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PENNSYLVANIA LAW CAUSATION DISMISSALS OF WARNING CLAIMS BASED ON A PLAINTIFF'S FAILURE TO READ THE WARNING

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In warning-based tort litigation, a common fact pattern that should just as often lead to summary judgment is when plaintiff did not in fact rely on the allegedly inadequate warning because s/he simply did not read the warning at all. In Sherk v. Daisy-Heddon, a Div. of Victor Comptometer Corp., 450 A.2d 615 (Pa. 1982), the Pennsylvania Supreme Court held that the plaintiff "cannot prevail" on a warning theory because any causal link between the alleged failure to warn and the ultimate injury was severed by the critical actor's – in Sherk, the parents of a minor − failure to read the allegedly inadequate warning:

> [Plaintiff] cannot prevail on the theory that if the parents of [the product user] had known of the [product's risks], they would not have permitted [the user] to have possession of the [product] and thus be in a position to misuse it. . . . When the [product] arrived in the mail, [the mother] **did not** open the box or **read the instructions**. Instead, the box "was put away," and [she] directed her sons that the [product] was not to be used until their father had instructed them in its use.

Id. at 619 (citations omitted) (emphasis added). Given the critical failure to read, "[o]n this record it is clear that the alleged "defect" in the warnings accompanying the [product] did not cause [plaintiff's decedent's] death." Id. (citations omitted).

In typical warning-related litigation, the plaintiff product user is usually the critical actor. For instance, in Kenney v. Watts Regulator Co., 512 F. Supp.3d 565 (E.D. Pa. 2021), the plaintiff's warning claim against a product manufacturer failed because "no one in [plaintiff's] home knew of the [product's] existence or had ever seen or read the instructions." Id. at 579. It was therefore "irrelevant whether the instructions were ambiguous." Id. "[N]o reasonable juror could find the ambiguity in the instructions could have caused the [plaintiff's] injuries." Id. at 580.

> [Plaintiff] adduced no evidence of anyone in the home reading the warning. . . . [N]ot only did [plaintiff] not see the instructions accompanying the [product], he did not know [it] existed. Given no one knew of the [product] and its instruction, the level of detail in the warning could not have prevented the injury.

Id. at 584-85 (footnote omitted).

Similarly, Allstate Property & Casualty Insurance Co. v. Haier US Appliance Solutions, Inc., 2022 WL 906049, at *9-10 (M.D. Pa. March 28, 2022), neither of the insurer's subrogors in a fire case had read the defendant's product warnings. The husband "never read the instructions and expresses doubt as to whether the stove even came with a manual." Id. at *9. The wife "admits there was a manual and asserts she read at least some portions of it," but not the key portion that contained that allegedly inadequate warnings. Id. Summary judgment was proper in Allstate v. Haier due to causation being "speculative" in light of the plaintiffs' failure to read the relevant warnings:

> [Insurer] insists a warning would have made a difference but offers no theory as to how a different or additional warning could have prevented the fire. Without even a theory of causation, we must find [its] contention that a different warning could have prevented the fire . . . to be mere speculation. Mere speculation about causation is insufficient for a failure-to-warn claim to survive a motion for summary judgment.

Id. at *10 (citations omitted).

Other Pennsylvania cases standing for the same proposition – that the alleged inadequacy of an unread warning cannot possibly be causal – are: Nelson v. American Honda Motor Co., 2021 WL 2877919, at *6 (Mag. W.D. Pa. May 17, 2021) (where plaintiff "never received, read, or relied on" warnings, "no matter how robust the warnings . . . could or arguably should have been, their deficiencies could not have been the cause" of his injuries), adopted, 2021 WL 2646840 (W.D. Pa. June 28, 2021); Elgert v. Siemens Industry, Inc., 2019 WL 1318569, at *14 (E.D. Pa. March 22, 2019) (summary judgment granted under Restatement §388 negligent warning claim where plaintiff "admits that he never read the service manual, even though he had access to it"); Chandler v. L'Oreal USA, Inc., 340 F. Supp.3d 551, 562 (W.D. Pa. 2018) (summary judgment granted in part because "the record is undisputed that Plaintiff did not read the warnings on the exterior of the [product's] box"; other warnings ignored), aff'd, 774 F. Appx. 752 (3d Cir. 2019); Flanagan v. MartFive LLC, 259 F. Supp.3d 316, 321 (E.D. Pa. 2017) (summary judgment granted against warning claim; "[t]he jury would then have to speculate that Plaintiff would have heeded a warning . . . even though he testified under oath that he did not read these materials"; "there is no genuine issue of material fact regarding whether Plaintiff would have heeded a warning"); Wright v. Ryobi Technologies, Inc., 175 F. Supp.3d 439, 454 (E.D. Pa. 2016) ("[a]s [plaintiff] admits he never read the Operator's Manual, the purported inadequacy of the unread warnings therein could not have caused his injury"); Hartsock v. Wal-Mart Stores East, Inc., 2009 WL 4268453, at *2 (E.D. Pa. Nov. 23, 2009) ("Plaintiff admits that he does not remember receiving a manual, nor would he have requested or read one, so the contents therein cannot have caused Plaintiff's

injuries."); Mitchell v. Modern Handling Equipment Co., 1999 WL 1825272, at *7 (Pa. C.P. Philadelphia Co. June 11, 1999) ("the fact that Plaintiff failed to read the existing instructions confirms the conclusion that any allegedly inadequate instructions were not the proximate cause of Plaintiff's accident"), aff'd mem., 748 A.2d 1260 (Pa. Super. 1999).

Additional authority for failure to read being fatally dispositive in Pennsylvania warning litigation comes in the context of prescription medical product liability litigation, where the critical actor is almost always the prescribing physician rather than the plaintiff. See Demmler v. SmithKline Beecham Corp., 671 A.2d 1151, 1155 (Pa. Super. 1996) ("In the duty to warn context, . . . plaintiffs must further establish proximate causation by showing that had defendant issued a proper warning to the learned intermediary, he would have altered his behavior and the injury would have been avoided.").

Thus, Russell v. Ethicon, Inc., 2020 WL 5993774 (M.D. Pa. Oct. 9, 2020), recognized "that if the physician does not read the warnings provided, the failure to provide an additional warning cannot be the proximate cause of an injury." Id. at *6. Further, it did not matter whether the physician affirmatively denied reading the warnings or simply did not remember doing so. Since plaintiff bears the burden of proof, lack of memory testimony requires a plaintiff to "point[] to contrary evidence in the record that would suggest that [prescriber] did read and rely upon [defendant's] inadequate warning." Id. (footnote omitted). "[F]ail[ure] to do so" led to summary judgment on causation. Id.

A surgeon's failure to read medical device instructions for use was likewise fatal in Ebert v. C.R. Bard, Inc., 2020 WL 2332060 (E.D. Pa. May 11, 2020).

> [T]here is no room for such disagreement; [the surgeon] did not read the [device's] IFU in its entirety, nor could he recall whether he read it before implanting the filter. . . . Thus, even assuming that the warnings were inadequate, more detailed warnings . . . such as comparative failure rates, would have made no difference.

Id. at *7 (citation omitted).

Ebert relied on the similar result in Kline v. Zimmer Holdings, 2015 WL 4077495 (W.D. Pa. July 6, 2015), aff'd, 628 Fed. Appx. 121 (3d Cir. 2016), the plaintiff's implanting surgeon "admitted that he did not read the package insert that accompanied the device, because he never reads them for any device he implants." Id. at *7. That testimony was fatal to the plaintiff's warning claim. "Thus, even if the warning in this case were insufficient, it would not have made a difference. Other courts have come to the same conclusion[.]" Id. at *25 (citations omitted).

One of those other courts was Mazur v. Merck & Co., 767 F. Supp. 697 (E.D. Pa. 1991), aff'd, 964 F.2d 1348 (3d Cir. 1992), in which a nurse's failure to read allegedly inadequate vaccine warnings warranted entry of summary judgment for lack of causation:

> It seems [plaintiffs] contend that unless there is affirmative proof the learned intermediary actually read the package circular, the vaccine manufacturer must be held liable. No case supports this contention; the law and common sense are just the opposite. The vaccine manufacturer is not responsible for how the learned intermediary chooses to do her job. . . . [Defendant] is not vicariously liable for [the nurse's] failings, if there were any. That [the nurse] may not have seen the package circular does not implicate [defendant]. . . . To suggest [defendant] had to have someone present at each [use of the product] to double-check that the appropriate precautions were taken is ludicrous.

Id. at 712-13 (citations omitted). See also Ferrara v. Berlex Laboratories, Inc., 732 F. Supp. 552, 553, 555 (E.D. Pa. 1990) (prescriber "did not consult the warning inserts" and his "failure to remember" the relevant warnings "was the causal link"), aff'd without opinion, 914 F.2d 242 (3d Cir. 1990).

Numerous Pennsylvania trial court opinions grant summary judgment where a prescribing physician did not read relevant drug warnings. For example, in Pettit v. Smithkline Beecham Corp., 2012 WL 3466978 (Pa. C.P. June 12, 2012), aff'd mem., 2013 WL 11273055 (Pa. Super. March 4, 2013) (in table at 69 A.3d 1280), "[the prescriber] repeatedly testified he could not recall ever reviewing the [drug's] label or PDR." Id. Summary judgment was appropriate because "when a physician fails to read or rely on a drug manufacturer's warnings, such failure constitutes the intervening, independent and sole proximate cause of the plaintiff's injuries, even where the drug manufacturer's warnings were inadequate." Id. See Nelson v. Wyeth, 2007 WL 4261046 (Pa. C.P. Dec. 5, 2007) ("[defendant's] alleged failure to adequately warn could not have been the factual cause of [plaintiff's injuries] since the prescribing physician did not read nor rely upon any of [defendant's] warnings as contained in the label accompanying the prescription drug"); Berry v. Wyeth, 2005 WL 1431742, at *5 (Pa. C.P. June 13, 2005) (summary judgment granted based on failure to establish proximate causation when one physician failed to read the drug's labeling or the information in the PDR and the plaintiff failed to secure testimony from another prescribing physician that he had relied on the labeling to prescribe the drug to plaintiff).

A couple of cautionary notes – First, in employment situations plaintiffs are entitled to rely upon a "heeding presumption" in warning cases. Moroney v. General Motors Corp., 850 A.2d 629, 634 & n.3 (Pa. Super. 2004) (heeding presumption "authorized only in cases of workplace exposure"); Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 538 (Pa. Super. 2003) ("where the plaintiff is not forced by employment to be exposed to the product causing harm, then the public policy argument for an evidentiary advantage becomes less powerful"), aff'd, 881 A.2d 1262 (Pa. 2005) (*per curiam*); Goldstein v. Phillip Morris, 854 A.2d 585, 587 (Pa. Super. 2004) (same as Viguers). In cases where the heeding presumption applies, defendants must come forward with affirmative evidence of a plaintiff's failure to read in order to rebut this presumption and prevail on causation.

Second, in general, failure to read is not a defense to allegations that a warning –

whatever its substance – was insufficiently conspicuous to attract the plaintiff's attention. E.g., Moore v. Combe, Inc., 2023 WL 7089940, at *2 (E.D. Pa. Oct. 26, 2023) (plaintiff allowed to proceed, despite his "deposition [testimony] that he never read the existing warnings," on a theory that the "borderline illegible" warning was not "prominently located and conspicuous"). Thus, defendants asserting failure to read need to anticipate situations where the plaintiff might be able to raise conspicuity as an exception.

Nevertheless, as the abundant precedent cited above demonstrates, a plaintiff's failure to read purportedly inadequate warnings can be a valid, and dispositive, defense in many cases raising inadequate warning claims.