IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Docket No. 2006-IA-01682-SCT

A.O. SMITH CORPORATION, THE BOC GROUP, INC., F/K/A AIRCO, INC., THE ESAB GROUP, INC., HOBART BROTHERS COMPANY, LINCOLN ELECTRIC COMPANY, TDY INDUSTRIES, INC., UNION CARBIDE CORPORATION, AND CBS CORPORATION AS SUCCESSOR BY MERGER TO VIACOM, INC., F/K/A WESTINGHOUSE ELECTRIC CORP., Defendants/Appellants

VERSUS

JOHN THOMPSON AND NADINE THOMPSON, Plaintiffs/Appellees

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI CIVIL ACTION NO. 251-05-1083

Consolidated With: Docket No. 2006-IA-00617

CATERPILLAR INC., Defendant/Appellant

VERSUS

JAMES DEAN WHITE, ET AL., Plaintiffs/Appellees

Interlocutory Appeal from the Circuit Court of the First Judicial District of Hinds County, Civil Action Nos. 251-01-960, 251-05-1083

REPLY BRIEF OF APPELLANTS
ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
No. 2006-IA-01682-SCT

A.O. SMITH CORPORATION, ET AL. APPELLANTS

VERSUS

JOHN THOMPSON, ET AL. APPELLEES

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. **Appellants/Defendants:** A.O. Smith Corporation, The BOC Group, Inc., f/k/a Airco, Inc., The ESAB Group, Inc., Hobart Brothers Company, Lincoln Electric Company, TDY Industries, Inc., Union Carbide Corporation and CBS Corporation as successor by merger to Viacom, Inc., f/k/a Westinghouse Electric Corp.

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3. **Appellees/Plaintiffs:** John Thompson, Nadine Thompson

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5. **Other Defendants/Appellants:** Caterpillar, Inc., General Electric Co.

6. **Counsel for Other Defendants/Appellants:** W. Wayne Drinkwater, Mary Clay Morgan, Bradley Arant, Rose & White, LLP; John McCants, III, Thomas W. Tardy, III, Forman Perry, Watkins, Krutz & Tardy

7. **Other Defendants:** Welding Engineering Supply Company, Inc.

8. **Counsel for Other Defendants:** Terry High, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

9. The Honorable Bobby B. DeLaughter, Hinds County Circuit Judge

10. The Honorable Winston Kidd, Hinds County Circuit Judge.

Respectfully submitted,

A.O. SMITH CORPORATION, THE BOC GROUP, INC., F/K/A AIRCO, INC., THE ESAB GROUP, INC., HOBART BROTHERS COMPANY, LINCOLN ELECTRIC COMPANY, TDY INDUSTRIES, INC., UNION CARBIDE CORPORATION AND CBS CORPORATION AS SUCCESSOR BY MERGER TO VIACOM, INC., F/K/A WESTINGHOUSE ELECTRIC CORP., Defendants/Appellants

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PRELIMINARY STATEMENT

Plaintiffs' opposition brief ("Pls.' Br.") does nothing to undermine the conclusion that the Circuit Court erred in denying summary judgment to defendants on plaintiffs' claims for aiding and abetting and negligent performance of a voluntary undertaking. Indeed, their arguments only confirm that the court's decision is contrary to fundamental, bedrock principles of Mississippi law, constitutes bad policy, and should be reversed.

Plaintiffs attempt to divert attention from the fallacies underlying the Circuit Court's decision with respect to aiding-and-abetting liability by mischaracterizing defendants' arguments as amounting to the contention that "nobody did anything." (Pls.' Br. at 1.) Obviously, that is not defendants' argument. Rather, defendants have demonstrated that the Circuit Court erred in adopting aiding-and-abetting liability because: (1) applying such a theory in product liability cases is contrary to fundamental principles of Mississippi law; (2) it is logically impossible to "substantially assist" a tort of omission such as failure to warn; (3) courts around the country have held that the type of conduct alleged in this case does not constitute substantial assistance of a tort as a matter of law; (4) allowing an aiding-and-abetting claim would interfere with a fair trial of the product liability claims; and (5) recognizing the claim would unwisely chill the exercise of First Amendment rights. As explained below, plaintiffs barely address most of these arguments and do not even come close to overcoming those arguments they do address.

With respect to the Circuit Court's ruling on negligent performance of a voluntary undertaking, plaintiffs' failure even to defend that decision is an implicit concession that it is contrary to Mississippi law and must be reversed.

For all of these reasons, as explained further below, this Court should reverse the Circuit Court's decision denying defendants' motion for summary judgment on plaintiffs' aiding-and-abetting and voluntary undertaking claims.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RECOGNIZING THE TORT OF AIDING AND ABETTING IN THE CONTEXT OF THE WELDING FUME LITIGATION.

As defendants explained in their opening brief, the Circuit Court's recognition of a new cause of action for aiding and abetting in a failure-to-warn product liability case is erroneous and should be reversed for multiple reasons. Plaintiffs' attempts to rebut those arguments – at least where they chose to respond at all – simply lack merit.

A. Aiding-And-Abetting Liability Would Result In A Dramatic Expansion of Mississippi Tort Law.

Plaintiffs do not dispute that Mississippi law imposes a duty on a product "manufacturer or seller" to warn only the users of its own products, and not users of other companies' products. Miss. Code Ann. § 11-1-63(c)(i). Nor do they dispute that under well settled Mississippi law, a plaintiff can only sue the manufacturer of the specific product that allegedly injured him. *See Monsanto Co. v. Hall*, 912 So. 2d 134, 136-137 (Miss. 2005) (plaintiff in asbestos personal injury action must prove that defendant made asbestos to which he was exposed); *Moore v. Miss. Valley Gas Co.*, 863 So. 2d 43, 46 (Miss. 2003) ("it is incumbent upon the plaintiff in any products liability action to show that the defendant's product was the cause of the plaintiff's injuries"). In light of these well-established principles, it should be clear that plaintiffs cannot maintain a tort suit against a defendant who did not manufacture the product that allegedly injured the plaintiff.

The Circuit Court's decision would permit a product liability plaintiff to circumvent these fundamental rules, and to sue defendants for harm caused by products they did not manufacture, simply by alleging that the defendant "aided and abetted" the manufacturer that did make the product. If allowed to stand, that conclusion would eviscerate the rational limits placed on tort liability by the MPLA. Moreover, it would effectively permit industry-wide liability by allowing

any person harmed by a product to sue any member of an industry trade association without regard to whether that entity manufactured the product that allegedly harmed the plaintiff or even was a manufacturer at all.

Plaintiffs argue that such a radical change in product liability law would in fact have no "wide ranging effect" because "defendants are only liable for aiding and abetting if they take some 'affirmative' action that provides 'substantial assistance' with knowledge that the primary tortfeasor was breaching his own duty of care." (Pls.' Br. at 6.) But this assertion ignores the fact that trade associations and the types of activities alleged by plaintiffs are commonplace in industry. As defendants showed in their opening brief ("Defs.' Br."), there are literally thousands of trade associations in existence across the country, and approximately 180 trade and professional associations are involved in standard-setting activities. (Defs.' Br. at 15.) Nor would liability end even there. Under plaintiffs' approach, individuals could be held liable in product liability cases for collaborating on articles, participating in standard-setting committees, or even making statements about the safety of a challenged product. Thus, hundreds of people who had nothing to do with the manufacture of a product would be potentially liable, in addition to scores of companies that never manufactured the product at issue. (*See id.* at 15-16.)[1]

In sum, the result sought by plaintiffs – and approved by the trial court – is precisely contrary to the purpose of the MPLA, has no basis in Mississippi law, and would constitute a dangerous and limitless expansion of tort liability. As the California Supreme Court explained in rejecting such an approach:

> Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective

[1] Plaintiffs also fail to address the troubling First Amendment implications of expanding liability in a manner that chills trade association membership and involvement. (*See id.* at 26-28.)

> products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.

Sindell v. Abbott Labs., 607 P.2d 924, 933 (Cal. 1980). The same is true here, and this is reason enough to reverse the trial court's ruling.

B. Aiding-And-Abetting Liability Cannot Apply To A Tort Of Omission.

As defendants explained in their opening brief, the trial court ruling also erred because it is impossible to aid and abet a tort of omission such as the failure-to-warn claims at issue in this litigation. (*See* Defs.' Br. at 18-21.) Plaintiffs cannot and do not dispute that numerous courts, including the court presiding over the federal welding fume coordinated proceeding, have so held. Instead, their primary response is that defendants engaged in affirmative conduct that included the manufacturing and selling of the product. (Pls.' Br. at 3.) But that conduct has nothing to do with plaintiffs' aiding-and-abetting claims. Plaintiffs do not allege – and proffered no evidence on summary judgment – that defendants were involved in each others' design and manufacturing processes, or that one defendant's conduct in manufacturing and selling its own product aided and abetted any other manufacturer's alleged failure to warn with respect to its products. Thus, defendants' conduct in manufacturing and selling their own products is utterly irrelevant to plaintiffs' claim that "Defendants substantially assisted and encouraged the Warning Defendants' failure to warn." (Third Am. Compl. ¶ 90, R. 43.)

Plaintiffs also contend that defendants sought to keep the dangers of manganese from the public" by, for example, allegedly preparing and disseminating an article that downplayed a new warning. (Pls.' Br. at 4.) According to plaintiffs, if defendants had "desisted from their misinformation campaign then the primary tort of selling a defective product would not have happened." (*Id.* at 6.) Plaintiffs never explain, however, how the publication of an allegedly misleading article substantially assists an alleged failure to warn. If the article had never been

published, it would not have been any more difficult for a manufacturer to ***fail*** to include on its warning label the information that plaintiffs contend should have been included. A manufacturer does not need any assistance in order to remain silent. Indeed, plaintiffs concede that "[d]efendants are correct to note that 'the content of each manufacturer's warning label was within the manufacturer's sole control and that manufacturer did not need or receive anyone's help in order to allegedly omit certain information from the label.'" (*Id.* at 4-5 (quoting Defs.' Br. at 18).) This concession is fatal to their aiding-and-abetting claim.

C. The Type Of Conduct Alleged By Plaintiffs In This Case Does Not Constitute Substantial Assistance As A Matter Of Law.

Plaintiffs also fail to address the numerous authorities cited by defendants holding that the type of trade association conduct alleged in this case does not constitute substantial assistance in committing a tort. (*See* Defs.' Br. at 20-24 (citing *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, 1779-80 (D.S.D. 1984) (evidence that manufacturers adhered to same manufacturing specifications was insufficient to establish liability); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1039 (D. Mass. 1981) (no aiding-and-abetting liability because each company "had independent distribution channels and advertising practices"); *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 204 (Ct. App. 2003) (no aiding-and-abetting liability where plaintiffs contended that the defendants had funded research concerning the health hazards of asbestos and then deleted all references to cancer from the research findings when they were published); *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 224 (N.Y. 1992) (aiding-and-abetting theory inapplicable where manufacturers of multi-piece tire rims allegedly failed to issue warnings about rims, campaigned through their trade association to dissuade OSHA from placing responsibility for safety precautions on the manufacturers, lobbied against a ban on rims, and declined to recall an allegedly defective type of rim).) According to these courts, to establish liability for aiding and abetting, "not only must the manufacturers have engaged in more than

parallel activity, but their activity must also have been tortious in nature." *Rastelli*, 591 N.E.2d at 225. Thus, absent evidence that defendants' participation in a trade association was "tortious," there simply can be no liability for aiding and abetting. *Id.* Plaintiffs' failure to address this caselaw appears to be a concession that they seek to impose aiding-and-abetting liability under precisely the same circumstances in which other courts have wisely rejected such claims.

D. Defendants' Right To A Fair Trial On The Product Liability Claims Would Be Jeopardized By Permitting Aiding-And-Abetting Claims.

Finally, plaintiffs urge the Court to reject defendants' argument that allowing aiding-and-abetting claims would be bad policy because such claims would undermine the fairness of product liability trials. According to plaintiffs, "Defendants' notion that legitimate claims should be dismissed simply because it would complicate the trial is nothing short of bizarre." (Pls.' Br. at 7.) The flaw in plaintiffs' argument is that it assumes its conclusion – that aiding and abetting is a "legitimate claim" that plaintiffs are entitled to present to the jury. But the question before this Court is whether to recognize a novel cause of action under Mississippi law for aiding and abetting in a product liability case in the first place. In making that decision, it is plainly appropriate – indeed imperative – for the Court to consider the deleterious effects that such a claim would have on civil justice.

Plaintiffs do not dispute that product liability cases should focus on whether the ***defendant*** has breached a particular duty to the ***plaintiff***. They also do not dispute that the Legislature has established a careful framework for bifurcating facts relevant to compensation and punitive damages. The purpose of this framework is to guide the jury's decision-making process and to avoid excessive damages awards that are unsupported by the evidence, that are unfair to defendants, and that impair the perception of the Mississippi judicial system. If aiding and abetting were a recognized claim in these cases, this carefully crafted framework would be undermined. Plaintiffs would seek to introduce "motive" evidence that is irrelevant to the

product liability claim before the jury, as well as back-door punitive damages evidence that does not properly belong in the liability phase of a trial. (*See* Defs.' Br. at 24-26.)

Plaintiffs attempt to downplay this threat by saying that evidence of the knowledge of non-parties is relevant to determining what information defendants had a duty to know and disclose about welding hazards. (*See* Pls.' Br. at 8.) But even if the ***knowledge*** of non-parties were admissible to some degree to prove that certain alleged facts were knowable by defendants, the alleged ***misconduct*** of non-parties would not be relevant to the trial of the product liability claims, and the inevitable result would be "evidence spillover" and improper consideration of irrelevant evidence by the jury.

Moreover, in deciding whether to adopt aiding-and-abetting liability as the law of Mississippi, this Court must consider the far-reaching ramifications of the doctrine not just for this case, but also for future cases. If aiding and abetting were adopted for product liability cases, a plaintiff could sue one manufacturer on a traditional product liability theory, but claim that the alleged misconduct of dozens of other members of an industry is relevant to proving that the manufacturers "aided and abetted" each other. It would be impossible to provide a fair trial of the product claims under those circumstances because evidence concerning the conduct of scores of actors would be admitted, making it impossible for the jury to keep track of what evidence was relevant to the product liability claims. In short, the trial would simply devolve into a referendum on the behavior of an entire industry rather than the conduct of a particular manufacturer vis-à-vis a particular plaintiff.

The MPLA provides persons who allege product liability claims with a full and fair opportunity to seek recovery for their alleged injuries. There is no need to recognize a new and unmanageable claim that would simply invite unfairness into the proceedings.

II. PLAINTIFFS ADMIT THAT THEY HAVE NO CLAIM FOR NEGLIGENT PERFORMANCE OF A VOLUNTARILY ASSUMED DUTY.

Plaintiffs appear to concede that the Circuit Court's decision on their claim for negligent performance of a voluntary undertaking is indefensible by failing to address it at all. Their unwillingness to do so is understandable. Under Mississippi product liability law, a manufacturer has a duty to warn only foreseeable users of its products. (*See* Defs.' Br. at 14.) Plaintiffs make no attempt to defend the Circuit Court's conclusion that there was evidence in the record from which a rational jury could conclude that defendants undertook to provide a service beyond discharging that pre-existing and traditional duty. As defendants explained in their opening brief, Mississippi has never recognized the claim alleged by plaintiffs, and even if it did, plaintiffs fail to satisfy each and every requirement of *Restatement (Second) Torts* § 324A. (*See id.* at 28-36.)

For all of these reasons (as plaintiffs themselves apparently concede), the trial court's ruling that plaintiffs could proceed with a voluntary undertaking claim should be dismissed.

CONCLUSION

For the reasons stated above and in defendants' opening brief, the Court should reverse the Circuit Court's decision insofar as it denies defendants' motion for summary judgment on plaintiffs' aiding-and-abetting and voluntary undertaking claims.

Respectfully submitted, this the 24th day of March, 2008.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document has been hand-delivered to the Honorable Bobby B. DeLaughter and to the Honorable Winston Kidd and to counsel of record for appellees and by electronic mail to counsel of record for appellants.

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HINDS COUNTY CIRCUIT COURT

This the 24th day of March, 2008.

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