05cv17734A-ord(sj).wpd

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CURT & NANCY COOLEY,	:	**Case No. 1:05-CV-17734**
Plaintiffs,	:	
v.	:	
LINCOLN ELECTRIC CO., et al.,	:	
Defendants	:	**Judge Kathleen M. O'Malley**
	:	**MEMORANDUM & ORDER**

This action is brought by plaintiff Curt Cooley, a welder, against four manufacturers of welding rods: (1) Lincoln Electric Company; (2) Hobart Brothers Company; (3) The ESAB Group, Inc.; and (4) BOC Group, Inc. f/k/a Airco, Inc.[1] The gravamen of Cooley's complaint is that the defendants failed to warn him of the hazards of using welding rods – specifically, that inhaling manganese contained in the fumes given off by welding rods could cause him to suffer permanent brain damage. In the second count of his amended complaint, Cooley asserts the defendants are liable for fraud for failure to disclose. In this count, Cooley alleges the defendants: (1) "failed to disclose and concealed material facts within their knowledge," being the hazard posed by inhaling manganese in welding fumes; (2) "knew that [Cooley]

[1] Curt is joined as a plaintiff by his wife, Nancy Cooley, who brings a claim for loss of consortium. For simplicity, the Court refers in this opinion to Curt as "Cooley," as though he is the sole plaintiff.

was ignorant of the [hazard] and did not have an equal opportunity to discovery [sic] the truth about the dangers presented by defendants' products;" and (3) "intended to induce [Cooley] to . . . buy and use their products, by failing to disclose the [hazard]."[2]

Defendants seek summary judgment on Cooley's fraud claim, which the parties agree is governed by Iowa law. For the reasons stated below, the motion (docket no. 94) is **GRANTED**.

I. Background.

This case has been consolidated with the Multidistrict Litigation known as *In re: Welding Fume Prods. Liab. Litig.*, case no. 03-CV-17000, MDL no. 1535. Previously, the undersigned has issued three opinions addressing fraud claims brought by other *Welding Fume* plaintiffs. The Court issued the first such opinion in *Ruth v. A.O. Smith Corp.*,[3] which was governed by Mississippi law. In *Ruth*, the Court observed that "Mississippi courts . . . have consistently held that a claim of fraud may not be based upon an omission or silence, unless there exists a special relationship between the parties."[4] In *Ruth*, the allegations of fraudulent conduct were predicated not on what the manufacturing defendants affirmatively misrepresented, but only on what they allegedly failed to disclose. Under Mississippi law, however, "silence, in the absence of a duty to speak, is not actionable."[5] Ruth tried to overcome this rule by arguing he was in a special, fiduciary relationship with the defendants, but the Court rejected this argument, finding "[t]he relationship between Ruth and the defendants . . . was simply one of product-user /

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[2] Amended complaint at ¶¶97-99.

[3] *Ruth v. A.O. Smith Corp*., 2005 WL 2978694 (N.D. Ohio Oct. 11, 2005).

[4] *Id.* at *3.

[5] *Id.* at *4 (quoting *Smith v. Tower Loan of Mississippi, Inc.*, 216 F.R.D. 338, 358 (S.D. Miss. 2003)).

product-manufacturer."[6] Ruth also argued the allegedly deficient product warnings provided by the defendants were, in and of themselves, "affirmative misrepresentations" upon which a fraud claim could be based. The Court rejected this argument also, because "to hold otherwise would convert all product manufacturer's duty to warn claims into fraud claims."[7] The Court concluded that, under Mississippi law, "the affirmative misrepresentations upon which a claim for fraud must be premised cannot include only the very warnings that support a product liability claim for failure to warn."[8] Because plaintiff Ruth pointed only to his reliance on the product warnings and the information they allegedly omitted, and not to any other communication from the defendants that qualified as an affirmative misrepresentation, the Court granted the *Ruth* defendants' motion for summary judgment.

The Court next addressed a summary judgment motion on a fraud claim in *Tamraz v. Lincoln Elec. Co.*,[9] which was governed by California law. In *Tamraz*, the Court did not have to divine whether California law would recognize a fraud claim in the context of a product liability action, because a California state court had examined that precise question in the specific context of a *Welding Fume* case. California law provides that there are four circumstances when "nondisclosure or concealment may constitute actionable fraud," including these two: (1) "when the defendant had exclusive knowledge of material facts not known to the plaintiff;" and (2) "when the defendant actively conceals a material fact

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[6] *Id.*

[7] *Id.* at *5. The Court also held that Ruth could not base his fraud claim on historical statements made by defendants to trade journals, because there was no evidence he ever personally relied on these alleged misrepresentations.

[8] *Id.*

[9] 2007 WL 3399721 (N.D. Ohio Nov. 13, 2007).

from the plaintiff."[10] In a state court case known as *King v. BOC Financial Corp*., a California court concluded a jury could reasonably find, based on the same evidence as exists in this case, that the defendants were liable for either of these two circumstances.[11] The *King* court also ruled that "the absence of transactions directly between Plaintiff and the manufacturing defendants does not eliminate the possibility of a valid fraud claim."[12] Another California case explains how this could occur:

> One who makes a misrepresentation or false promise or conceals a material fact is subject to liability if he or she intends that the misrepresentation or false promise or concealment of a material fact will be passed on to another person and influence such person's conduct in the transaction involved. A person has reason to expect that misrepresentation, false promise or nondisclosure of material fact will be passed on to another person and influence that person's conduct if he or she has information that would lead a reasonable person to conclude that there is a likelihood that it will reach such person and will influence his or her conduct in the transaction involved. * * * One who makes a misrepresentation or false promise or conceals a material fact with the intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that category who is actually misled thereby.[13]

Thus, this Court denied the summary judgment motion in *Tamraz*, holding the plaintiffs had adduced sufficient evidence to allow a jury to conclude the defendants engaged in fraudulent nondisclosure through indirect communications to others. The *Tamraz* jury found in favor of the plaintiff on his claim for failure to warn, but found for the defendants on his fraud claim.

The third time this *Welding Fume* MDL Court addressed a claim for fraud occurred in the case of

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[10] *Limandri v. Judkins*, 52 Cal.App.4th 326, 336 (Cal. Ct. App.1997).

[11] *See Tamraz*, 2007 WL 3399721 at *9-10 (discussing the analysis in *King*).

[12] *Id.* at *9 (quoting *King*, slip op. at 8,).

[13] *Id.* (quoting the jury instructions from *Whiteley v. Philip Morris, Inc.*, 117 Cal.App.4th 635, 680-681 (Cal. Ct. App. 2004) (internal quotation marks omitted)). *See also Zavala v. TK Holdings, Inc.*, 2004 WL 2903981 at *10 (Cal. Ct. App. Dec. 16, 2004) ("Under [the indirect communication] theory, the maker of a fraudulent misrepresentation is subject to liability to another who acts in justifiable reliance upon it, if it is made to a third person and the maker intends or has reason to expect that its terms will be repeated to the other, and that it will influence his conduct.").

Jowers v. BOC Group, Inc.,[14] which was also governed by Mississippi law. Unlike in the case of *Ruth*, where the plaintiff pointed only to alleged omissions in the product warning labels, themselves, the plaintiff in *Jowers* asserted "there were representations and omissions made by the defendants to his employer, Ingalls Shipyard, regarding the hazards (or lack thereof) associated with welding, and that he relied on these representations and omissions indirectly because Ingalls conveyed this information to him, as the defendants intended."[15] These other representations and omissions were allegedly contained in, for example, welding handbooks supplied by the defendants to Jowers' employers. The Court concluded that Mississippi law allowed Jowers to "pursue a theory of fraud premised upon indirect reliance on affirmative misrepresentations made by a defendant to Ingalls."[16] The Court wrote:

> Jowers asserts the defendants purposefully gave false information regarding welding fume safety to Ingalls, Ingalls reasonably relied upon this false information when instructing Jowers on how to weld safely, this reliance had the effect of placing Jowers in peril – ultimately causing him to suffer physical harm – and defendants could expect that giving this false information to Ingalls would imperil Jowers and other Ingalls welders. Based on the evidence so far presented, all of these assertions have more than a scintilla of evidentiary support.[17]

Accordingly, the Court denied defendants' motion for summary judgment, but cautioned it would apply

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[14] 2009 WL 995613 (S.D. Miss. Apr. 14, 2009) (appeal pending).

[15] *Id.* at *5; *see also id.* at *7 (Jowers asserts that, "even though he cannot point to any affirmative misrepresentations made by the defendants upon which he relied directly, the defendants made affirmative misrepresentations to his employer, Ingalls Shipyard, with the expectation that Ingalls would essentially repeat those misrepresentations to him; and, further, that Ingalls supervisors and managers did, in fact, pass on those misrepresentations and Jowers did, in fact, reasonably rely upon them.")

[16] *Id.* at *7.

[17] *Id.* at *8.

very exacting evidentiary standards at trial.[18] The Court later granted a motion for judgment as a matter of law on Jowers' fraud claim, pursuant to Fed. R. Civ. P. 50, for failure to establish the necessary factual predicate.

With this background,[19] the Court now examines whether defendants are entitled to summary judgment on Cooley's fraud claim under Iowa law.

II. Iowa Law.

The Iowa Supreme Court set out the contours of a viable fraud claim in a product liability setting in *Wright v. Brooke Group Ltd.*[20] In *Wright*, the court responded to the following question, which had been certified by a federal district court presiding over a tobacco case: "Under Iowa law, can a

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[18] *See id.* ("The Court holds, however, that Jowers may prevail on this claim only if he shows at trial that: (a) a defendant made an affirmative misrepresentation to Jowers' employer; (b) the defendant reasonably expected that the employer would convey substantially the same affirmative misrepresentation to Jowers; (c) the employer actually did so; and (d) Jowers actually and reasonably relied upon the affirmative misrepresentation. Also, the type of showing to support this alleged indirect reliance is exacting, and a fraud claim will only lie against the individual defendant who made the relied-upon affirmative misrepresentation. Finally, given that Jowers admits there were no affirmative misrepresentations contained in the defendants' warnings, the affirmative misrepresentations upon which he allegedly relied indirectly must be appear outside of the defendants' warning labels, themselves.") (footnotes omitted).

[19] The Court hereby incorporates by reference the *Ruth*, *Tamraz*, and *Jowers* opinions cited above. In addition, the Court also incorporates by reference its recitations of the general background of this MDL and the undisputed facts applicable to this case, as set out in the following Orders: *Jowers v. Lincoln Elec. Co.*, 608 F.Supp.2d 724 (S.D. Miss. 2009) (reviewing evidence in the context of assessing a post-judgment motion) (appeal pending); *In re Welding Fume Prods. Liab. Litig.*, 2007 WL 3226951 (N.D. Ohio Oct. 30, 2007) (granting summary judgment to defendant Caterpillar in all MDL cases); *In re Welding Fume Prods. Liab. Litig.*, 2007 WL 1087605 (N.D. Ohio April 9, 2007) (granting summary judgment to defendant Metropolitan Life Insurance Company in all MDL cases); and *Ruth v. A.O. Smith Corp.*, 2005 WL 2978694 (N.D. Ohio Oct. 11, 2005) (granting summary judgment on a conspiracy claim). Should any party later wish to appeal this Order, the Court makes clear here that the other rulings so incorporated must be included as an addendum to this Order and made a part of the appellate record.

[20] 652 N.W.2d 159 (Iowa 2002).

manufacturer's alleged failure to warn or to disclose material information give rise to a fraud claim when the relationship between a Plaintiff and a Defendant is solely that of a customer/buyer and manufacturer?"[21] The court began its answer with the observation that, under Iowa law, a failure to disclose material information can be fraud only if the concealment is made by a party with a duty to disclose. Accordingly, the *Wright* court recharacterized the issue presented as: "whether a manufacturer has a duty to communicate 'material information' to the ultimate user of the manufacturer's product."[22] The court then concluded that a manufacturer does not have any such duty, "with two exceptions."[23] These exceptions are when the manufacturer: "(1) has made misleading statements of fact intended to influence consumers, or (2) has made true statements of fact designed to influence consumers and subsequently acquires information rendering the prior statements untrue or misleading."[24]

The court explained that these two exceptions exist because "there is support in Iowa case law for the conclusion that the intentional tort of fraud is not necessarily limited to parties dealing directly with each other;" rather, "what is really important is that the statements were made for the purpose of influencing the action of another."[25] The court determined that, if a manufacturer issued statements that were (or became) misleading, and issued those statements for the purpose of influencing users of its product, then a consumer who relied on those statements could bring a claim for fraud. Ultimately, "a manufacturer who makes statements for the purpose of influencing the purchasing decisions of consumers

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[21] *Id.* at 163.

[22] *Id.*

[23] *Id.* at 177.

[24] *Id.* (citing Restatement (Second) of Torts §551(2)(b, c)).

[25] *Id.* at 176.

has a duty to disclose sufficient information so as to prevent the statements made from being misleading, as well as a duty to reveal subsequently acquired information that prevents a prior statement, true when made, from being misleading."[26] The Court explicitly "decline[d] to extend th[is] duty of disclosure . . . to a general duty to warn" based only on the manufacturer/buyer relationship, stating that "principles of products liability law define the duties of disclosure owed by a manufacturer to a consumer arising out of their relationship as such."[27]

Research reveals only three Iowa appellate cases applying the *Wright* ruling in a products liability context. In *Johnson v. Harley Davidson Motor Co.*,[28] the plaintiff purchased a used motorcycle that had a trailer hitch. After the plaintiff crashed while riding with his wife in the trailer, he sued, among others, the manufacturers of the motorcycle, the trailer, and the trailer hitch. Shortly after the Iowa Supreme Court issued *Wright*, the *Johnson* plaintiff sought leave to amend to assert a fraud claim; the factual premise for the claim was that there were misrepresentations or omissions made in advertisements issued by the trailer and trailer hitch manufacturers. The trial court denied the motion to amend and the appellate court affirmed. One of the bases for the *Johnson* court's affirmance was that the plaintiff "cannot prove detrimental reliance on the statements in the advertisements because (1) there is no evidence [he] saw the advertisements before purchasing the trailer, and (2) the hitch already was installed on the motorcycle when [he] bought the motorcycle, so no advertisements could have influenced [his] decision."[29]

Thus, the *Johnson* court found the plaintiff's lack of reliance took him outside of the "narrow"

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[26] *Id.*

[27] *Id.*

[28] 2004 WL 370251 (Iowa Ct. App. Feb. 27, 2004). *Johnson* is the only one of the three cases cited by the parties.

[29] *Id.* at *10.

exceptions identified in *Wright*.[30] Although it affirmed summary judgment on the fraud claim, the *Johnson* court reversed summary judgment on the plaintiff's failure-to-warn claims against the manufacturers of the trailer and the trailer hitch, concluding there existed a jury question as to whether the danger of pulling a trailer was open and obvious, and whether the plaintiff had actual knowledge of the danger.

At the same time as the *Johnson* court issued its opinion, an Iowa federal district court relied on *Wright* in *Employers Mutual Casualty Co. v. Collins & Aikman Floor Coverings, Inc.*[31] In *Employers Mutual*, the plaintiff insurance company built new offices and needed almost 24,000 square yards of carpet. The plaintiff told the defendant carpet company that it "desired carpet on which chairs with casters (rolling chairs) could be used without chair mats."[32] After a few years, however, the carpet supplied by the defendant began to lose its color in circular patterns under the chairs. The plaintiff brought several claims, such as breach of warranty, and also added a claim for fraudulent concealment. The defendant moved for summary judgment on the fraud claim but the court denied the motion, observing that the insurance company had adduced evidence that the carpet company engaged in "affirmative acts of concealment" – for example, it knew the carpet-wear problem would occur after several years and only pretended to be puzzled by the problem.[33] The court stated: "Under *Wright*, if [the defendant] knew the use of its carpet under rolling chairs without mats would result in the crushing and whitening/greying that occurred a couple of years later, the jury could find [the defendant] had a duty to disclose this information to [plaintiff] in connection with the sale. There is thus evidence to support a claim of fraudulent

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[30] *Id.*

[31] 2004 WL 840561 (S.D. Iowa Feb. 13, 2004).

[32] *Id.* at *2.

[33] *Id.* at *13-14.

nondisclosure in this regard."[34]

The third Iowa appellate product liability case that cites *Wright* is *Baier v. Ford Motor Co.*,[35] in which the plaintiff was rear-ended while driving a 1967 Ford Mustang. The car's gas tank ruptured, fuel leaked into the passenger compartment, and the fuel ignited, badly burning the plaintiff. The Classic Mustang had "what is commonly called a 'drop-in' gas tank," as opposed to a 'strap-on' gas tank; the former provides "only one layer of metal between the gas and the trunk," while the latter provides "two layers of metal between the gas and the trunk and the tank is not part of the structure of the car."[36] The plaintiff brought product liability claims and also a claim for fraudulent concealment, pointing to crash tests performed by Ford but not divulged to the National Highway Traffic Safety Administration ("NHTSA") when it was examining the safety of Ford's drop-in gas tanks. The *Baier* court agreed with the plaintiff that there was sufficient evidence to support a claim for fraudulent concealment, because a jury might reasonably agree the plaintiff "could justifiably rely upon the alleged misrepresentations made by Ford to a third-party, in this case NHTSA."[37] In other words, a jury could accept the *Baier* plaintiff's arguments that: (1) "Ford had reason to expect that its misrepresentations made to NHTSA would be passed on to a third party and that these misrepresentations were made with the purpose of influencing the actions of another;"[38] and (2) he relied on Ford's statements by virtue of NHTSA's conclusion that the Mustang was safe and met federal rear-end crash safety standards. Accordingly, Ford could be liable for

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[34] *Id.* at *20.

[35] 2005 WL 928615 (N.D. Iowa Apr. 21, 2005).

[36] *Id.* at *1.

[37] *Id.* at *6.

[38] *Id.*

failure to "disclose sufficient information so as to prevent [its] statements [to NHTSA] from being misleading."[39]

III. Analysis.

An important aspect of the cases cited above is that the results depend on the type of communications upon which the plaintiff allegedly relied. In *Johnson*, the trailer and trailer hitch bore no warnings at all.[40] Thus, the plaintiff did not point to statements or omissions contained in product warning labels to support his fraud claim; rather, the plaintiff pointed to statements or omissions allegedly contained in the manufacturers' advertisements. Because there was no evidence that the plaintiff had actually seen or relied directly or indirectly upon any of these advertisements, the court disallowed the plaintiff from pursuing a fraud claim.

In *Employers Mutual*, the insurance company and the carpet supplier engaged in lengthy direct negotiations, at which time the insurance company told the carpet supplier of its specific needs. The alleged acts of concealment supporting the insurance company's fraud claim involved the carpet supplier's omission that its product could not fulfill these needs, and its failure to correct affirmative statements that were made directly to and relied upon by the plaintiff. Again, the misrepresentations and omissions were not contained in product warning labels.

And in *Baier*, the plaintiff relied indirectly on Ford's statements to NHTSA that there was no data suggesting the Mustang did not comply with federal rear-end crash safety standards. Because Ford arguably made misleading statements of fact intended to influence consumers and did not correct those

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[39] *Wright*, 652 N.W.2d at 176.

[40] *Johnson*, 2004 WL 370251 at *7.

statements, the plaintiff was permitted to pursue a fraud claim. The statements at issue were contained in Ford's communications to NHTSA, not in its consumer warnings.

In this case, Cooley does not premise his fraud claim on any statements to third parties, as did the *Baier* plaintiff. As Cooley explains in his opposition brief: "Mr. Cooley's fraudulent misrepresentation claim depends on his reliance **on the product labels themselves**. The half-truths in those labels misled Mr. Cooley, causing him to use the products, and to use them in a way that injured him."[41] The brief goes on to discuss only Cooley's reliance on the product warning labels; the brief makes no mention of any alleged reliance by Cooley upon any other communication from defendants, whether received directly from the defendants or indirectly through an employer or union. Thus, for example, Cooley is not premising his fraud claim upon affirmative statements or omissions contained in articles authored by defendants in trade journals, or welding handbooks supplied by defendants to employers, or even the manufacturers' MSDSs. The only statements or omissions made by defendants upon which Cooley allegedly relied were the product labels.

Cooley's circumstances are in contrast to those in *Jowers*, where the plaintiff allegedly relied on communications from the defendants *other than* their product labels. As the Court explained:

> Jowers notes that defendant Lincoln provided to Ingalls a 1972 welding handbook stating that welding fumes are "innocuous." Jowers asserts the evidence will show that: this statement is false; Lincoln knew it was false when it made it; Lincoln expected Ingalls to pass this false information on to its welder-employees; Ingalls actually did pass this information on to Jowers; and Jowers reasonably relied upon it, to his detriment. Thus, Jowers argues summary judgment on his fraud claim is inappropriate because he can establish indirect reliance upon affirmative misrepresentations made by the defendants.[42]

Accordingly, Jowers was permitted to "pursue a theory of fraud premised upon indirect reliance on

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[41] Opposition brief at 3 (emphasis added).

[42] *Jowers*, 2009 WL 995613 at *7.

[omissions and] affirmative misrepresentations made by a defendant to Ingalls."[43] This scenario is similar to *Baier*, where the Iowa appellate court permitted the plaintiff to pursue a theory of fraud premised upon indirect reliance on alleged omissions and affirmative misrepresentations made by Ford to NHTSA.

Also, Cooley's situation is different from the two plaintiffs in *Employers Mutual* and *Johnson*, both of whom asserted reliance on communications they received directly from the defendant – communications that were not simply product labels. In *Employers Mutual*, the plaintiff relied on oral and written statements made to it directly by the carpet supplier, and on failures to correct alleged omissions in those statements. In *Johnson*, the plaintiff sought to rely on statements made directly to him in advertisements by the trailer and trailer hitch manufacturers, and on failures to correct omissions in those advertisements. Neither of these two plaintiffs relied in any way on the product warning labels that came from the manufacturer to support their fraud claims.

This review reveals that there is no Iowa case supporting the proposition that the "narrow" exception outlined in *Wright* upon which Cooley seeks to rely – that is, that the welding rod manufacturers "made misleading statements of fact intended to influence consumers"[44] – may be predicated only upon information allegedly omitted from a warning label. Cooley argues this Court should permit such a claim because, "if the Iowa Supreme Court [in *Wright*] had intended to create a safe harbor for product labels, then the Iowa Supreme Court would have done so explicitly."[45] This argument fails for two reasons. First, it is just as easy to say that, had the Iowa Supreme Court intended to allow fraud claims based on omissions in product labels alone, it would have done so explicitly – especially because no prior Iowa case

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[43] *Id.*

[44] *Wright*, 652 N.W.2d at 177.

[45] Opposition brief at 9.

had ever so held. Second, the *Wright* court *did* strongly suggest it meant not to allow the specie of fraud claim Cooley seeks to advance when it "decline[d] to extend the duty of disclosure in this context to a general duty to warn."[46] Rather, the *Wright* court reaffirmed that existing "[p]rinciples of products liability law define the duties of disclosure owed by a manufacturer to a consumer arising out of their relationship as such." These principles, of course, include liability for the alleged failure to warn, a claim which Cooley has asserted.

Cooley asserts the Court's ruling in *Ruth* "created a safe harbor for fraudulent misrepresentations on product labels" in Mississippi, and argues that disallowing his present fraud claim would create a similar "safe harbor" in Iowa.[47] This assertion is untenable. First, the Court has never used the term "safe harbor" when analyzing the claims asserted by a *Welding Fume* plaintiff for fraud (or any other theory). Second, the Court has never suggested a plaintiff cannot pursue a fraud claim based on reliance on a welding rod product label that states, for example, "the fumes given off by this product cannot cause harm." A manufacturer who knowingly includes a false affirmative statement on its product warning label certainly may be liable for fraud. Rather, the Court held in *Ruth* only that the alleged *omissions* in the

[46] *Wright*, 652 N.W.2d at 176.

[47] Opposition brief at 2, 8-9.

defendants' product labels, alone, could not support a claim for fraud under Mississippi law.[48] As the Tenth Circuit Court of Appeals stated when examining Kansas law, "claims that a . . . manufacturer has not warned of known product dangers are generally not cognizable as fraudulent concealment claims . . . . Rather, they are cognizable as failure to warn claims. To hold otherwise would convert all product manufacturer's duty to warn claims into fraud claims."[49]

In sum, Iowa law does not permit Cooley to proceed on a fraudulent concealment theory when the only alleged omissions he points to are contained in the manufacturer's product warning labels. The exceptions identified in *Wright* to the general rule that a manufacturer has no duty to communicate "material information" to the ultimate users of its product do not encompass the type of "direct reliance" claim that Cooley seeks to assert.

As suggested in *Baier*, Iowa law would probably allow Cooley to bring the type of "indirect

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[48] It is worth repeating here the actual language of the warning labels. The defendants' standard, mandatory warning label from 1967 reads:

> Caution. 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 & Cutting" published by the American Welding Society.

The defendants' standard warning label from 1972 reads:

> **FUMES AND GASES** can be dangerous to your health.
> - Keep your head out of fumes.
> - Use enough ventilation or exhaust at the arc or both.
> - Keep fumes and gases from your breathing zone and general area.
>
> * * *
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> See American National Standard Z49.1, "Safety in Welding and Cutting," published by the American Welding Society.

There are no affirmative misrepresentations in these labels. Rather, plaintiffs object that the labels *should have stated, but did not,* that inhaling manganese from welding fumes can cause permanent brain damage.

[49] *See Ruth*, 2005 WL 2978694 at *5 (quoting *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906, 913 (10th Cir. 2005). Similarly, the *Ruth* Court observed its ruling was "not to say that Ruth cannot proceed against the defendants for their alleged silence and omissions; is it just that he must do so using a failure to warn theory, not a conspiracy or fraud theory." *Id.*

reliance" fraud claim that was permitted (though ultimately not proven) in *Jowers*. And, as suggested in *Employers Mutual*, Iowa law would probably allow Cooley to pursue a fraudulent concealment claim if he had evidence of reliance upon direct communications from the manufacturers other than their product labels. But, under Iowa law, Cooley cannot rely on alleged omissions in the defendants' product labels, alone, to support his fraud claim.

Accordingly, the defendants' motion for summary judgment on Cooley's claim of fraudulent concealment must be granted.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: August 31, 2009