plaintiffs. Missouri requires "but for" and proximate causation. "But for" causation denotes that the plaintiff's injury would not have occurred "but for" the defendant's conduct. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo.banc

1993). Viewing the petition as a whole, even in the most liberal light, the facts alleged to do not suffice to show that "but for" defendants' trade association activities, plaintiffs would not have been injured.

Finally, there is the matter of the burden on the defendants and the community, if the duty sought by plaintiffs were recognized. Although the cases speak in terms of economic burden, there are other burdens that ought to be considered. Paramount is the burdening of fundamental rights of speech and association. As noted above, defendants have an absolute right to associate and speak on matters of public importance. In the context of the allegations of count IV, plaintiffs would impose substantial burdens on those rights if, by associating for the purpose of promoting their economic interests, the defendants thereby were exposed to liability for injuries resulting from any product manufactured or distributed by any member of the association. Imposition of liability in the circumstances alleged by count IV would also discourage industrial research and development in areas of product safety. Cf. *State ex rel. Kawasaki Motors Corp. v. Ryan*, 777 S.W.2d 247 (Mo.App.E.D. 1989)(adverting to the "privilege" of "critical self analysis"). To discourage manufacturers from conducting such research and from engaging in scientific debate concerning product safety issues would impose an intolerable burden on the community, and assumes that the free market rewards deception and punishes efforts at self-improvement, which simply is not true.

Products liability doctrines evolved to meet a perceived need to impose liability without fault in an era of assembly line

manufacturing and mass marketing. Those doctrines can and do offer ample avenues of redress for persons injured by products in the stream of commerce. The Court can perceive absolutely no reason (other than the naked desire to have deep-pocketed defendants available to pay judgments, or, even better, quick settlements) to cast the net of liability even wider than it is already cast by established tort principles.

To be sure, it will be argued that society has no interest in fostering deceptive trade practices or the concealment of hazards in the use of products. No doubt the tobacco companies will be held up as the paradigm of the type of corporate marketing misbehavior and research manipulation that should entail liability. See, e.g., *Insolia v. Philip Morris, Inc.*, 216 F.3d 596 (7th Cir. 2000). However, the tobacco analogy is nothing to the purpose. By all means, let the manufacturers of the products that caused injury to plaintiffs be liable. By all means, let the evidence of how they engaged in, or aided and abetted, false research and propaganda be admissible as against those manufacturers on the issue of failure to warn and punitive damages. But, even assuming the truth of plaintiffs' allegations regarding false trade association research and publishing, it does not follow that any duty of care *toward plaintiffs here* must be imposed on defendants who, on the face of the petition, had nothing to do with manufacturing or marketing the products to which Leroy Hunt was exposed (identified in Exhibit A to the petition). Of course, with regard to those defendants whose products allegedly injured

plaintiffs, count IV is merely redundant of the other claims properly pleaded.

ORDER

In light of the foregoing, it is

ORDERED that the motions of defendants to dismiss counts III and IV of the petition be and the same are hereby granted; all other motions to dismiss or make more definite are deferred to the Presiding Judge; and it is

FURTHER ORDERED that count III of the petition be and the same is hereby dismissed, with prejudice as to defendants Air Products & Chemicals, Allegheny Technologies, A.O. Smith, BOC/AIRCO, Deloro Stelite, Dow Chemical, ESAB, Eutectic Corp., General Electric, Hobart Brothers, Illinois Tool Works, Lincoln Electric, Metropolitan Life, Miller Electric, Praxair, Sandvik, Select Arc, Stoody, Thermadyne, Union Carbide, and Westinghouse, at plaintiff's cost; and it is

FURTHER ORDERED that count IV of the petition be and the same is hereby dismissed with prejudice as to defendants Air Products & Chemicals, Allegheny Technologies, A.O. Smith, Deloro Stelite, Dow Chemical, Eutectic Corp., General Electric, Illinois Tool Works, Metropolitan Life, Miller Electric, Sandvik, Select Arc, Stoody, and Westinghouse, and without prejudice as to defendants BOC/AIRCO, ESAB, Hobart Brothers, Lincoln Electric, Praxair, Union Carbide and Thermadyne, all at plaintiff's cost,; and it is

FURTHER ORDERED that the above cause is continued and re-set for trial on Monday, March 5, 2007, commencing at 9:00 a.m. in Division 18; and it is

FURTHER ORDERED AS FOLLOWS:

1. (a) Discovery will be closed 45 days prior to the scheduled trial date, except with regard to experts. (b) All experts will be disclosed not later than 90 days prior to the scheduled trial date. Disclosure of experts shall include a statement as to whether the expert will give opinions concerning specific products at issue, and, if so, what products will be mentioned. Expert depositions may be taken up to the date of closing discovery. Expert disclosure shall also include identification of any treating physicians who are expected to give opinions concerning causation relating to particular defendants' products, further identifying the products that will be mentioned by each such expert. No party is authorized to adopt lists of experts identified by other parties. Each party shall state specifically the identity of all experts expected to be called at trial.

2. Except by leave of Court, the plaintiffs and the defendants collectively will be limited to no more than two (2) "state of the art" expert witnesses at the trial, and no more than one medical causation expert from any specialty (i.e., no more than one neurologist, no more than one pathologist, etc.). Due to the possibility of scheduling conflicts, the parties may designate in discovery more than the number of experts specified herein, but, if they do so, the designating party or parties shall pay the opposing party's entire cost of depositions (excluding attorney's fees, but including attorney travel expenses) of such additional experts.

3. Not later than 45 days prior to the trial setting, plaintiffs shall file an amended petition setting forth specifically the last date of claimed exposure to each specific product manufactured or distributed by each defendant.

4. Not later than 7 days prior to the scheduled trial date, all parties shall file (a) lists of witnesses, exhibits, and depositions (with specific page and line designations) that **will** be used at trial, (b) separate lists of witnesses, exhibits and depositions that **may** be used at trial, (c) a trial brief not to exceed 20 pages, briefly outlining any the main issues in the case, emphasizing any issues not previously raised in welding fume cases in this circuit, and (d) all motions in limine, not to exceed 5 pages each, including supporting memoranda. The Court will not tolerate abuse of the "may be called" or "may be used" lists at trial. Parties can and should file consolidated witness, exhibit and deposition lists, but mere incorporation of other parties' lists by reference is not permitted. If the parties agree, narratives based on depositions can be submitted in lieu of deposition designations.

5. All parties shall appear in Division 18 for purposes of a pretrial conference pursuant to Rule 62.01, Mo.R.Civ.P., at 2:00 p.m. on the Friday preceding the scheduled trial date. Not later than the pretrial conference, all parties shall file objections to disclosed exhibits and deposition designations, identified as "will be used," and shall file deposition counter- or cross-designations.

6. Motions to dismiss or for summary judgment must be filed at least 40 days before the scheduled trial date. ANY EXHIBITS FILED IN

SUPPORT OF OR IN OPPOSITION TO ANY MOTION WHATSOEVER, THAT EXCEED 20 PAGES IN THE AGGREGATE, SHALL BE FILED ON DISKETTE OR CD-ROM IN A STANDARD FORMAT READABLE BY THE COURT'S COMPUTER SYSTEM. QUESTIONS ABOUT FORMATS ARE TO BE DIRECTED TO THE COURT'S INFORMATION SYSTEMS MANAGER. THE CLERK'S OFFICE IS FORBIDDEN TO ACCEPT ANY FILING NOT IN COMPLIANCE WITH THIS ORDER.

SO ORDERED:

Robert H. Dierker
Circuit Judge

Dated: 4/20, 2006
cc: Counsel/Presiding Judge