IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ROGER AND BETTY PENWELL,

Plaintiffs,

v.

MEMORANDUM AND ORDER
06-C-337-S

RUST-OLEUM CORPORATION,

Defendant.

Plaintiffs Roger and Betty Penwell commenced this products liability and breach of warranty action in the Circuit Court for Barron County, Wisconsin alleging that defendant Rust-Oleum Corporation's Varathane wood stain caused a fire in their home. Defendant removed the matter to this Court on the basis of diversity of citizenship, 28 U.S.C. §§ 1441, 1446 and 1332. The matter is presently before the Court on defendant's motion for summary judgment. The following facts are undisputed for purposes of the pending motion.

FACTS

On December 31, 2005 plaintiff Betty Penwell purchased a one quart can of Varathane wood stain. The same day she applied the stain to woodwork in her home and used cotton rags to wipe down the stained woodwork. She gathered the stain soaked rags and discarded them in a plastic waste basket. The rags spontaneously combusted and the resulting fire damaged plaintiffs' home.

The principal display panel of the label on the Varathane can includes the statement:

> WARNING!
> COMBUSTIBLE LIQUID AND VAPOR
> Read cautions on back panel carefully

The back panels on the label are printed in white on a black background and include instructions and warnings in English and Spanish. Among the warnings on the back panel is the following statement:

> DANGER: Rags, steel wool or other waste soaked with this product may spontaneously catch fire if improperly discarded. Immediately after use, place rags, steel wool or waste in a sealed, water filled, metal container. Dispose of in accordance with local fire regulations.

MEMORANDUM

Defendant now moves for summary judgment contending that its Varathane label fully complies with requirements of the Federal Hazardous Substances Act, 15 U.S.C. § 1261, et. seq., (FHSA) and that even if the stain was misbranded, plaintiffs have failed to support causation. Plaintiffs concede that all causes of action depend on proving that the Varathane stain can label warnings failed to comply with FHSA requirements. However, plaintiffs oppose summary judgment contending that fact questions remain concerning FHSA compliance as well as whether mislabeling caused the fire loss.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

FHSA compliance

The FHSA preempts state cautionary labeling requirements that differ from FHSA standards. 15 U.S.C. § 1261(b)(1)(A). As a consequence, plaintiffs seeking common law tort damages based on inadequate product labeling may recover only if they prove a violation of FHSA standards. Moss v. Parks Corp., 985 F.2d 736, 740-41 (4th Cir. 1993).

Plaintiffs suggest three violations of applicable FHSA labeling requirements: (1) the front panel fails to identify spontaneous combustion as a principal hazard; (2) the back panel fails to properly identify or signal the spontaneous combustion hazard; (3) the back panel warning is not conspicuous or legible. The court now concludes that the first two arguments fail as a matter of law to state a violation of FHSA requirements under the undisputed facts, but that a genuine issue of fact remains concerning whether the spontaneous combustion warning on the back label is sufficiently conspicuous.

Concerning the front panel, FHSA provisions and related regulations make clear that "combustible" is the proper principal hazard to be identified. 15 U.S.C. § 1261(p)(1)(E) requires that a label include "an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard. The principal hazard at issue here is combustibility and defendant used the term prescribed by statute to warn of that hazard. The statute makes clear that "combustible" is the appropriate level of specificity. All combustible materials combust under various conditions such as exposure to heat, pressure ignition sources, etc. These individual conditions are not the principal hazard as defined by the statute. Spontaneous combustion is not a separate principal hazard which must be separately listed

but is a condition of combustibility properly encompassed by the principal hazard identified on the front label.

There is no basis in the FHSA or related regulations to support the contention that the words used in the spontaneous combustion warning on the back panel violate the act. The relevant provisions prescribe only that principal hazards be identified on the principal display panel, a requirement which defendant met with respect to combustibility. Concerning the use of the word "danger" preceding the spontaneous combustion warning, applicable regulations require and prescribe signal words only for the principal display panel, where they were properly employed. See 16 C.F.R. § 1500.121. Furthermore, using a signal word which is stronger than that prescribed by the regulation could not conceivably been the cause of plaintiff not observing the warning. In fact, the content of the warning itself would have apprised plaintiff of the dangerousness of the very situation which allegedly caused the fire, had the warning been noticed.

The final argument, that the warning was not sufficiently conspicuous, raises a fact issue which precludes summary judgment. The parties agree that the following regulations are applicable to the Varathane back panel:

16 C.F.R. § 1500.121(c)(6)(ii)

> The type size of the cautionary labeling shall be reasonably related to the type size of any other printed material in the accompanying literature and must be in conspicuous and

> legible type by typography, layout, or color with other printed matter on the label.
>
> * * *

16 C.F.R. § 1500.121(d)(2)

> For cautionary information appearing on panels other than the principal display panel, the label design, use of vignettes, or proximity of other labeling or lettering shall not be such that any cautionary labeling statement is obscured or rendered inconspicuous.

The cautionary language at issue appears near the bottom of one of four columns, each having about 44 lines. It is separated from other language warning to "keep away from open flame" by an extensive first aid discussion and directions for disposal, and is followed immediately by a more prominent limited warranty signal. The typography consists of small, white letters on glossy black background. Plaintiffs' expert opines that the overall effect of the label's arrangement, wording and typography renders the warning inconspicuous to a typical consumer. In light of the factual nature of the assessment and the conflicting testimony, it cannot be determined as a matter of law whether the overall label design and proximity of the warning to other lettering renders the cautionary statement inconspicious.

Cause

Assuming plaintiff is able to establish that the cautionary statement was rendered inconspicuous, such inconspicuousness may

be found to be a cause of the fire. First, there is sufficient evidence to sustain a finding that the fire started as result of spontaneous combustion. Plaintiff Betty Penwell testifies that she placed the rags in a hallway waste basket with no apparent nearby ignition source. The label itself concedes that the product is susceptible to spontaneous combustion under the circumstances described. Accordingly, a reasonable inference is that the fire started by spontaneous combustion. Second, plaintiff Betty Penwell has testified that she did not see or read the warning because it did not stand out. Whether this is true is a question of her credibility. Furthermore, It cannot be said as a matter of law that had she observed the warning she would not have heeded it and thereby prevented the fire.

ORDER

IT IS ORDERED that Defendant's motion for summary judgment is DENIED.

Entered this 22nd day of December, 2006.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge