STATE OF MICHIGAN

COURT OF APPEALS

KIM WHITE, as Personal Representative of the ESTATE OF CRAIG WHITE, Plaintiff-Appellant, v VICTOR AUTOMOTIVE PRODUCTS INC, BARJAN PRODUCTS LLC, BARJAN LLC, and BELL AUTOMOTIVE PRODUCTS INC, Defendants-Appellees.	UNPUBLISHED May 18, 2010 No. 286181 Livingston Circuit Court LC No. 07-023144-NP

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

In this product liability action, plaintiff appeals as of right from the trial court's orders granting defendants' motions for summary disposition. We reverse and remand for additional proceedings consistent with this opinion.

I. Summary of Facts and Proceedings

Plaintiff's decedent, Craig White, purchased a muffler repair kit manufactured and marketed by defendants. The kit included a metal patch to be placed over the hole in the muffler, a strip of "bandage" to be wrapped around the patch and the muffler to hold the patch in place, and mechanic's wire to wrap around and secure the bandage. The packaging described the product as a "Muffler and Tail Pipe Repair Kit" and stated, "Just wrap it on for instant repair." The instructions included with the kit, however, directed the user to "start the engine and run at idle for at least 10 minutes" after applying the "bandage." The instructions provided with the kit read in total:

> **INSTRUCTIONS:**
>
> 1. Allow exhaust system and muffler to cool to a touch.
>
> 2. Clean surface of muffler or pipe to be repaired with sand paper, steel wool or wire brush.

3. Cover holes with included metal heat shield, or by using metal or tin can.

4. Open foil packet containing bandage.

5. Wrap bandage completely around damaged area, overlapping each wrapping at least 3/4 inch. Note: Large repairs may require more than one bandage to adequately cover repair.

6. Secure bandage with mechanic's wire enclosed.

7. Start engine and run at idle for at least 10 minutes.

8. Bandage will cure with heat from exhaust system.

WARNING: Always wear safety classes and cloth or leather gloves when working on exhaust systems. Rust and debris can injure eyes and skin. Flush eyes thoroughly with water if contacted – for skin use soap and water. Never work on vehicle suspended in air NOT supported by adequate jack stands.

IF SWALLOWED, DRINK WATER AND GET IMMEDIATE MEDICAL ATTENTION. [Emphasis in original.]

White attempted to perform the muffler repair on April 29, 2005. According to the testimony of White's wife and son, when they left the house at about 11:00 a.m., White was in the driveway, working on the muffler. When they returned at about 2:15 p.m., they found White dead in the garage with the car up on a floor jack, the motor running and the garage door closed.[1] Tools were under the car and the bandage was found wrapped around the muffler. White was found near the exit to the garage. The police report stated in pertinent part:

> In the garage I observed the Buick to be elevated on a jack stand. Underneath the Buick I observed a small, rolling platform, that is used to enable a subject to crawl underneath a vehicle and assist with mobility while working on the vehicle. I further observed an activated utility light as well as several tools and accessories lying on the floor. On the rear trunk area of the Buick, I observed an empty package that contained a muffler repair kit. By looking at the picture on the muffler repair kit, and observing the muffler underneath the Buick, it was apparent that the victim had in fact used the kit as its contents were on the muffler.
>
> When Detective Steinaway arrived, I assisted in his investigation. During the investigation, I collected the empty package from the Buick to be placed as evidence at LCSD. While reading instructions listed on the back of the package,

[1] The reason why White moved from the driveway into his garage remains unknown.

> *it appeared as though the victim went step by step with the directions. The final instruction on these directions was to turn on the automobile and allow it to run for approximately ten minutes*, which would in turn allow the bonding agent applied to the muffler to heat up and activate properly. This could be a possible explanation for why the vehicle's ignition was activated and running. *While reading the warning label on the package listed directly below the instructions, it did not advise of the dangers of carbon monoxide*. [Emphasis added.]

An autopsy confirmed that White died of asphyxiation from carbon monoxide.

Plaintiff's complaint alleged two violations of the duty to warn. First, plaintiff alleged that "Defendants breached their duty of care . . . in failing to include an instruction with the product that vehicles should not be run in an enclosed space or must be moved outside before starting the engine as directed [in the instructions]." Second, that "Defendant's breached their duty of care . . . in failing to warn of the dangers of carbon monoxide poisoning."

Before any depositions were taken, and almost three months before the close of discovery, defendants moved for summary disposition, relying on MCL 600.2948(2) which provides:

> A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

Defendants' motion asserted that the "dangers of carbon monoxide poisoning are obvious and should have been a matter of common knowledge"; that the risk of injury or death from running an automobile engine in a closed garage is or should be obvious to a reasonably prudent product user; and that if even if not obvious to a reasonably prudent person, the risk would or should be obvious to White because he was experienced in working on engines. Defendants' sole documentary evidence was White's resume.

After a hearing, the trial court granted summary disposition to defendants, concluding:

> Using an objective standard it's clear that the material risk of death due to carbon monoxide poisoning as a result of running a car in an enclosed garage would be obvious to the reasonably prudent user of a muffler repair kit. I don't think you can really argue that much about it. . . . I think it would be obvious and that would be to the general public, and it would be especially obvious to someone who used motors. Granted he may have been an . . . outboard engine mechanic, but nevertheless, it seems to me that he was in a position especially to know this even more than an average citizen. But nevertheless, to a reasonably prudent person it would be obvious this was a highly dangerous thing. I think it is common knowledge that it's a dangerous thing and – especially when you look at so many other options he would have had, like just open the garage door, might have been a lot better.

Plaintiff now appeals.

We review de novo a trial court's decision to grant a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that we also consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

MCL 600.2948(2) modified the substantive standard as to when a duty to warn exists and when it does not. Under the common law, as set forth in *Glittenberg v Doughboy Recreational Industries* (*On Reh*), 441 Mich 379; 491 NW2d 208 (1992), no duty to warn existed if the danger in question was open and obvious. Under the statute, there is no liability[2] for failure to warn of a material risk if that risk is or should be obvious to a reasonably prudent product user or of a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based.

MCL 600.2948(2) did not, however, alter the procedural approach set forth in *Glittenberg* where the Supreme Court stated that

> [w]hen a defendant claims that it owes no duty to warn because of the obvious nature of a danger, a court is required, as a threshold matter, to determine that issue. The court must determine whether reasonable minds could differ with respect to whether the danger is open and obvious. *If reasonable minds cannot differ on the "obvious" character of the product-connected danger, the court determines the question as a matter of law. If, on the other hand, the court determines that reasonable minds could differ, the obviousness of the risk must be determined by the jury.* [*Id.* at 398 (emphasis added).]

Using this procedural standard, we will address the two substantive tests seriatim.

A. Reasonably Prudent Product User

Under the statute, the first issue is whether a reasonable juror could find that the material risk of remaining in a closed garage with a running automobile while the muffler bandage cures is or should be "obvious to a reasonably prudent product user." Given the statute's use of the phrase "reasonably prudent product user," this is an objective test. Here, the trial court

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[2] We note that the plain language of MCL 600.2948(2) does not appear to eliminate a product manufacturer's or seller's common law duty to warn, but rather shields these parties from liability despite the duty. The statute does not state that a defendant "has no duty"; it states that a defendant "is not liable." Nevertheless, in *Greene v AP Products, Ltd*, 475 Mich 502, 504; 717 NW2d 855 (2006), the Supreme Court concluded that "the statute imposes a duty to warn that extends only to material risks not obvious to a reasonably prudent product user, and to material risks that are not, or should not be, a matter of common knowledge to persons in the same or similar position as the person who suffered the injury in question." Therefore, we will consider defendant's arguments in the framework of duty despite the statutory language that contains no such reference.

concluded, "Using an objective standard, it's clear that the material risk of death due to carbon monoxide poisoning as a result of running a car in an enclosed garage would be obvious to a reasonably prudent user of a muffler repair kit."

In light of the holding in *Greene v AP Products, Ltd*, 475 Mich 502; 717 NW2d 855 (2006), we reject plaintiff's contention that defendants must show that the risk of death, i.e., the specific injury that resulted, would be obvious to a reasonably prudent product user. The *Greene* Court determined that the nature of the specific harm incurred is not controlling. *Id.* at 510.[3] The issue, as defined by *Greene*, is whether a reasonable person would have known of a material risk arising out of remaining with the vehicle in a closed garage while the muffler bandage cures.

In *Greene*, the Supreme Court held that no reasonable person could conclude that there was no material health risk associated with ingesting and inhaling the subject hair oil, the consumption of which resulted in the death of plaintiff's child. *Id.* at 515. Significantly, the Court found that the obviousness of "the risk of death" from ingestion of the product was something as to which reasonable minds could differ. *Id.* at 510. The Court, however, narrowed the question to whether reasonable minds could differ as to the presence of *any* material risk of injury from ingestion of the product and concluded that they could not. *Id.* at 510-512. The Court noted several factors upon which it relied for this conclusion:

> - the hair oil "was not marketed as safe for human consumption or ingestion." Rather, "the label clearly states that the product is intended for use as a hair and body oil";
>
> - "the plaintiff herself demonstrated an awareness that the hair oil posed a material risk if ingested";
>
> - the product label specifically listed several oils which can cause material harm if ingested or inhaled; and
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> - the product label listed "numerous other ingredients . . . [that] a reasonably prudent product user would be, or should be, loath to ingest" such as "isopropryl myristate, fragrance and azulene." [I*d.* at 512.]

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[3] We recognize that our Supreme Court's decision in *Greene* holds that we are to ignore whether a reasonably prudent product user would recognize the severity of the harm he may suffer and we adhere to *Greene*. We note, however, that we find it difficult to evaluate the term "material risk" in the absence of such a consideration since an evaluation of risk typically involves two elements, i.e., the likelihood of the harm occurring and the severity of the harm. See, e.g. 2 Dobbs, The Law of Torts, Practitioner Treatise Series (2001), § 360, p 995:

> As in ordinary negligence cases, issues about risk fall into two large categories. The first is associated with probability and foreseeability; how likely is it that the product will cause harm? The second is associated with the magnitude of the harm likely to befall the victim is harm in fact results.

This analysis is consistent with that followed in *Glittenberg*, where the Court held that it is not necessary to provide a warning not to dive into the shallow end of a pool. The *Glittenberg* Court held that even if a pool user lacked the knowledge of anatomy and neurology to understand that striking the bottom of the pool could cause paralysis, any reasonable person could see the depth of the pool and its concrete bottom that they would strike if they dove in headfirst. *Glittenberg*, 441 Mich at 401 n 29. Thus, reasonable minds could not differ on whether a material risk of harm was inherent in diving head first into the shallow end. *Id.*

This is also consistent with the caselaw that holds that no warnings are necessary regarding products whose very appearance and/or intended function obviously reveal the material risk. For example, both the appearance of a knife or saw, i.e. sharp edged, and their intended function, i.e., cutting, reveal the risk of harm of being cut even if the extent of the harm that may flow from such a cut may not be understood. By contrast, in this case, neither the product itself, a muffler "bandage," nor its function, i.e., to repair a hole in a muffler, obviously reveal a risk of material harm. Unlike *Glittenberg*, one cannot observe the risk simply by looking at the product. There is nothing about the appearance of the muffler kit that suggests a risk of harm. Further, unlike *Greene*, where the product's directions as to proper use, i.e., *external* application to the hair or skin implied a risk to its internal consumption, there was nothing in the muffler kit's directions for use that implied a risk of harm in the manner in which White used the product.

Given the lack of an obvious risk of harm contained within the product's appearance or function, defendants argue that no reasonable person could fail to know that remaining present while running a car in a closed garage while the muffler bandage cured carried with it a risk of material harm. For reasonable minds not to differ on the issue, it would have to be obvious that the exhaust contained carbon monoxide or other injurious chemicals and that exposure for a period long enough for the muffler bandage to cure created a material risk of harm.[4]

A fact-finder may ultimately conclude that defendants are correct that a reasonably prudent person would be aware that automobile exhaust contains carbon monoxide or other injurious chemicals and that exposure for a period long enough for the muffler bandage to cure creates a material risk of harm. However, defendants have not provided any *evidence* from which such a conclusion may be drawn and it is only upon evidence that a court may make such a determination. For this reason, the trial court erred in its ruling which reads:

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[4] We do not doubt that exposure to exhaust fumes even briefly is unpleasant and may cause temporary mild discomfort. However, the issue is whether there is something obvious about such an exposure such that any reasonable person would know that it presented a *material* risk of harm. Defendant suggests that *Greene* holds that if there is any harm that is obvious, even a *de minimis* harm, it is sufficient to totally eliminate any duty to warn as to any harm. We do not agree. As discussed *supra*, while *Greene* holds that the precise extent of the harm that may be suffered need not be understood, it does not dispense with the statute's threshold requirement that the harm that is obvious be significant enough to rise to the level of a "material" risk. While *Greene* instructs us not to weigh the severity of obvious versus non-obvious risks of harm, it does not obviate the statutory language that the risk be "material."

> Using an objective standard it's clear that the material risk of death due to carbon monoxide poisoning as a result of running a car in an enclosed garage would be obvious to the reasonably prudent user of a muffler repair kit. I don't think you can really argue that much about it. . . . I think it would be obvious and that would be to the general public . . . . [T]o a reasonably prudent person it would be obvious this was a highly dangerous thing. I think it is common knowledge that it's a dangerous thing and – especially when you look at so many other options he would have had, like just open the garage door, might have been a lot better.

This ruling is in error in three respects. First, the trial court considered the issue of comparative negligence in reaching its decision, by noting in support of its ruling that White had "so many other options . . . like just open the garage door." Whether a user has other ways to avoid his injury is a question of comparative negligence and does not go to the issue of whether the risk "is or should be obvious to a reasonably prudent user." See *Glittenberg*, 441 Mich at 403 ("[T]he doctrine of comparative negligence has no effect on the duty determination."). Second, the trial court did not even address whether it is obvious to any reasonable person that carbon monoxide is present in automobile exhaust given that carbon monoxide is odorless and colorless and can be inhaled without discomfort. Third, the trial court offered no evidentiary basis for its conclusion "that it would be obvious this was a highly dangerous thing." It appears to have made its decision based on its own personal understanding of the risk of such action, rather than upon review of evidence of what is generally known by reasonable people concerning this action. We stress again that such evidence would not be necessary where the product itself, such as a knife, a saw, or a gun, by its form or essential function, inherently reveals a risk of material harm. However, where the product's form or essential function does not itself reveal the risk, a court may not simply conclude as a matter of law, without evidentiary support, that a reasonable person would know about that risk. Such a conclusion, in the absence of evidence to support it amounts to nothing more than the judge taking judicial notice of what he or she personally knows and, by *ipse dixit*, stating that what he or she knows is what a reasonable person should know. The issue of what a reasonable person knows is not one to be determined by a trial court's personal view, even if it is a reasonable one adopted in good faith. Rather, only a finder of fact may make that determination, unless the evidence shows that reasonable minds could not differ.

At the time of the motion, plaintiff had proffered several articles and data that significant numbers of people, as many as 100 per year die, from accidental carbon monoxide poisoning in Michigan in a manner that supports plaintiff's claim that the danger of exposure to automobile exhaust is not necessarily "obvious to a reasonably prudent user." Plaintiff also presented an expert affidavit in this regard.[5] Finally, plaintiff submitted warnings from devices that create carbon monoxide exhaust. One such warning, which was for a generator, stated:

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[5] The proffered expert averred that he is a PhD licensed professional engineer with specialization in safety engineering and that he has four decades of experience in safety design and safety standards with both private and governmental entities. He averred that exposure to levels of carbon monoxide above 300 ppm for more than 1-2 hours or above 800 ppm for 1 hour
(continued…)

> DANGER! POISON GAS – POISON GAS – POISON GAS CARBON MONOXIDE HAZARD Using a generator indoors WILL KILL YOU IN MINUTES. Exhaust contains a poison gas that you cannot see or smell. Never use a generator indoors, in garages or carports. ONLY use outdoors and far from open windows, doors, and vents.

It is difficult to conclude that reasonable minds could not differ on the open and obvious nature of the risk when reasonable minds concluded that such a powerful warning was necessary.

Because the trial court does not reference any of this evidence, we are uncertain whether it considered it before making its ruling. Nevertheless, by not addressing the evidence in the record, the trial court erred by improperly weighing evidence, which is a task reserved for the trier of fact. See *Anderson v Liberty Lobby, Inc*, 477 US 242, 249; 106 S Ct 2505; 91 L Ed 2d 202 (1986) ("[A]t the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

In contrast to plaintiff's presentation, the defense did not proffer *any* evidence supporting its contention that a reasonable person would know that carbon monoxide is present in automobile exhaust or that an exposure long enough for the muffler bandage to cure presents a material risk of harm.[6]

In lieu of evidence, defendants cite to a limited body of out-of-state caselaw. However, the weight of this caselaw does not support defendant's position. First, defendants cite several cases involving products such as saws, knives and guns, where the product's form or purpose reveals a material risk. As already discussed, this case does not fall within that category. Defendants also cite to several tobacco cases. However, we conclude that tobacco cases are *sui generis* and, in any event, tobacco products have carried warnings of material harm for decades.

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constitute fatal concentrations. He averred that the lack of any warning about carbon monoxide with the product was in violation of standards set forth by ASTM, ANSI, ISO, NFPA and the Manufacturing Chemists Association. He opined that "exposure to an invisible odorless gas such as carbon monoxide is not open and obvious" and that "[g]iven the relatively limited period of exposure time and the stated instructions on the subject muffler kit packaging, a reasonable consumer would likely believe it was safe to remain in a closed garage for ten minutes while the vehicle engine was on so that the muffler kit "bandage" could cure. Indeed, it is unlikely that a reasonable consumer would leave a running vehicle unattended following application of muffler bandage."

[6] The dissent opines that summary disposition was properly granted because "the burden of proof is on the plaintiff, not on the defendant." However, the dissent seems to confuse the ultimate standard to be employed by the factfinder with that to be employed by the court on a motion for summary disposition. Here, the plaintiff presented evidence as to what people know about carbon monoxide that supported its claim. At that point, the burden of coming forward was on defendants. However, the defense presented absolutely no evidence on the question and simply asserted that its view of what constitutes universal knowledge should be accepted.

Defendants rely heavily on *Lake v Tenneco*, unpublished opinion of the United States District Court for the Middle District of Florida, issued December 17, 2007 (Docket No. 8:06-cv-1462-T-24), a federal case arising in Florida arising out of a death due to carbon monoxide exposure. However, since the filing of defendants' brief, the Eleventh Circuit reversed the district court. *Lake v Tenneco*, 319 Fed Appx 769 (2009). The Circuit Court noted that "[t]he muffler included no installation instruction or warning about the danger of carbon monoxide poisoning" and stated that "we cannot say, as a matter of law, that the danger of carbon monoxide poisoning was obvious to an objective, reasonable person."[7] *Id.* at 770. We agree with the Eleventh Circuit that whether the risk of carbon monoxide poisoning is obvious to a reasonable person must be determined based on the facts and circumstances of the case and not on a blanket rule.

In another case cited by defendants, *Zuercher v Norther Jobbing*, 66 NW2d 892 (Minn, 1954), the Minnesota Supreme Court found that a jury could reasonably find that the danger of carbon monoxide poisoning was not obvious. Defendants' citation to *Beans v Entex*, 744 SW2d 323 (Tex App, 1988) and *Hanlon v Lane*, 648 NE2d 26 (Ohio App, 1994) are also unavailing. In the former case, the Texas appeals court affirmed summary disposition as to the natural gas supplier on the grounds that it could not be held responsible for a defective heater, but the court did not dismiss the case against the heater manufacturer. Similarly, in *Hanlon*, the suit against the utility supplying the natural gas was dismissed, but the case arose out of an improperly functioning fireplace. Finally, in *Schiro v AMRD*, 719 SO2d 597 (La App, 1998), also cited by defendants, the Louisiana appeals court held that there was a cause of action against an ambulance company brought by an emergency room worker who was injured by ambulance exhaust fumes that entered the emergency room. The court rejected the argument that the ambulance personnel did not know of the risk because there was substantial deposition testimony that prior to the incident giving rise to the lawsuit, the ambulance crews were repeatedly told of the problem. In other words, unlike the instant case, there was *evidence* that they knew of the risk.[8]

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[7] The Eleventh Circuit also observed that the vehicle was being run in a well-ventilated area. However, more specifically, it noted that "the muffler included no installation instructions or warning about the danger of carbon monoxide poisoning if it was improperly installed." The plaintiffs in *Lake*, unlike White, did not follow the installation directions and, in fact, conducted the installation in a way that was wholly inconsistent with those directions.

[8] There is one other Michigan case relevant to this discussion, *Hill v Husky Briquetting*, Inc, 54 Mich App 17; 220 NW2d 127, aff'd 393 Mich 136 (1974). However, the applicability of that case is highly questionable given it was decided prior to *Glittenberg* and the adoption of MCL 600.2948(2). Accordingly, we do not rely upon it. In *Hill*, the maker of charcoal briquettes included a warning on the bag that the briquettes should only be used in "properly ventilated areas." *Id.* at 19. Rather than holding that the risk of burning charcoal in an unventilated area was known to all reasonable persons, or even that the warning was sufficient as a matter of law, the Court held that whether the warning was adequate in the circumstances of the case was a jury question. The Court unanimously held that "in this case and on this record the facts were not so clear that all men would draw the . . . conclusion [that the warning was adequate]" and, thus, "the question, although close, is properly for the jury to consider." *Id.* at 25.

Ultimately, defendants cite only one foreign case that supports its position, *Charlton v Day Island Marina, Inc*, 732 P2d 1008 (Wash App, 1987). In that case, the Washington intermediate court of appeals affirmed summary judgment in favor of the defendant marina owner who failed to provide adequate ventilation in the boat house where the defendant died from carbon monoxide poisoning while running his boat inside. The court agreed that dismissal was proper under Washington's law governing a landlord's duty to his lessee, i.e. that a landlord can only be held liable for injuries "caused by obscure or latent defects of which it had actual knowledge." *Id.* at 1011. The court stated that the danger of carbon monoxide poisoning in an unventilated building was "one of common knowledge and obvious to the user." However, much like the trial court in the instant case, the *Charlton* court stated this to be so without offering any reasoning or evidence other than the personal conclusions of the judges, who plainly cannot serve as factfinders.

Defendants provided no evidence in the present case that a reasonable person would know that an exposure to automobile exhaust in a garage for the time needed to cure the muffler repair presented a risk of material harm. Indeed, the only evidence in the record at this time is the data provided by plaintiff that significant numbers of people die from accidental carbon monoxide poisoning and the affidavit from plaintiff's expert supporting plaintiff's claim that the danger was not obvious. Under these circumstances, defendants were not entitled to summary disposition on the question of whether the risk of material harm from carbon monoxide inhalation from running an automobile long enough to cure this muffler product is or should be obvious to a reasonably prudent product user.[9]

B. Persons in the Same or Similar Position

[9] The dissent, suggesting that our analysis constitutes an "absurdity" offers the hypothetical of a person attempting to do a muffler repair underwater and drowning and asserts we would find a question of fact in that setting as to what a reasonable person would know about the risks of performing a muffler repair underwater. While rhetorically attention-grabbing, this argument misses the point and, more important, fails to address the facts of this case. First, water, unlike carbon monoxide, is not imperceptible and a person would immediately be unable to breath while underwater. By contrast, carbon monoxide is imperceptible and a person is still able to breath while in a roomful of carbon monoxide. Indeed, with carbon monoxide, knowledge of its presence and its risk would constitute the only safeguard against harm. Moreover, while it is foreseeable that people will conduct automobile repairs in a garage and that in the winter they may close their garage, we believe an automobile parts manufacturer could safely rely on the unforseeability that repairs will be conducted underwater. The dissent also fails to recognize that while plaintiff has the burden of proof, once plaintiff comes forward with proofs, the burden shifts to the defendant to provide evidence to the contrary. Thus, while we cannot envision this occurring, if a plaintiff was actually able to present evidence that reasonable people cannot perceive that they are underwater, and that reasonable people are unaware that breathing while underwater can cause material harm, a defendant would be wise to present at least some evidence to the contrary.

MCL 600.2948(2) also bars liability or duty[10] if the material risk "is or should be a matter of common knowledge to persons in the same or similar position" as the decedent. Defendants argue that White had work experience involving engine repair and that the material danger of exposure to exhaust for the time necessary to cure the muffler repair is common knowledge to other people in the same profession.

As we discussed concerning the "reasonably prudent product user" issue, defendants' argument may very well persuade a factfinder, but it is not supported at this time by evidence that can justify a conclusion that no reasonable juror could see the matter differently. The only evidence offered by defendants was White's resume which indicated that, at the time of his death, White was self-employed doing roofing, drywall, electrical work, plumbing, carpentry and "service and repair of marine inboard and outboard motors"; that during another brief period he did "on the water boat repair"; and that in the 1980's and 1990's he had served as an "engine dyno technician" and a "marine technician." These bare entries do not provide us with evidence of what White's duties were, let alone to what degree and in what context he dealt with carbon monoxide. The resume alone does not demonstrate that White was closely connected with operations around running automobiles in enclosed places. At the very least, it would be important to know what the job responsibilities were for the various positions listed on White's resume.[11]

Moreover, defendants have not offered any evidence regarding what a person engaged in such work would know regarding the risk of harm. It may be that mechanics routinely put up with several minutes of exposure to automobile exhaust and that they do not consider such a period of exposure to be risky. It may be that all such workers know that even a few minutes of exposure presents a risk of material harm and act accordingly. However, we are judges and not mechanics and cannot presume, without evidence, to know what they know.[12]

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[10] See n 2, *supra*.

[11] We note that this type of information is generally readily available in discovery and remind trial courts that these are the types of cases where summary disposition prior to the completion of discovery is premature. *Peterson Novelties, Inc. v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2001).

[12] Defendants rely on *Hutchinson v Tambasco*, 309 Mich 597; 16 NW2d 87 (1944), where a car wash disputed its employee's workers compensation claim after he collapsed at work due to carbon monoxide poisoning. The Court found that "there was competent testimony to show plaintiff's paralysis was caused by the carbon monoxide gas to which he was exposed in his employment on the occasion in question." *Id.* at 607. Defendants point to a statement in the case where the Court "takes notice" that those who routinely work with automobiles are aware of the risks of carbon monoxide poisoning. *Id.* at 604. However, not surprisingly, the *Hutchinson* Court did not rely on such "notice" in its holding. Moreover, the issue in *Hutchinson* was whether after watching the employee collapse while working next to a running car in the car wash, the employee's foreman was on notice of an "accident" under the workers compensation statute. *Id.* at 600-601. This after-the-fact understanding by someone who watches another person collapse is far different from a pre-event awareness by the worker himself. Indeed, in
(continued…)

We take no position on whether a reasonably prudent user knows that automobile exhaust contains carbon monoxide nor that a exposure long enough to cure the muffler bandage can cause material harm. We also take no position on whether these matters are common knowledge to others in the same or similar position as White. Rather, we hold that there was insufficient evidence in the record as it presently exists to make that determination as a matter of law. See *Glittenberg*, 441 Mich at 386 n 2 ("The prior record was inadequate to allow us to evaluate whether a material issue of fact regarding the open and obviousness of the danger could be created."). Accordingly, we reverse the grant of summary disposition and remand for proceedings consistent with this opinion.

/s/ Michael J. Kelly
/s/ Douglas B. Shapiro

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Hutchinson, until the worker's collapse, both the worker and his foreman were working in a closed environment with a running car and did not seek to leave, thus suggesting that they were not aware of the danger until one of them collapsed.

STATE OF MICHIGAN

COURT OF APPEALS

KIM WHITE, as Personal Representative of the ESTATE OF CRAIG WHITE,

Plaintiff-Appellant,

v

VICTOR AUTOMOTIVE PRODUCTS INC, BARJAN PRODUCTS LLC, BARJAN LLC, and BELL AUTOMOTIVE PRODUCTS INC,

Defendants-Appellees.

UNPUBLISHED
May 18, 2010

No. 286181
Livingston Circuit Court
LC No. 07-023144-NP

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

K. F. KELLY, J. (*dissenting*.)

I disagree with my colleagues' conclusion that the trial court's grant of summary disposition in this matter was premature. In my view, defendants had no duty to warn of dangers associated with another manufacturer's product. Further, assuming for the sake of argument that such a duty existed, running the engine of a car in a small, enclosed space, such as a garage, is an obvious material risk to a reasonably prudent product user and would be especially obvious to a person like decedent whose employment involved servicing and repairing engines. I would affirm the trial court.

I. FACTUAL BACKGROUND

The facts in this matter are not in dispute and I do not repeat them here. I would emphasize, however, that decedent was experienced in repairing, servicing, and testing motors of various types. Before his death in 2005, he was self-employed for several years as a mechanic and handyman. His resume indicates that he "service[d] and repair[ed] . . . marine inboard & outboard motors, all boat systems (on-site and home based)." Decedent also had prior experience in 2001 "repair[ing]/winterizing [water boat] motors," and jobs titles of his previous employment dating back to 1994 imply that his jobs were connected to the technical aspects of marine motors.

II. ANALYSIS

Plaintiff contends, and the majority agrees, that a question of fact exists whether the danger of carbon monoxide poisoning associated with running a car in a closed garage was obvious under MCL 600.2948(2). I disagree. This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Where, as here, a defendant moves for summary disposition under the theory that it owes no duty to warn because the danger is obvious, a court must decide as a threshold matter whether reasonable minds could differ with respect to whether the danger is open and obvious. *Glittenberg v Doughboy Recreational Indus*, 441 Mich 379, 398; 491 NW2d 208 (1992). "If reasonable minds cannot differ on the 'obvious' character of the product-connected danger, the court determines the question as a matter of law." *Id*. at 398-399. If, however, reasonable minds could differ, the obviousness of risk is a question for the jury to decide. *Id*. at 399.

In product-liability actions, a defendant's duty to warn of dangers is governed by MCL 600.2948(2). That provision provides:

> A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

In other words, "a manufacturer has no duty to warn of a material risk associated with the use of a product if the risk: (1) is obvious, or should be obvious, to a reasonably prudent product user, or (2) is or should be a matter of common knowledge to a person in the same or a similar position as the person upon whose injury or death the claim is based." *Greene v AP Prod, Ltd*, 475 Mich 502, 509; 717 NW2d 855 (2006). "[A] 'material risk' is an important or significant exposure to the chance of injury or loss." *Id*. at 510. However, a defendant is not required to warn of specific dangers that could result from the risk. *Id*.

I would note at the outset that the harm decedent suffered was a direct result of running the car's engine in an enclosed space, and not the result of following the directions for, and using, the muffler wrap. It is undisputed that the muffler wrap did not create the carbon monoxide; rather, the vehicle produced the carbon monoxide and decedent's misuse of the vehicle in an enclosed space resulted in the ultimate harm. Consistent with these facts, plaintiff never alleged that the muffler wrap itself was dangerous or defective; rather, plaintiff alleged that decedent's harm was caused by the carbon monoxide. Defendants, however, have no duty to warn of dangers present in other manufacturers' products. "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Brown v Drake-Willock Int'l*, 209 Mich App 136, 145; 530 NW2d 510 (1995) citing *Spaulding* v *Lesco Int'l Corp*, 182 Mich App 285, 290; 451 NW2d 603 (1990). Thus, summary disposition for defendants on this basis would have been proper.

The trial court, however, dismissed plaintiff's action by finding that the hazard would be obvious to the reasonably prudent person and that decedent was even more knowledgeable of the associated risks than the general public. Contrary to the majority, I find no error in the trial court's decision. Moreover, even assuming that the trial court's reasoning was in error, it

nonetheless reached the right result given the foregoing. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.") (citation and quotation marks omitted).

A. REASONABLY PRUDENT PRODUCT USERS

The risk of carbon monoxide poisoning resulting from running a car's engine in an enclosed space is obvious to *a reasonably prudent* user of a car. See *Hanlon v Lane*, 98 Ohio App 3d 148, 154-155; 648 NE2d 26 (1994) (it is common knowledge that carbon monoxide is a toxic, potentially lethal, odorless and colorless gas); *Schiro v American Medical Response Services*, 719 So 2d 597, 600 (La App 1998) ("It is common knowledge that a vehicle's engine exhaust pipes emits carbon monoxide, that carbon monoxide is poisonous and that running vehicle engines in enclosed areas is dangerous."); and *Beans v Entex*, 744 SW2d 323, 325 (Tx Ct App 1988) (asphyxiation due to carbon monoxide inhalation in an unventilated area is an open and obvious danger).[1]

In fact, plaintiff even *concedes* that "most [people] recognize a general knowledge that breathing automotive exhaust poses a health risk." Assuming the muffler wrap killed decedent, which it did not, plaintiff's claim falls on this admission alone. See *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990) (indicating that a party's factual admissions are binding); MRE 801(d)(2). Moreover, even if plaintiff had not made this admission, plaintiff has failed to meet her burden of showing that the danger of carbon monoxide is not obvious to a reasonably prudent product user. Plaintiff points to the fact that over a hundred people in Michigan die per year from carbon monoxide poisoning. However, it cannot be inferred from this fact that the danger of car exhaust is covert. Nor does the affidavit of plaintiff's expert support her position—the affiant concludes that because many Americans have died from carbon monoxide poisoning and because the gas cannot be seen or smelt, that the danger of carbon monoxide is not apparent to a reasonably prudent consumer of a muffler wrap. Again, this evidence does not show that reasonably prudent consumers are unaware of the risks posed by running a car in an enclosed space.

The majority, however, contends that the trial court erred by granting summary disposition because defendants produced no evidence indicating that a reasonably prudent user of the muffler wrap would know that auto exhaust contains carbon monoxide. This conclusion is legally erroneous—the burden of proof in a products liability case is on the plaintiff, not the defendant. See *Moody v Chevron Chem Co*, 201 Mich App 232, 237; 505 NW2d 900 (1993). In addition, their conclusion blatantly ignores plaintiff's admission that it is "general knowledge" that automotive exhaust poses a health risk. I would conclude that the danger of breathing exhaust fumes containing carbon monoxide is obvious to a reasonably prudent user of a car and that the trial court did not err by concluding the same.

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[1] The absurdity of the majority's conclusion is demonstrated by an analogous example, i.e., requiring defendants to warn users of the muffler wrap against the danger of a vehicle's exhaust in an enclosed space is akin to requiring them to warn against using the muffler wrap under water, as such a use could cause drowning.

B. PERSONS IN SAME OR SIMILAR POSITIONS

Moreover, the risk associated with idling an automobile engine in an enclosed space is a matter of common knowledge to a person in the same or a similar position as decedent. In *Hutchinson v Tambasco*, 309 Mich 597, 604; 16 NW2d 87 (1944), our Supreme Court stated:

> We take notice of the fact that it is common knowledge among persons whose employment is closely connected with operations around automobiles in enclosed places such as garages that carbon monoxide gas is expelled through the exhaust of a running motor and even small portions of the gas mixed with air are poisonous and may cause a person who inhales such gas to collapse.

Here, decedent's resume explicitly states that he repaired, serviced, and winterized marine motors. This evidence reflects that he had at least some employment history that would have involved, by implication, knowledge that an engine produces exhaust and that such exhaust was an occupational hazard. Viewing this evidence in a light most favorable to plaintiff, it compels the conclusion that the risks associated with engine exhaust involved when repairing, servicing, and winterizing motors would be common knowledge to decedent and those similarly situated. Thus, in my view, the trial court did not err by granting summary disposition on this basis.

Despite the lack of any evidence showing that decedent did not possess such knowledge, the majority contends that decedent's resume does not include enough details regarding his job responsibilities and, consequently, that a juror could view the matter differently to conclude that decedent lacked common knowledge of exhaust associated with engine repair. I simply fail to see how this supposed question of fact exists. The resume plainly states that decedent repaired and serviced engines. The obvious and natural inference is that decedent had knowledge, or should have had knowledge, of the dangers of carbon monoxide associated with his work. Any other inference would be nonsensical; a reasonable juror could reach no other conclusion. In my view, no question of fact exists with regard to decedent's knowledge. Thus, I agree with the trial court that defendants did not have a duty to include carbon monoxide warnings on the muffler wrap package.

I would affirm.

/s/ Kirsten Frank Kelly