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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CONWED CORPORATION,

Plaintiff,

vs.

UNION CARBIDE CORPORATION,

Defendant.

Civil No. 5-92-88 (DDA/RLE)

**ORDER ON DEFENDANT'S
RENEWED MOTION FOR
SUMMARY JUDGMENT ON
BULK SUPPLIER /
SOPHISTICATED USER
GROUNDS**

Brownson & Ballou, PLLP, by ROBERT D. BROWNSON and KRISTIK. WARNER, Minneapolis, Minnesota, and MICHAEL R. GOLDMAN, Chicago, Illinois, for Plaintiff Conwed Corporation.

Foley & Lardner, by TREVOR J. WILL and MICHAEL D. ROSENBERG, Milwaukee, Wisconsin, and LISA M. ELLIOTT, Minneapolis, Minnesota, for Defendant Union Carbide Corporation.

This is a workers' compensation subrogation action under Minnesota law. Plaintiff Conwed Corporation ("Conwed") paid workers' compensation benefits to many of its former employees who developed asbestos-related diseases. Conwed claims that Defendant Union Carbide Corporation ("Union Carbide") is liable to Conwed for those benefit payments because Union Carbide failed adequately to warn of the hazards of asbestos that Union Carbide manufactured and sold to Conwed. Union Carbide moved for summary judgment, *inter alia*, on the ground that Minnesota law imposed no duty to warn on Union Carbide because Conwed was a sophisticated user of asbestos. The Court denied that motion by Order dated July 3, 2001, holding that material factual issues existed concerning Conwed's status as a sophisticated user, the adequacy of any warnings Union Carbide communicated to Conwed, and the reasonableness of Union Carbide's reliance upon Conwed to warn Conwed's employees of those hazards. In August and September 2002, the parties tried the portion of the case involving Conwed's former employees who developed mesothelioma to a jury, which returned a verdict in favor of Union Carbide.

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1 Union Carbide's asbestos was more toxic than other forms of asbestos. Union Carbide kept the
2 results of the 1966 study and the 1967 report confidential and did not share that information with
3 Conwed or any other purchaser of Union Carbide's asbestos. Although Union Carbide conducted
4 some testing of air samples taken at Conwed's plant, Union Carbide also appears to have done little
5 else to determine how Conwed used Union Carbide's asbestos or what Conwed knew about the
6 hazards of that asbestos.

7 The Court's July 3, 2001, Order provides a detailed discussion of the "sophisticated user"
8 defense in Minnesota, and the discussion here will be confined to whether Gray affects the
9 application of that defense in this case. The plaintiff in Gray was a foundry employee who
10 developed silicosis as a result of inhaling silica sand dust in the course of his employment. 664
11 N.W.2d at 883. The defendant, a supplier of silica sand to the foundry, delivered the sand in bulk
12 and had little ability to communicate a warning to the foundry's employees. Id. at 886. The
13 defendant argued that it had no duty to warn the plaintiff because the foundry was aware of the
14 hazards of inhaling silica dust and was in a better position than the defendant to warn its employees
15 of those hazards. Id. The parties took the unusual step of agreeing to the entry of judgment on
16 stipulated facts, so the case reached the appellate court in a "unique procedural posture, and despite
17 the likelihood of the existence of genuine issues of material fact." Id. Given the foundry's
18 undisputed knowledge of the hazard and superior ability to communicate a warning based on the
19 nature of the product, the Minnesota Court of Appeals held that the defendant reasonably relied on
20 the foundry to warn the employees as a matter of law and that the defendant thus had no duty to warn
21 the plaintiff. Id. at 887.

22 Union Carbide, noting that Gray does not address the defendant's knowledge of the hazards
23 of silica sand, contends that a supplier's knowledge of its product's hazards, including knowledge
24 superior to that the purchaser possesses, is no longer relevant to the sophisticated user defense in
25 Minnesota. That position, however, does not comport with Restatement (Second) of Torts § 388
26 (1965), which Gray itself recognizes as providing the applicable legal standard, 664 N.W.2d at 886,
27 and which focuses specifically on the reasonableness of the supplier's reliance on an intermediary
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1 to communicate a warning to a product's ultimate user. The reasonableness of a supplier's actions
2 of necessity depends upon the supplier's knowledge of the pertinent facts.² With respect to the
3 supplier's superior knowledge of a hazard, Union Carbide's position also is flatly contrary to Hill
4 v. Wilmington Chemical Corp. 156 N.W.2d 898 (Minn. 1968), which held that a supplier of a
5 product has a duty to warn of dangers inherent in the use of the product and not known to the
6 purchaser. Id. at 902. To the extent that Gray's analysis supports Union Carbide's position, the
7 Court accordingly finds that the Minnesota Supreme Court is not likely to adopt it. See United Fire
8 & Cas. Ins. Co. v. Garvey, 328 F.3d 411, 413 (8th Cir. 2003) (holding that decisions of an
9 intermediate state appellate court are not binding on a federal court sitting in diversity if the state's
10 highest court would decide the issue differently). Gray otherwise is consistent with the Court's July
11 3, 2001, Order and with prior Minnesota case law. See Hegna v. E.I. du Pont de Nemours & Co.,
12 825 F. Supp. 880, 884 (D. Minn. 1992) (holding that a bulk supplier satisfies its duty to warn an
13 ultimate user of a product under Minnesota law when the bulk supplier reasonably believes that an
14 intermediary knows the dangers associated with the product and reasonably relies on the
15 intermediary to communicate a warning of those dangers to the ultimate user), aff'd, 27 F.3d 571
16 (8th Cir. 1994) (unpublished table decision). Cf. Minneapolis Soc'y of Fine Arts v. Parker-Klein
17 Assocs. Architects, Inc., 354 N.W.2d 816, 821 (Minn. 1984) (holding generally that a product
18 supplier has no duty to warn of hazards of which the product user is or should have been aware),
19 overruled on other grounds by Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990).

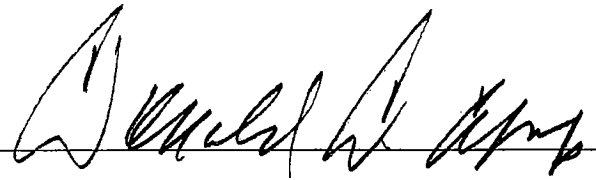
20 After carefully reviewing the present record, the Court disagrees with Union Carbide's
21 contention that the sophisticated user issue is amenable to summary disposition under the appropriate
22 legal standard. Union Carbide has not met its burden of establishing, given all the facts and
23 circumstances of the case, that Union Carbide's knowledge of the hazards of asbestos was not
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25 ² Asbestos products liability cases from other jurisdictions rejecting arguments similar to
26 Union Carbide's include Adkins v. GAF Corp., 923 F.2d 1225, 1231 (6th Cir. 1991), Willis v.
27 Raymark Industries, Inc., 905 F.2d 793, 797 (4th Cir. 1990), and Russo v. Abex Corp., 670 F. Supp.
206, 208-09 (E.D. Mich. 1987).

1 superior to Conwed's or that Union Carbide's reliance on Conwed to communicate warnings to
2 Conwed's employees was reasonable. Issues of fact remain as well regarding the adequacy of Union
3 Carbide's warnings.

4 For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Union Carbide's renewed
5 motion for summary judgment on bulk supplier / sophisticated user grounds (Docket No. 514) is
6 DENIED.

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8 Dated: September 8, 2003


DONALD D. ALSOP, Senior Judge
United States District Court

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