IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Docket No. 2006-M-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

BRIEF OF APPELLANTS
ORAL ARGUMENT REQUESTED

ATTORNEYS FOR APPELLANTS:

Michael W. Ulmer (MSB No. [redacted])
James J. Crongeyer, Jr. (MSB No. [redacted])
WATKINS & EAGER PLLC
Post Office Box 650
Jackson, Mississippi 39205
(601) 965-1900

R. David Kaufman (MSB No [redacted])
M. Patrick McDowell (MSB No. [redacted])
Brunini, Grantham, Grower & Hewes
Post Office Drawer 119
Jackson, Mississippi 39205-0119
(601) 948-3101

Richard L. Forman (MSB No [redacted])
Forman, Perry, Watkins, Krutz & Tardy, PLLC
Post Office Box 22608
Jackson, Mississippi 39225-2608
(601) 960-8600

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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.

2. **Counsel for Appellants/Defendants:** Michael W. Ulmer, Lewis W. Bell, James J. Crongeyer, Jr., Watkins & Eager PLLC; R. David Kaufman, Charles McBride, M. Patrick McDowell, Brunini, Grantham, Grower & Hewes; Richard L. Forman, Tim Gray, Forman, Perry Watkins, Krutz & Tardy, PLLC; Mark C. Carroll, T. Gerry Bufkin, Carroll, Bufkin & Coco

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

4. **Counsel for Appellees/Plaintiffs:** Lowry M. Lomax, Scott O. Nelson, Richard F. Scruggs, David Shelton, C. Victor Welsh, III, Crymes G. Pittman Stephen L. Shackelford, James B. Grenfell, Don Barrett, L. Breland Hilburn, Eugene C. Tullos, Tom Rhoden, Wynn E. Clark, James R. Reeves, Jr., Joey C. Langston, Tom Scott, John L. Walker, Richard M. Fountain, Robert F. Wilkins, Richard B. Schwartz

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.

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

BY: Michael W. Ulmer
MICHAEL W. ULMER

OF COUNSEL:
Michael W. Ulmer (MSB No. 5760)
James J. Crongeyer, Jr. (MSB No. 10536)
WATKINS & EAGER PLLC
Post Office Box 650
Jackson, Mississippi 39205
Telephone: (601) 965-1900
Facsimile: (601) 965-1901

Richard L. Forman (MSB No. 5427)
Forman, Perry, Watkins, Krutz & Tardy, PLLC
Post Office Box 22608
Jackson, Mississippi 39225-2608
(601) 960-8600

R. David Kaufman (MSB No. 3526)
M. Patrick McDowell (MSB No. 9746)
Brunini, Grantham, Grower & Hewes
Post Office Drawer 119
Jackson, Mississippi 39205-0119
(601) 948-3101

STATEMENT REGARDING ORAL ARGUMENT

At issue in this appeal are the merits of two new causes of action never recognized by this Court or the Mississippi legislature. It is the position of the Appellants that if these causes of action were to be adopted by this Court, they would significantly expand the scope of the Mississippi Product Liability Act. The significance of this Court's ruling on this appeal therefore merits oral argument on these issues.

Appellants also request oral argument for the purpose of clarifying any remaining questions the Court may have regarding their involvement in the trade and professional organizations upon which Plaintiffs/Appellees base their claims of aiding and abetting and negligent performance of an undertaking.

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STATEMENT OF ISSUES

The undersigned defendants appeal from an unprecedented decision by the Circuit Court of Hinds County (DeLaughter, J.), creating two new theories of liability that have not been recognized by this Court or by the Legislature. Those new theories, as applied by the Circuit Court, would impose liability on a defendant in a product case without regard to whether that defendant manufactured the product that allegedly injured the plaintiff, and indeed without regard to whether that defendant is even a product manufacturer or seller. Under the Circuit Court's decision, a defendant could be jointly and severally liable for a plaintiff's alleged injuries based solely on the defendant's participation in professional associations and organizations that recommended voluntary product standards -- organizations that also included representatives of the United States government, respected universities, trade unions, and others.

The appeal presents two issues.

1. Can a plaintiff in a product liability case assert an "aiding and abetting" claim against a defendant without regard to whether the defendant made a product that allegedly harmed him based on the theory that the defendant, by participating in a trade association and/or an organization that recommended voluntary warning standards, "substantially assisted" the product manufacturer in failing to warn about potential hazards of the product?

2. Can a plaintiff in a product liability case sue a member of a trade association and/or standard-recommending organization without regard to whether that defendant manufactured the product that allegedly harmed the plaintiff on the theory that, by participating in those organizations, the defendant voluntarily undertook to warn the world about potential product hazards?

STATEMENT OF THE CASE

I. PLAINTIFFS' CLAIMS

This is a product liability case against current and former manufacturers of welding consumables. Plaintiffs, John and Nadine Thompson, are a welder and his wife. Third Amended Complaint ¶¶ 2, 6 (R. 15, 20). Mr. Thompson claims that he suffered neurological harm as a result of exposure to welding fumes while working as a welder and welding supervisor. *Id.* ¶¶ 6-14 (R. 20-23). Ms. Thompson asserts a claim for loss of consortium, and her claim is therefore entirely derivative of, and dependent on, the claims of her husband. *Id.* ¶ 185 (R. 187). Plaintiffs' case is one of approximately 100 cases brought by hundreds of Mississippi welders alleging similar claims and one of thousands of welding cases brought nation-wide.

Plaintiffs originally filed their claims on November 23, 2001, as plaintiffs joining in an amended complaint that was filed in a case styled *Ruth v. Lincoln Electric Co.*, In the Circuit Court of Hinds County, Mississippi, First Judicial District, No. 251-01-960. That complaint asserted conventional claims for failure to warn and strict liability against the defendants based on the allegation that defendants manufactured welding consumables used by the plaintiffs. Motion of Defendants for Summary Judgment, Ex. B, *Ruth* Second Am. Compl., ¶¶ 70-97 (R. 346-351). Plaintiffs alleged that defendants knew that manganese in welding fumes could cause neurological harm and sold welding consumables without adequate warnings. *Id.* ¶¶ 22-23 (R. 335). In addition to seeking to hold each defendant liable for its own products, plaintiffs alleged that defendants were jointly and severally liable to each plaintiff under the law of civil conspiracy, without regard to whether they manufactured a product that supposedly harmed that plaintiff. *Id.* ¶¶ 63-69 (R. 344-346). Plaintiffs contended that defendants agreed through two professional associations -- the American Welding Society ("AWS") and the National Electrical Manufacturers Association ("NEMA") -- to conceal welding fume hazards. *Id.* ¶¶ 13-69 (R.

339-346). The *Ruth* complaint did not allege claims for aiding and abetting or negligent performance of a voluntarily undertaking.

Thereafter, the lead plaintiff in the *Ruth* action, Charles Ruth, filed a separate action in the United States District Court for the Northern District of Ohio, where all federal welding fume cases have been coordinated for pre-trial purposes (the "MDL Court"). Mr. Ruth proceeded with his claims in that forum, although the state court *Ruth* action itself was not removed to federal court. The MDL Court granted summary judgment to defendants on Mr. Ruth's conspiracy claim. *Ruth v. A.O. Smith Corp.*, No.1:04-CV-18912, 2005 WL 2978694 at *3-5 (N.D. Ohio Oct. 11, 2005). Applying well-settled Mississippi precedent, the court held that Mr. Ruth's conspiracy claim failed because he did not have a claim for an independently viable intentional tort. The only intentional tort alleged -- fraudulent concealment -- failed because defendants did not owe a duty to disclose information necessary to support such a claim. *Id.* The MDL Court correctly held that only a fiduciary relationship can give rise to the duty to disclose necessary to state a claim for fraudulent concealment and the manufacturers of welding consumables obviously had no such duty to welders. That holding is equally applicable to any welding fume case governed by Mississippi law.

The *Thompson* plaintiffs were subsequently severed from the *Ruth* case, and in March 2006, they filed an amended complaint. *Thompson* Third Am. Compl. (R. 14-73). The amended complaint asserted for the first time, in addition to negligence and strict liability claims, purported claims for "aiding and abetting" and "negligent performance of a voluntary undertaking." *Id.* ¶¶ 75-123, 135-144 (R. 26-54, 57-60). These new claims are predicated on the same alleged trade association conduct that supplied the basis for the failed conspiracy claim in *Ruth*. Now, however, instead of claiming that this purported conduct evidenced an improper

agreement to commit an intentional tort, plaintiffs allege that defendants "substantially assisted" each other in failing to warn about and investigate alleged hazards of welding fume. *Id.* ¶¶ 75-123 (R. 39-54). Plaintiffs also all allege that, by participating in AWS and NEMA, defendants voluntarily undertook to warn the world about the potential hazards of welding fume and that defendants negligently performed this undertaking. *Id.* ¶¶ 135-144 (R. 57-60).

The fact that the new aiding and abetting and voluntary undertaking claims, which are based on the same alleged conduct that supplied the basis for the conspiracy claim, were added five years into the litigation -- and only after the MDL Court's decision in *Ruth* -- makes plain that plaintiffs added these claims solely in an attempt to evade the federal court's conspiracy ruling. Further, this attempt was fruitless in the MDL litigation, as the MDL Court has recently determined that claims of aiding and abetting and negligent performance of an undertaking were without merit and dismissed those claims. *In re Welding Fume Products Liability Litigation,* No. 1:03-CV-17000, 2007 WL 3226951 (N.D. Ohio Oct. 30, 2007); *see also Tamraz v. Lincoln Electric Co.*, No. 1:04cv18948, Tr. at 146-147 (granting summary judgment to welding defendants on aiding and abetting claim) (see Attachment 1 in Appendix to Brief).[1]

II. THE TRADE AND PROFESSIONAL ORGANIZATIONS AT ISSUE

Plaintiffs' aiding and abetting and voluntary undertaking claims are predicated principally on the participation of defendants' employees in AWS and NEMA at different times between the 1930s and the present. Plaintiffs further attempt to bolster these claims based on the

[1] The MDL Court, which has presided over thousands of welding fume cases, and has tried three welding fume cases, even made mention of the Circuit Court's ruling in the *White* case (which has been consolidated for appeal with the present action, as it involves an identical order) in a footnote to its opinion of October 30, 2007. The MDL Court held that, based on all of the evidence known to the MDL Court, summary judgment was proper, and it disagreed with the trial court's decision in the *White* case. *In re Welding Fume Litigation,* No. 1:03-CV-17000, 2007 WL 3226951 at *26 n. 147 (N.D. Ohio Oct. 30, 2007).

participation of AWS and NEM in the American National Standards Institute's ("ANSI") promulgation of voluntary recommended minimum warning standards for welding consumables. It is, therefore, important to set forth some basic facts about AWS, NEMA, and ANSI. These facts are undisputed on the summary judgment record before the Circuit Court.

A. The American Welding Society

AWS is a non-profit professional society. Notice of Filing Supplemental Exhibits, Ex. C, Declaration of Stephen Hedrick ("Hedrick Decl.") ¶ 5 (R. 412). The mission of AWS is to "advance the science, technology and application of welding." *Id.* Membership in the AWS is open to anyone who wants to join. *Id.* ¶ 8 (R. 412). AWS currently has approximately 50,000 members, including engineers, scientists, educators, researchers, welders, manufacturers of welding equipment, inspectors, welding foremen, and welding union members. *Id.* ¶ 6 (R. 412). Approximately 5,000 welders are members of AWS today. *Id.* ¶ 7 (R. 412).

Over the years, employees of a large number of entities other than manufacturers of welding consumables have been members of AWS and participated in meetings of AWS and its committees. *Id.* ¶¶ 6, 8, 29-30 (R. 412, 415-416). A prime example is the membership of AWS's Safety and Health Committee, which addressed issues concerning the health and safety of using welding consumables. That committee included at various times, employees of the National Institute for Occupational Safety and Health, the Occupational Safety and Health Administration, Ohio State University, Columbia University, the United States Army, the University of Illinois, and the University of Houston. *Id.* ¶ 29 (R. 415-416). Those entities did not manufacture welding consumables and plaintiffs have not alleged that they had any incentive to promulgate any incorrect or misleading information.

B. The National Electrical Manufacturers Association

NEMA is a trade association created in 1926 consisting of companies involved in the electrical supply industries. Notice of Filing Supplemental Exhibits, Ex. D, Declaration of Frank Kitzantides ("Kitzantides Decl.") ¶ 2 (R. 566). NEMA acts as a clearing house for gathering, compiling, and analyzing data related to the electrical supply industries; it promotes standardization of electrical equipment; and it engages in advocacy with respect to laws and regulations effecting the electrical industries. Kitzantides Decl. ¶ 3 (R. 566).

NEMA currently has approximately 400 members. Kitzantides Decl. ¶ 2 (R. 566). These include companies involved in a diverse set of businesses, including building equipment, medical diagnostic imagery systems, electronics, industrial automation, insulating materials, lighting systems, power equipment, and wire and cable. *Id.* NEMA maintains numerous committees and subcommittees that focus on particular issues of concern to its members. Kitzantides Decl. ¶ 4 (R. 566-567). At the times relevant to this case, NEMA has had a section called the Electrical Welding Section (or Arc Welding Section) to address issues related to welding.

C. Participation Of AWS And NEMA In Recommending Voluntary Minimum Warning Standards to ANSI

The undisputed summary judgment record demonstrates that the warning standards to which plaintiffs' complaint refers were promulgated not by defendants, or AWS, or NEMA -- but by the American Standards Association ("ASA") and its successor, ANSI. ASA served, and ANSI serves, as a forum for representatives of the private and public sectors to develop voluntary standards for quality control and safety in various industries. The welding standards were voluntary, and neither AWS nor NEMA has or had any authority to force any of its members to comply with the standards. Hedrick Decl. ¶ 12 (R. 413).

Standards with respect to welding are formulated by a committee of ASA/ANSI known as the ANSI Z-49 Committee. *Id.* ¶ 10 (R. 412). Composition of that Committee has continually changed over time. AWS and NEMA have been members since the late 1940's and 1950's. Hedrick Decl. ¶ 10, and Ex. B attached to Decl. (R. 412, 425-433). The ANSI Z-49 Committee has included many organizations that have no motive or interest in concealing information from welders, including entities of the United States government, labor unions, universities and insurance companies. Hedrick Decl. ¶ 15 (R. 413-414). The same scientific literature concerning the health effects of welding fumes that was available to defendants was available to these entities as well.

The rules of ANSI require that the Z-49 Committee reach consensus in adopting standards. *Id.* ¶ 13 (R. 413). This means that the views of all members of the Committee must be considered and that a concerted effort be made to resolve any objections made by any member to proposed standards. *Id.* While various committees of AWS and NEMA have discussed recommendations that AWS and NEMA would make to the ANSI Z-49 Committee, a standard could be adopted only by a vote of the ANSI Z-49 Committee. At least two thirds of the organizations that are members of the ANSI Z-49 Committee must vote in favor of a proposed standard in order for the proposal to be adopted. *Id.* Although a given organization might be represented in the committee by more than one person, each organization exercises one vote. Hedrick Decl. ¶ 14 (R. 413). Further, ANSI recommended standards set forth only recommended minimum warnings. Nothing prevented manufacturers of welding consumables from providing additional warnings with their products.

III. THE CIRCUIT COURT'S DECISIONS

A. The September 27, 2006 Decision

On September 27, 2006, the Circuit Court (DeLaughter, J.) issued a decision granting summary judgment in favor of defendants on plaintiffs' conspiracy claim, but denying summary judgment on the aiding and abetting and voluntary undertaking claims. September 27, 2006 Order ("Order") (R. 633). The Circuit Court did not explain the basis for its decision, but presumably relied on the reasoning provided in its earlier September 14, 2006 decision on a motion to dismiss made by defendant Caterpillar. September 14, 2006 Memorandum Op. and Order ("Caterpillar Order" or "Caterpillar Decision") (R. 395-406).

B. The Caterpillar Decision

In the Caterpillar Decision, the Circuit Court correctly dismissed plaintiffs' claims for concert of action, finding they were equivalent to a claim of civil conspiracy under Mississippi law. Conspiracy is not an independent tort; rather it is a means of imposing liability on persons who agreed to commit a tort. To have a conspiracy claim, a plaintiff must have a viable underlying tort claim. Thus, the Circuit Court determined that the plaintiffs' claims of concert of action/conspiracy were based on an agreement to be negligent, not on an intentional tort, and found that "it is a *non sequitur* to speak of parties conspiring to commit negligence." Caterpillar Order at 7 (R. 401). In dismissing the concert of action/conspiracy claim, the Circuit Court relied on the well-reasoned decision of the federal welding MDL Court in the *Ruth* case described above.

Even though the Circuit Court correctly found that the conspiracy theory did not apply, it also held that plaintiffs had stated a viable claim for aiding and abetting under Mississippi law. The Circuit Court recognized that this Court has not adopted the tort of aiding and abetting in any context, but nonetheless predicted that this Court would recognize such a theory in a product

liability case, relying on *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694 (S.D. Miss. 2004). *Dale* did not involve product liability claims, but instead involved claims under the federal Racketeer Influenced and Corrupt Organization Act and common law fraud claims against several individuals and entities who schemed to defraud insurance companies. In *Dale*, Judge Lee predicted that Mississippi would recognize a claim for aiding and abetting fraud because Mississippi recognizes the supposedly "related and analogous" tort of civil conspiracy and because, according to Judge Tom Lee, twenty-eight states had adopted the theory set forth in Restatement (Second) Torts § 876(b) in some context. *Id.* at 700-01. The Circuit Court, relying on *Dale*, concluded that "aiding and abetting is a viable tort in Mississippi, provided that the elements of 876(b) are met." Caterpillar Order at 5 (R. 399). The Circuit Court did not address the radical factual distinctions between *Dale*, which involved a relatively small group of people acting over a short time period to execute a scheme to defraud in violation of a federal statute, and the present case, which involves the actions of thousands of persons and entities over a period of eighty years and which involves product liability claims for failure to warn. The Circuit Court cited no case from anywhere in the country imposing liability in a product liability case based on an aiding and abetting theory.

The Circuit Court held that plaintiffs had adequately alleged that defendants aided and abetted each other in negligently failing to warn. The Court cited to alleged evidence from which it said a rational jury could conclude that Caterpillar employees, as members of AWS and NEMA, "aggressively sought to keep the dangers of manganese from public view." Caterpillar Order at 6 (R. 400). The court took the position that a failure to prevent another defendant from inadequately warning about hazards presented by its product could constitute aiding and abetting and held that whether Caterpillar's failure to "take preventative measures" constituted substantial

assistance raised "an issue for jury resolution." *Id.* The Circuit Court did not address the substantial authority from courts around the country holding that an aiding and abetting theory is inapplicable as a matter of law in a case where the underlying tort is a tort of omission -- such as an alleged failure to warn.

With respect to plaintiffs' claim that defendants had negligently performed a service that they had voluntarily undertaken, the Circuit Court noted that plaintiffs had alleged that defendants held themselves out "as leaders in all issues relating to the health and safety of themselves and welding fumes." *Id.* at 9 (R. 403). The Circuit Court relied on an AWS "Mission Statement," which, as characterized by the court, provided that AWS would

> (1) Aggressively pursue, with other professional organizations, industry, government, and label solutions to all aspects of the health and safety hazards in welding and allied fields;
>
> (2) "[T]o promote knowledge concerning occupational and environmental effects on the health and safety of personnel involved in welding and allied processes"; and
>
> (3) "[T]o develop safe practices and standards for such processes to ensure a safe working environment for welders and personnel."

Id. at 9-10 (R. 403-404). The court held that this alleged evidence would allow a rational jury to conclude that participants in AWS had voluntarily undertaken to provide services to protect welders. *Id.*

The Circuit Court then concluded that these acts, "once undertaken by Caterpillar and other defendants, if not done carefully, would certainly be dangerous to welders." *Id.* It further held that "[w]hether plaintiffs were rightfully led to act on their faith of Caterpillar's performance is a question of fact, or at least a mixed question of law and fact." *Id.*

SUMMARY OF ARGUMENT

The Circuit Court adopted two radical theories of liability not recognized by this Court or by the Legislature. Under the Circuit Court's decision, a manufacturer can potentially be held liable for a plaintiff's alleged injuries without regard to whether the manufacturer made a product that allegedly injured the plaintiff simply because the manufacturer's employees participated in trade and professional associations with employees of other manufacturers. Indeed, a single manufacturer -- or any other participant in those associations -- could become liable for the products made by an entire industry. Such a result is contrary to Mississippi law and is bad policy. This Court should reject this theory just as the federal MDL Court and several state courts already have done.

Plaintiffs' contention that defendants aided and abetted each other by substantially assisting each other in failing to warn welders about welding fume hazards should have been rejected by the Circuit Court for several reasons. First, allowing aiding and abetting liability in products cases would contravene the Mississippi Product Liability Act ("MPLA"), which sets forth the limits for liability in products cases and does not recognize claims against defendants who did not manufacture or sell the product at issue. Second, as other courts have recognized, plaintiffs' theory is contrary to logic because it is impossible to aid and abet a tort of omission, such as failure to warn. Third, permitting aiding and abetting liability in mass product liability cases such as this one would invite plaintiffs to introduce evidence that is improper and prejudicial in the liability phase of the trial. And finally, permitting an aiding and abetting claim for associational conduct would improperly and unwisely chill the exercise of First Amendment rights of association and free speech by threatening the exercise of those rights with potentially massive, unbridled tort liability.

Plaintiffs' voluntary undertaking claim should have been rejected for similar reasons. Even if Restatement (Second) Torts § 324A, on which plaintiffs predicate their claim, were the law of Mississippi, neither defendants nor AWS undertook to provide services for the benefit of plaintiffs. The AWS's statement that it wished to promote welder safety does not constitute the undertaking of a service, and, even, if it did, would constitute an undertaking by AWS, not by any defendant. Moreover, for section 324A to be applicable, plaintiffs would have to demonstrate that defendants' increased the risk of harm to Mr. Thompson, or that defendants undertook a duty owed to Mr. Thompson by a third party, or that Mr. Thompson suffered harm by relying on defendants' promise to undertake services. Plaintiffs did not make any such showing in opposition to defendants' motion for summary judgment.

Plaintiffs' voluntary undertaking theory, like their aiding and abetting theory, would expand potential liability in products cases beyond all reasonable bounds, and well beyond the scope of the MPLA. Trade and professional associations commonly seek to promote safe products and the safe use of products. If participation in such laudable organizations were construed as the voluntary undertaking of a service, every member of an industry could be found liable for harm done by all products made by an entire industry. Even non-industry members of such organizations -- such as representatives of universities and governments -- could be held liable. Applying plaintiffs' voluntary undertaking theory here would thus result in nearly boundless liability in contravention of Mississippi law.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING AIDING AND ABETTING LIABILITY POTENTIALLY APPLICABLE IN THIS CASE

Aiding and abetting is a criminal law concept referring to the imposition of liability on persons who substantially assist another in committing a crime. A classic example is the person

who drives a get-away car for a bank robber. Some courts in other states have imported the theory into tort law to impose liability on those who substantially assist another in committing a tort. Those courts, however, have applied the doctrine only in narrow circumstances. Application of the theory generally has been limited to "conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage, or encouraged and assisted the person who directly caused the injuries by participating in a joint activity." *Sindell v. Abbott Labs.*, 607 P.2d 924, 933 (Cal. 1980). For example, where two people are drag racing and one collides with an innocent victim, some courts have held that the other racer is liable for aiding and abetting because, without his participation, there would have been no drag race and therefore no accident. *See, e.g., Agovino v. Kunze*, 181 Cal. App. 2d 591, 599, 5 Cal. Rptr. 534 (Cal. Ct. App. 1960). This narrow application of aiding and abetting liability in a civil law context has led one court to observe that "[p]recedent . . . is largely confined to isolated acts of adolescents in rural society." *Halberstam v. Welsh*, 705 F.2d 472, 489 (D.C. Cir. 1983).

It is undisputed that Mississippi has not adopted the tort of aiding and abetting. Nonetheless, the Circuit Court predicted that Mississippi would recognize such a cause of action, predicting that "aiding and abetting is a viable tort in Mississippi, provided the elements of Section 876(b) of the Restatement (Second) of Torts [were] met." Caterpillar Order at 5 (R. 399). That section provides:

> **§ 876. Persons Acting in Concert**
>
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> * * *

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself

* * *

Restatement (Second) Torts § 876 (1979).

The Court need not reach the hypothetical issue of whether it might ever be appropriate to adopt Section 876(b) as the law of Mississippi because it is clear that such a theory should not apply to a product liability case such as this one. Rather, as discussed below, aiding and abetting liability (1) would eviscerate fundamental principles of Mississippi law that place rational limits on tort liability; (2) makes no sense in a case alleging an omission; (3) has been rejected by courts around the country under similar circumstances; (4) would interfere with a fair trial of the product liability claims; and (5) would chill the exercise of First Amendment rights.

A. Allowing Aiding And Abetting Liability In Mass Products Cases Would Risk Imposition Of Industry-Wide Liability In Contravention Of Mississippi Law

Tort law has developed clearly defined rules to place rational limits on liability. One of these rules is that a manufacturer has a duty to warn only users of its own products. MISS. CODE ANN. § 11-1-63(a). This rule is mirrored in the principle that a product manufacturer can be liable to a given plaintiff only if the manufacturer made a product that injured that plaintiff. Indeed, the Legislature imposed limits on tort liability in products cases when it enacted the MPLA, which does not allow companies who did not themselves manufacture or sell an injury-causing product to be sued under the Act. *See Monsanto v. Hall*, 912 So. 2d 134 (Miss. 2005) (plaintiff in asbestos personal injury action must prove that defendant made asbestos to which he was exposed); *Harrison v. B.F. Goodrich Co.*, 881 So. 2d 288 (Miss. Ct. App. 2004) (company that licensed tire trademark to company who made tire that harmed plaintiff not liable under product liability statutes); *Moore v. Mississippi Valley Gas Co.*, 863 So. 2d 43, 46 (Miss. 2004)

("it is incumbent upon the plaintiff in any products liability action to show that the defendants' products was the cause of the plaintiffs' injuries"). Applying an aiding and abetting theory to a product liability case such as this one would eviscerate these well-established rules and expand potential liability beyond all rational limits.

It is commonplace for manufacturers in a given industry to behave in similar ways in response to available information and competitive influences. *Sindell v. Abbott Labs*, 607 P.2d 924, 932-933 (Cal. 1980). It is also commonplace for members of industries to participate in trade associations. There are literally thousands of trade associations in the United States today. *See* Encyclopedia of Associations (37th ed. 2001). It also is commonplace for trade associations to participate in voluntary standard-setting organizations. For example, ANSI's website lists approximately 180 professional and trade organizations that are involved in the promulgation of standards for different products and services under the auspices of ANSI. "ANSI Accredited Standards Developer" available at www.ansi.org/about_ansi (last visited 11/13/07). Construing such activities to constitute substantial aid and encouragement in committing a tort would open the door to a asserting aiding and abetting liability in almost every mass product liability case. If the Circuit Court's theory were accepted, a person who was injured by an alleged defect in a car made by Ford could sue General Motors on the theory that GM "aided and abetted" Ford's supposed failure to warn by participating in a trade association that did not advocate that manufacturers issue warnings about the type of alleged hazard at issue.

Moreover, the Circuit Court's theory, taken to its logical conclusion, would impose liability on all members of trade associations and standard setting organizations who did not take "preventative measures" even if they were not manufacturers. Many entities and individuals other than manufacturers of welding consumables -- including government employees,

researchers, and welders -- participated in AWS and the ANSI Z-49 Committee. Hedrick Decl. ¶ 6, 11, 29, and attached Exhibits A-P (with list of committee members) (R. 412-413, 415, 418-564). For example, the ANSI Z-49 Committee included, at various times, representatives of the United States Labor Department, the National Safety Council, the American Public Health Association, the United States Public Health Service, the American Conference of Governmental Industrial Hygienists, and others. *Id.* If support of, or participation in, the promulgation of minimum voluntary warning standards constituted aiding and abetting, each of these entities conceivably could be held liable for plaintiffs' alleged injuries. Similarly, if participation in AWS activities constituted aiding and abetting, all members of AWS -- including representatives of the Occupational Safety and Health Administration, Columbia University, Ohio State University, and the United States armed forces -- potentially could be liable for plaintiffs' alleged injuries. *See id.* ¶ 29 (R. 415-416) (providing examples of AWS members). Such a result would expand potential liability beyond all reasonable bounds.

Such an expansion of tort liability would be contrary to this Court's efforts to enforce reasonable limits on such liability, especially in a product liability context. This Court has consistently supported a strict interpretation of the MPLA, and has further recognized the Act's incorporation of the principles of Restatement (Second) of Torts § 402A. In *Lane v. R.J. Reynolds Tobacco Co.*, turning only to § 402A for guidance, this Court expressly ruled that "[s]trictly interpreted, § 11-1-63 precludes all product liability actions against tobacco companies." *Lane*, 853 So. 2d 1144, 1149 (Miss. 2003). In fact, this Court's adherence to a strict interpretation of § 11-1-63 resonated throughout the opinion: "Opting for a *stricter* construction of § 11-1-63, this Court declines to follow the decision by the learned district judge," *Id.* at 1150. (Emphasis added.) "Strictly applying § 11-1-63, the Court finds that state law definitively

precludes this lawsuit." *Id.* (Emphasis added.) Later, in *R.J. Reynolds v. King*, the Court clarified its ruling in *Lane*, consistent with its strict interpretation of § 11-1-63, pointing out the general principle that the statute should be applied based on its plain meaning: "because [§ 11-1-63] is not ambiguous, this Court will not consider same." *King*, 921 So. 2d 268, 274 (Miss. 2005). This strict approach to the application of MISS. CODE ANN. § 11-1-63 has been consistent throughout Mississippi case law. *See Clark v. Brass Eagle, Inc.*, 866 So. 2d 456, 461 (Miss. 2004) (noting the Court of Appeals "correctly recognized MISS. CODE ANN. § 11-1-63 as the 'starting point' for a products liability claim"); *Harrison v. B.F. Goodrich Co.*, 881 So. 2d 288, 290 (Miss. App. 2004) (finding that summary judgment for Goodrich was appropriate based on MISS. CODE ANN. § 11-1-63, which, "by its explicit terms, confines product liability claims to manufacturers or sellers of products").

Other opinions by this Court likewise demonstrate its efforts to place reasonable limitations on liability in a variety of contexts. *See, e.g., Paz v. Bruch Engineered Materials, Inc.*, 949 So. 2d 3 (Miss. 2007) (rejecting the creation of a claim for medical monitoring in the absence of a present physical injury); *Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31 (Miss. 2004) (admonishing that the test for admissibly of expert testimony imposed by May 2003 amendments to the Mississippi Rules of Evidence "has effectively tightened, not loosened, the allowance of expert testimony"); *Janssen Pharmaceutical, Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004) (imposing limits on joinder of plaintiffs); *Amsouth Bank v. Gupta*, 838 So. 2d 205 (Miss. 2002) (reversing verdict because jury improperly considered punitive damages before determining liability and compensatory damages); *MIC Life Inc. Co. v. Hicks*, 825 So. 2d 616 (Miss. 2002) (finding punitive damages awarded "grossly excessive").

Allowing plaintiffs to proceed with an aiding and abetting theory would be contrary to Mississippi law and the trend of this Court's decisions.

B. Aiding And Abetting Liability Is Inapplicable In A Product Liability Failure To Warn Case

Aiding and abetting liability in products cases such as this is not only contrary to Mississippi law; it is also contrary to common logic. Section 876(b) is predicated on the rationale that someone who substantially assists the commission of a tort has caused harm to the plaintiff. Restatement § 876, cmt. d (emphasis added). For example, a car owner who lends his car to a friend and encourages the friend to drive knowing that he is drunk will have facilitated a tort in the event the friend has an accident and harms someone on the way home. It arguably makes sense to impose liability on the car owner because, in the absence of his conduct, the friend would not have had a car to drive and would not have hurt anyone. Consistent with this example, Section 876 refers to knowingly assisting "tortious *conduct*." Restatement (Second) Torts § 876(b) (emphasis added). Comment d repeatedly refers to encouraging a tortious "*act*" and acting as an "adviser" or giving "physical assistance" to an affirmative "*act.*" *Id.* at cmt. d (emphasis added).

This case presents a very different situation. The trial court held that defendants could be held liable for "aiding" a tort of omission – *e.g.*, the alleged *failure* of a manufacturer to warn those who use its products about the potential hazards of welding fumes. But the content of each manufacturer's warning label was within that manufacturer's sole control and that manufacturer did not need or receive anyone's help in order to allegedly omit certain information on the label. As the federal MDL Court has already noted, it is a *non sequitur* to say that one manufacturer gave substantial assistance to another in *failing* to put information in its warning label. *See In re Welding Fume Prods. Liability Litigation*, 2007 WL 1087605, at * 13, n. 19 (N.D. Ohio Apr. 9,

2007) ("It seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act") (quoting *Sindell v. Abbott Labs.*, 607 P.2d 924, 933 (Cal. 1980)); *see also Gullotta v. Eli Lilly and Co.*, No. 82-400, 1985 WL 502793, at *9 (D. Conn. 1985) ("This Court agrees with the Court in *Sindell* that 'it seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act'").

The Circuit Court appears to have recognized this fallacy in plaintiffs' theory, but nonetheless said that a rational jury could find that one defendant may have substantially assisted another manufacturer's failure to warn if it "failed to take preventative measures." Caterpillar Order at 5 (R. 399). However, failing to stop a tortfeasor from committing a tort does not constitute substantial assistance. *See In re Welding Fume Prods. Liability Litigation,* No. 1:03-CV-17000, 2007 WL 3226951, at *25 (N.D. Ohio Oct. 30, 2007) ("mere knowledge that a tort in being committed and the failure to act to prevent it does not constitute aiding and abetting"), *quoting Fiol v. Doellstedt*, 58 Cal. Rptr. 2d 308, 313 (Cal. Ct. App. 1996); *Parker v. Eli Lilly Co.*, No. CV-274501, 1996 WL 1586780, at *1-2 (Ohio Ct. Com. Pl. Jun. 21, 1996) (claim under Section 876 cannot be based on "failure to act in contravention of the tortfeasor"). Moreover, because one defendant does not have the power to control the warnings another company puts on its products, the only way a defendant could have taken "preventative measures" would have been for that defendant to warn the entire world -- including the users of other companies' products -- about the alleged hazards of welding fumes. The imposition of such a duty would be contrary to what has been a fundamental tenet of tort law for hundreds of years. Under the

MPLA, a manufacturer owes a duty to warn only the users of products it has made; it does not owe a duty to warn of hazards presented by other company's products. MISS. CODE ANN. § 11-1-63 ("The manufacturer or seller of the product shall not be liable if the claimant does not prove by a preponderance of the evidence that at the time the product left the control of the manufacturer or seller . . . [t]he product was defective because it failed to contain adequate warnings or instructions") (emphasis added). *See also, e.g., Wyeth Laboratories v. Fortenberry*, 530 So. 2d 688, 691 (Miss. 1988) (drug manufacturer has duty to "adequately warn the prescribing physician of any known adverse effects which might result from the use of *its* drugs") (emphasis added).

C. Courts Across The Country Have Rightfully Rejected Aiding And Abetting Liability

Accepting plaintiffs' theory would also put Mississippi out of step with other courts across the country which have held that aiding and abetting liability is inapplicable in product liability cases. For instance, the federal MDL Court and two state courts have held that aiding and abetting liability does not apply in the welding litigation. *See Tamraz v. Lincoln Electric Co.*, No. 1:04cv18948, Tr. at 146-147 (granting summary judgment to welding defendants on aiding and abetting claim) (see Attachment 1 in Appendix to Brief); *Boyd v. Lincoln Electric Co.*, No. 545413, *slip op.*, (Ct. Common Pleas, Cuyahoga County, Ohio, July 10, 2007) (summary judgment in favor of defendants) (see Attachment 2 in Appendix to Brief); *Calloway v. Lincoln Electric Co.*, No. 07-0473-6 Tr. at 45 (Circuit Court Union County, Ark., Aug. 22, 2006) (converting motion for summary judgment to motion for directed verdict and granting judgment to defendants) (attached as Exhibit D to Defendants' Motion for Summary Judgment, included in the Record at 392).

Similarly, in *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980), the California Supreme Court rejected the application of an aiding and abetting theory to DES manufacturers. Plaintiffs contended that the conduct of DES manufacturers reflected "'collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings, . . . and other acts or omissions . . . .'" *Id.* at 932 (citation omitted). The California Court of Appeals had held that these allegations stated a claim for aiding and abetting, and overturned the trial court's decision granting defendants' motion to dismiss. *Sindell v. Abbott Labs.*, 149 Cal. Rptr. 138, 145 (Cal. Ct. App. 1978), *reversed*, 607 P.2d 924 (Cal. 1980). Citing Section 876(b) and California case law, the mid-level appellate court held that "the allegations indicate that each defendant gave substantial assistance or encouragement to the tortious conduct of others." *Id.* (citations and quotations omitted).

The California Supreme Court reversed. It held as a matter of law that plaintiffs' allegations were insufficient to support the contention that defendants "substantially aided and encouraged one another" under Section 876(b). *Sindell*, 607 P.2d at 932. Using the term "concert of action" to include all of the theories under Section 876 -- including aiding and abetting liability -- the California Supreme Court explained that the alleged conduct constituted "common practice in industry" (*id.*) and that holding such conduct to be wrongful would expand liability beyond all reasonable bounds:

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

Id.[2]

The California Supreme Court in *Sindell* went on to distinguish prior cases in which aiding and abetting liability and other concert of action theories, had been applied. It characterized them as limited to "conduct by a *small* number of individuals whose actions resulted in a tort against a *single* plaintiff, usually over a *short* span of time, and the defendant held liable was either a direct participant in the acts which caused damage, or encouraged and assisted the person who directly caused the injuries by participating in a joint activity." *Id.* at 933 (emphasis added; footnotes omitted).[3] The scenario in which aiding and abetting liability had been allowed could not be any more different from the facts alleged in the welding litigation, where dozens of manufacturers and hundreds of other entities participated in AWS and NEMA over the course of several decades and allegedly caused harm to thousands of welders.[4]

In *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994), the United States Court of Appeals for the Third Circuit issued a writ of mandamus reversing the trial court's denial of summary judgment to Pfizer on a claim that Pfizer had aided and abetted other asbestos

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[2] It is clear that the *Sindell* court was using the term "concert of action" in the quoted passage to include aiding and abetting liability, as the court was reversing a holding of the California Court of Appeals that the plaintiffs had stated a claim for aiding and abetting.

[3] *See, e.g., Loeb v. Kimmerle*, 9 P.2d 199, 204 (Cal. 1932) (defendant who encouraged another to commit an assault held liable for injuries).

[4] The court in *Sindell* also noted that the core of plaintiffs' claims was a failure to warn claim and that it was "dubious" whether Section 876(b) "can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act." *Id.* at 933.

manufacturers in misleading the public about the hazards of asbestos products by participating in a trade association that coordinated legal and public relations positions, concealed hazards, and disseminated incorrect information. *Id.* at 1293. In an allegation strikingly parallel to plaintiff's contention in this case, plaintiffs in *In Re Asbestos School Litigation* alleged that manufacturers gave "substantial assistance or encouragement" to each other by "adhering to an industry-wide practice of refusing to provide adequate warnings and refusing to adequately test." Notice of Filing Supplemental Exhibits, Ex. G, Excerpts from *In Re Asbestos School Litigation*, Fourth Amended Complaint ¶ 59 (R. 631). The Third Circuit rejected plaintiffs' theory: "we do not see how a rational jury would find the existence of a civil conspiracy or concerted action based solely on the alleged fact that Pfizer and the other defendants consciously engaged in parallel conduct." *Id.* at 1294.

Numerous other courts have reached the same conclusion. *See, e.g., Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, 1779-80 (D.S.D. 1984) (summary judgment in favor of tire rim manufacturers because evidence that they adhered to same manufacturing specifications insufficient to establish liability); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1039 (D. Mass. 1981) (DES manufacturers not liable for aiding and abetting because each company "had independent distribution channels and advertising practices"); *Chavers v. Gatke Corp.*, 107 Cal. App. 4th 606, 610, 132 Cal. Rptr. 2d 198 (Cal. Ct. App. 2003) (affirming the trial court's refusal to give a jury instruction based on aiding and abetting theory 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 did not apply 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).[5]

For the reasons set forth herein, this Court should reach the same conclusion as these other courts and reject the application of aiding and abetting liability theory to product liability cases such as this one.

D. Permitting Aiding And Abetting Claims Would Interfere With A Fair Trial On The Product Liability Claims

The Court should reject also aiding and abetting liability because allowing plaintiffs to proceed with such a theory in product liability cases would interfere with providing a fair and orderly trial on the product liability claims.

The proper focus in a trial of any plaintiff's product liability claims is whether the *named defendants* breached a duty to the plaintiff that proximately caused the plaintiff's alleged injury, as defined under MISS. CODE ANN. § 11-1-63. To determine whether the *named defendants* breached a duty, the finder of fact must determine what the *named defendants* knew about potential hazards of manganese in welding rods and what warnings the *named defendants* provided with their products. MISS. CODE ANN. § 11-1-63(a), (c). If plaintiffs in this case were permitted to proceed on an aiding and abetting theory, they undoubtedly would take the view that they should be permitted to introduce as evidence any statement ever made, and any action ever

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[5] *See also Burnside v. Abbott Labs.*, 505 A.2d 973, 982-83 (Pa. Super. Ct. 1985) (affirming summary judgment in favor of DES manufacturers because alleged conduct of DES manufacturers in using similar warnings and marketing did not constitute substantial assistance in causing injury); *Parker v. Eli Lilly & Co.*, No. CV-274501, 1996 WL 1586780, at *1-2 (Ohio Ct. Com. Pl. Jun. 21, 1996) (rejecting theory in pharmaceutical case); *In re N.Y. State Silicone Breast Implant Litig.*, 166 Misc. 2d 85, 90 (N.Y. Sup. Ct. 1995) (summary judgment in favor of breast implant manufacturers on concert of action claim where plaintiffs alleged only that defendants relied on the same product research, marketed their product without adequate testing, and concealed or misrepresented known hazards).

taken, by any member of AWS, NEMA, and the ANSI Z-49 Committee in order to prove that members of these organizations knew about the alleged hazards of manganese in welding fume and that they aided and abetted each other in supposedly concealing those hazards. If that tactic were allowed, the jury potentially would hear evidence about the supposed knowledge and conduct of scores of people and entities that did not make a product used by the plaintiff and, indeed, had no connection whatsoever with the plaintiff. Even if the trial court were to issue an instruction cautioning the jury to consider evidence about the knowledge and conduct of non-parties only on the aiding and abetting claim, it would be extremely difficult for members of the jury to put evidence about non-parties out of their minds for purposes of deciding for purposes of the product liability claims what the named defendants knew and did. In short, there would be a substantial risk that evidence about the conduct of non-parties would taint the jury's decision on the product liability claims.

Moreover, plaintiffs have already made clear that they intend, as an integral part of attempting to prove their supposed aiding and abetting claim, to present purported evidence that defendants had an intent to conceal welding fume hazards and that they acted to conceal such hazards from the world. *See, e.g.*, Plaintiffs' Memorandum in Opposition to Caterpillar's Motion to Dismiss, at 24-29 (R. 812-817). In so doing, plaintiffs seek to circumvent the well-established rule that only evidence relating to compensating the named plaintiff is admissible in the liability phase of a product liability case. Under MISS. CODE ANN. § 11-1-65, the Legislature has set forth a bifurcated procedure in which the trier of fact must first determine that compensatory damages should be awarded before proceeding with the punitive damages phase of trial. If compensatory damages are awarded, the court may then commence an evidentiary hearing to determine whether punitive damages may be considered. MISS. CODE ANN. § 11-1-65 (b), (c).

Evidence which is only relevant to punitive damages should not be considered until that time. The Court recently explained:

> [E]vidence which does not pertain to compensating the plaintiff but only pertains to proof that a punitive damage award is appropriate, should not be heard by the jury until liability has been determined. Moreover, to try a case any other way would allow a jury to consider punitive damages evidence while determining the compensatory damage award. This is a troubling scenario when one considers that under such procedure, not only is the jury subject to possibly returning an inflated compensatory damage award based on consideration of the wrong evidence, it may also forego a finding for the defendant altogether in those situations where the jury most likely would have otherwise seriously considered finding for the defendant, by considering only the appropriate evidence as to fault/liability.

Bradfield v. Schwartz, 936 So.2d 931, 938 (Miss. 2006); *see also Hartford Underwriters Inc. Co. v. Williams*, 936 So.2d 888, 896-897 (Miss. 2006) (stating, "the clear intent of the Legislature was to prevent issue confusion and to create a barrier between testimony regarding the fundamental issue of liability and the inflammatory issue of egregious conduct"). This rule, which is carefully crafted to maintain fairness in product liability trials, would be rendered a nullity if plaintiffs were allowed to proceed with their aiding and abetting theory and introduce evidence about defendants' purported motives and the conduct of AWS and NEMA. Thus, allowing product liability plaintiffs to proceed with such a theory would allow in through the back door evidence that should clearly be excluded during the compensatory damages phase of a trial. This Court should not allow such a result.

E. The Circuit Court's Decision Impermissibly Chills The Exercise Of First Amendment Rights

Finally, the Circuit Court's ruling with respect to aiding and abetting liability should be reversed because allowing such liability would impede the exercise of First Amendment Rights.

Citizens have a constitutional right to participate in trade associations and standard-recommending organizations. *See Maple Flooring Manufacturers Assoc. v. United States*, 268 U.S. 563, 584 (1925); *In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994). Such organizations perform many useful functions for society. As one court explained:

> Such organizations serve many laudable purposes in our society. They contribute to the specific industry by way of sponsoring educational activities, and assisting in marketing, maintaining governmental relations, researching, establishing public relations, standardization and specification within the industry, gathering statistical data and responding to consumer needs and interests. Furthermore, trade associations often serve to assist the government in areas that it does not regulate.

Meyers v. Donnatacci, 531 A.2d 398, 404 (N.J. Super. Ct. Law Div. 1987); *see also In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999), citing *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 567 (1925) ("[T]rade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services."); *D.C. Pub. Co. v. Merchants & Mfrs. Ass'n*, 83 F. Supp. 994, 998 (D.D.C. 1949) ("Trade associations . . . serve a useful purpose in the economic life of any community.").

Subjecting a company to protracted litigation based on aiding and abetting and voluntary undertaking theories would force companies to take a hard look at the potential cost of membership and participation in those associations. Those costs would be substantial and would include the value of employee time diverted to defending the litigation, the substantial legal fees and other out-of-pocket costs of defending major litigation, and unjustified threats to a company's reputation from baseless allegations of improper conduct. As courts have recognized, these risks and costs could easily chill a company's desire to exercise its rights under the First Amendment. For example, the United States Court of Appeals for the Third Circuit explained:

> Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. [citations omitted] But the district court's holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them.

In re Asbestos School Litig., 46 F.3d at 1294; *see also Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198 (Ct. App. 2003) (agreeing with *In re Asbestos School Litig.*); *In re Citric Acid Litig.*, 996 F. Supp. 951, 958 (N.D. Cal. 1998) ("[I]t would be improper to infer conspiracy from [defendant's] membership, given the deterrent effect such a limited ruling would have on the legitimate activities of trade associations."). If those rights are chilled, fewer participants will be willing to engage in discussions of public importance, causing a substantial loss to free speech and society at large.

II. THE CIRCUIT COURT ERRED IN PERMITTING PLAINTIFFS' CLAIM FOR VOLUNTARY UNDERTAKING

Plaintiffs base their claim for voluntary undertaking on Restatement (Second) Torts § 324A. That section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increased the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) Torts § 324A (1965). It is undisputed that Mississippi has not adopted this section of the Restatement. As with aiding and abetting liability, however, it is not necessary for the Court to determine whether to adopt Section 324A because, even if it did, the section would

be inapplicable to this case. *See Hartford Steam Boiler Insp. & Ins. Co. v. Cooper*, 341 So. 2d 665 (Miss. 1977) (declining to determine whether Section 324A should be adopted because of facts of case did not fall within scope of section).

A. The Theory Of Voluntary Undertaking Does Not Apply To The Welding Litigation

The federal MDL Court and three state courts have ruled that a voluntary undertaking theory is inapplicable in the welding litigation because defendants did not undertake to provide a service as a matter of law and because plaintiffs cannot satisfy the requirements of Section 324A. *In re Welding Fume Litigation,* 2007 WL 3226951 at *18-20 (N.D. Ohio Oct. 30, 2007); *Solis v. Lincoln Electric Co.*, 2006 WL 1305068 (N.D. Ohio May 10, 2006); *Boyd v. Lincoln Electric Co.*, No. 545413, *slip op.* (Ct. Common Pleas, Cuyahoga County, Ohio, July 9, 2007) (see Attachment 2 in Appendix to Brief); *Calloway v. Lincoln Electric Co.*, No. CV04-0473-6 (Circuit Ct. Union County Arkansas Aug. 22, 2006) Tr. at 45 (attached as Exhibit D to Defendants' Motion for Summary Judgment, included in the Record at 392); *Hunt v. Air Prods. & Chemicals*, No. 052-9419, 2006 WL 1229082 (Mo. Cir. Co. Apr. 20, 2006). This Court should also reject the theory for the reasons set forth below.

1. Defendants Did Not Undertake A Service To A Third Party For The Benefit Of Plaintiff

The Circuit Court held that defendants voluntarily undertook to provide services based on an AWS mission statement that the Court said demonstrated defendants undertook to promote safety in welding. Caterpillar Order, at 9-10 (R. 403-404). But these aspirational statements do not constitute an undertaking of services and were not made by any defendant.

The MDL Court has held that AWS mission statements "do not represent a legally binding voluntary undertaking by AWS or by the [Safety and Health] Committee, much less by

each organized belonging to the Committee's changing membership." *In re Welding Fume Litigation,* 2007 WL 3226851, at *19. Similarly, in *Solis v. Lincoln Electric Co.*, 2006 WL 1305068 (N.D. Ohio May 10, 2006), plaintiffs contended that certain defendants agreed to provide a service to welders by making statements aspiring to be industry leaders in making safe products. The MDL Court correctly rejected plaintiffs' contention, finding that defendants' statements simply reflected the defendants' acknowledgment of their existing duties under product liability law to make safe products:

> All parties agree that the manufacturing defendants do have a duty to warn about the hazards of using their products, and a concomitant duty to undertake efforts to know what those hazards are. The above-quoted statements merely acknowledge these existing legal duties; they do not represent a voluntary obligation to shoulder additional legal duties.

Id. at *6. The same reasoning compels the conclusion that the type of aspirational statements by AWS relied on by the Circuit Court do not constitute an undertaking to provide services to a third party for the benefit of plaintiff.

Numerous courts have held that trade associations do not undertake to provide services merely by promising to promote safe use of products or by promising to promote medical research. *See Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 848-49 (8th Cir. 2001) (applying Arkansas law to hold that tobacco companies did not undertake to provide services within the meaning of Restatement § 324A by publicly asserting that they would pursue public health research about the dangers of cigarette smoking); *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178, 184 (Ill. App. Ct. 1999) (trade association's promulgation of non-binding instructions for installation of roof truss system did not constitute undertaking within meaning of Restatement § 324A); *Meyers v. Donnatacci*, 531 A.2d 398, 406 (N.J. Super. Ct. Law Div. 1987)

(promulgation by trade association of voluntary consensus standards for swimming pools did not constitute an undertaking).

Further, even if the statements cited by the Circuit Court constituted the undertaking of "services," those statements were not made by defendants. *In re Welding Fume Litigation*, 2007 WL 3226851, at *18-19 (even if, contrary to law, the AWS mission statement constituted an undertaking by AWS, it did not constitute an undertaking by any individual member of AWS). The proposed warnings standards to which plaintiffs refer were promulgated by a committee (the "ANSI Z-49 Committee") of the American National Standards Institute ("ANSI"), not by any defendant. Notice of Filing Supplemental Exhibits, Ex. C, Hedrick Decl." ¶ 10 (R. 412). Studies such as the *Effects of Welding On Health* and periodicals such as *The Welding Journal* were published by the American Welding Society ("AWS"), not by any defendant. *Id.* ¶¶ 26, 32 (R. 415-416).

Defendants are not liable for the acts of a trade or professional association merely because they or their employees were members of that association. *See Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996) (holding with respect to unincorporated association that "liability of members of a group should be analyzed in terms of the specific actions undertaken, authorized or ratified by those members" and "reject[ing] the lower court's intimation that the existence of such an association might alone form the basis for imposing tort liability on all members for the acts of some"); *see also Feldman v. North British & Mercantile Ins. Co.*, 137 F.2d 266, 268 (4th Cir. 1943) (member insurance company received information gathered and furnished by trade association with respect to plaintiff insured's prior loss by fire, but was not liable for the association's malicious prosecution of plaintiff); *Sweetman v. Barrows*, 161 N.E. 272, 275 (Mass. 1928) ("Mere membership in a voluntary association does not make all the members

liable for acts of their associates done without their knowledge or approval, and liability is not to be inferred from mere membership.") (citations omitted). And defendants can be no more liable for the acts of the ANSI Z-49 Committee than they can be for the acts of a trade or professional association. Further, plaintiffs proffered no evidence in opposition to summary judgment to support a different result here.

The conclusion that defendants did not undertake to provide a service through participation in AWS and NEMA is particularly appropriate given the nature of those organizations. While defendants or their employees were members of AWS, so were many other entities and individuals. Notice of Filing Supplemental Exhibits, Ex. C, Hedrick Decl. ¶¶ 6-7 (R. 412). And while AWS was a member of the ANSI Z-49 Committee, so were government agencies, public safety organizations, unions, and scores of non-defendant companies. *Id.* at Exs. A-B, D-I to Hedrick Decl. (R. 418-433, 440-508) (listing composition of ANSI Z-49 Committee at the beginning of each publication). Defendants cannot be construed to have provided a service merely by virtue of the fact that they were members of AWS or that AWS participated in the ANSI Z-49 Committee. To hold otherwise would be to hold that every member of AWS and the ANSI Z-49 Committee -- including employees of government agencies, research organizations, and unions -- provided a service for the benefit of plaintiffs and could potentially be liable under Section 324A. *See In re Welding Fume Litigation,* 2007 WL 3226851, at *20 ("Following plaintiffs' argument, every member of a trade association either has or assumes a duty to warn product users of dangers posed by the product, if those dangers are discussed at the organization meetings. This argument stretches the concept of duty too far."); *Boyd, slip op.* at 5 (finding that plaintiffs' theory would create a result that would be "against public policy") (see Attachment 2 in Appendix to Brief).

2. The Trial Court Erred Because Plaintiffs Do Not Have A Claim Because They Do Not Satisfy Subsections (a), (b), Or (c) Of Section 324A

Even if plaintiffs could demonstrate that defendants undertook to provide a service to a third party for Mr. Thompson's benefit, they would then have to demonstrate that they additionally satisfy one of the three alternative requirements set forth in subsections (a)-(c) of Section 324A. Because Plaintiffs cannot do so, the Circuit Court' ruling should be reversed on this ground as well.

a. Any Undertaking Did Not Increase The Risk Of Harm To Plaintiffs

In order to satisfy subsection (a), a plaintiff must offer evidence that the defendant instituted some "physical change to the environment" or some other "material alteration of circumstances" that itself increased the risk of harm to the plaintiff. *Patentas v. United States*, 687 F.2d 707, 717 (3d Cir. 1982); *see also Canipe v. National Loss Control Serv. Corp.*, 736 F.2d 1055, 1062 (5th Cir. 1984) (Section 324A(a) "requires some change in conditions that increase the risk of harm to the plaintiff over the level of risk that existed before the defendant became involved"). Plaintiff did not satisfy this requirement because he did not identify any way in which defendants changed his environment in a way that increased his risk of harm.

When a defendant merely allows an existing risk to continue, it cannot be held to have increased the risk of harm. *See Trosclair v. Bechtel Corp.*, 653 F.2d 162, 164-65 (5th Cir. 1981) (Mississippi law) (even if contractor's provision of safety inspections constituted a voluntary undertaking, they did not increase the risk of harm to the subcontractor's employees); *Tillman v. Travelers Indem. Co.*, 506 F.2d 917, 920-21 (5th Cir. 1975) (Mississippi law) (allegation that inspection failed to detect risk of harm did not constitute allegation that inspection increased the risk of harm); *Paz v. State of California*, 994 P.2d 975, 980-982 (Cal. 2000) (Restatement

Section 324A did not apply because "a failure to alleviate a risk cannot be regarded as tantamount to increasing that risk"; alleged negligent delay in installing traffic signal did not increase the existing risk presented by intersection); *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 398 (Tex. 1991) (drainage district's statement that it would repair damaged bridge did not increase risk presented by bridge); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 808 (Minn. 1979) (inspection that failed to detect risk of explosion did not increase the risk of harm because "the risk of explosion prior to the inspection was the same as after the inspection").

Here, plaintiffs allege that the manufacturers of welding consumables failed to provide adequate warnings about the potential hazards of welding fumes. The participation of some employees of defendants in activities by the National Electrical Manufacturers Association, AWS, or the ANSI Z-49 Committee did not alter those circumstances or increase the alleged risk of harm to plaintiff presented by the use of any welding consumable. *See In re Welding Fume Litigation,* 2007 WL 3226851, at *19, n.105 (Section 324A(a) is inapplicable because there is "no basis for a claim that . . . [a member of AWS] increased the risk (to welders) of harm from inhaling manganese in welding fumes"); *Meyers*, 531 A.2d at 406 (promulgation of voluntary swimming pool safety standards by National Spa and Pool Institute did not increase risk posed to plaintiff diving into shallow end of pool).

b. No Defendant Undertook A Duty Owed By A Third Party To Plaintiffs

Plaintiffs also fail to satisfy subsection (b) because no defendant assumed any duty owed to plaintiffs by a third party. Every defendant had a duty to warn users of its products of reasonably foreseeable risks associated with the use of those products. Every defendant performed that duty by, among other things, including warning labels and Material Safety Data

Sheets with the welding consumables it sold. There is no evidence that any defendant ever assumed the duty to provide warnings to the users of other defendants' products. Nor is there any evidence that defendants assumed any duty of Mr. Thompson's employers, such as the duty of those employers to maintain a safe workplace. *See In re Welding Fume Litigation*, 2007 WL 3226851, at 19 n. 105 (no basis for finding that Caterpillar undertook a duty owed to plaintiff by a third party).

c. Plaintiffs' Alleged Harm Was Not Suffered As A Result Of Anyone's Reliance On Any Undertaking

Finally, to satisfy subsection (c), plaintiffs would have to demonstrate that Mr. Thompson was harmed by a third party's reliance on defendants' alleged undertaking. To demonstrate such reliance, plaintiffs would first have to show that the third party received the statements that constituted the undertaking and that the third party then took some action, or refrained from taking some action, because of the undertaking. *See In re Welding Fume Litigation*, 2007 WL 3226851, at *19 (plaintiffs failed to satisfy 324A(c) because they could identify "no statement by Caterpillar directly to any plaintiff suggesting that Caterpillar explicitly undertook a duty to that plaintiff"); *Solis*, 2006 WL 1305068, at * 6 n.4 (plaintiff could not prove reliance on undertaking because there was no evidence that he was even aware of the statements by which defendant allegedly agreed to provide services); *see also Tillman v. Travelers Indem. Co.*, 506 F.2d at 920-21 (even if safety inspections by insurer had constituted an undertaking, plaintiff could not have relied on the alleged undertaking because he did not know about the inspections). Such reliance would exist, for example, where a defendant agreed to conduct safety inspections at an employer's place of business and the employer refrained from conducting its own safety inspections because the defendant was undertaking inspections. No comparable situation exists in this case.

B. Permitting A Voluntary Undertaking Claim Would Expand Tort Liability Beyond Rational Bounds

The Circuit Court's willingness to allow plaintiffs to proceed with their voluntary undertaking claims also raises the same policy concerns as its ruling with respect to aiding and abetting.

As explained above, many trade associations engage in the same types of activities that AWS and NEMA have engaged in, and many are involved in the promulgation of recommended product warning standards and the promotion safe of product use. Allowing the use of a voluntary undertaking theory in this case would thus open the door for the plaintiffs' bar to assert such a theory in virtually every mass product liability case.

If the Circuit Court's ruling stands, it would subject manufacturers to liability even though they did not manufacture the product that allegedly harmed a plaintiff, and would thus subject all manufacturers -- and even non-manufacturers -- to liability for products made by an entire industry. This would constitute a radical and unreasonable expansion of tort liability, far beyond the confines of the MPLA. Allowing a voluntary undertaking theory would also open the door to plaintiffs seeking to introduce evidence at trial about defendants' motives and the conduct of scores of entities who are not defendants, blurring the lines between evidence admissible during the liability phase and punitive damages phase of a trial. And, as noted above, the fear of such expansive, limitless liability would have the undesirable effect of chilling the exercise of First Amendment rights.

For all of these reasons, the Court should reject plaintiffs' voluntary undertaking theory and reverse the Circuit Court's order denying summary judgment.

CONCLUSION

This Court should revise the Circuit Court's decision insofar as it denies defendants' motion for summary judgment on aiding and abetting and voluntary undertaking claims.

Respectfully submitted, this the 14th day of November, 2007.

By: Michael W. Ulmer

Michael W. Ulmer (MSB No. [redacted]
James J. Crongeyer, Jr. (MSB No. [redacted])
WATKINS & EAGER PLLC
Attorneys for Appellants

OF COUNSEL:
Michael W. Ulmer (MSB No. [redacted]
James J. Crongeyer, Jr. (MSB No. [redacted]
WATKINS & EAGER PLLC
Post Office Box 650
Jackson, Mississippi 39205
Telephone: (601) 965-1900
Facsimile: (601) 965-1901

Richard L. Forman (MSB No. [redacted]
Forman, Perry, Watkins, Krutz & Tardy, PLLC
Post Office Box 22608
Jackson, Mississippi 39225-2608
(601) 960-8600

R. David Kaufman (MSB No. [redacted]
M. Patrick McDowell (MSB No. [redacted]
Brunini, Grantham, Grower & Hewes
Post Office Drawer 119
Jackson, Mississippi 39205-0119
(601) 948-3101

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 counsel of record for appellees and by electronic mail to counsel of record for appellants.

APPELLEES' ATTORNEYS DESIGNATED FOR SERVICE:

L. Breland Hilburn
The Eaves Law Firm
101 North State Street
Jackson, Mississippi 39201

C. Victor Welsh, III
Crymes G. Pittman
Pittman, Germany, Roberts & Welsh, LLP
Post Office Box 22985
Jackson, Mississippi 39225

Lowery Lomax
Scott Nelson
Maples & Lomax
Post Office Box 1368
Pascagoula, Mississippi 39568
Via US Mail

John Walker
Walker & Walker
1410 Livingston Lane, Suite A
Twin Lakes Office Park
Jackson, Mississippi 39213

ATTORNEYS FOR APPELLANTS/DEFENDANTS:

R. David Kaufman
Charles L. McBride
M. Patrick McDowell
Brunini, Grantham, Grower & Hewes
Post Office Drawer 119
Jackson, Mississippi 39205-0119

ATTORNEYS FOR AIRCO, INC., a/k/a THE BOC GROUP, INC.

Mark C. Carroll
T. Gerry Bufkin
Carroll, Bufkin & Coco
1671 Lelia Drive
Jackson, Mississippi 39216

ATTORNEYS FOR A. O. SMITH CORPORATION; THE ESAB GROUP, INC. *HOBART BROTHERS COMPANY; THE* LINCOLN ELECTRIC COMPANY; UNNIO CARBIDE CORPORATION; VIACOM INC.

W. Wayne Drinkwater
Mary Clay W. Morgan
Bradley, Arant, Rose & White, LLP
188 East Capitol Street, Suite 450
Post Office Box 1789
Jackson, Mississippi 39215-1789

ATTORNEYS FOR CATERPILLAR, INC.

Terry High
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
Post Office Box 14167
Jackson, Mississippi 39236-4167

ATTORNEYS FOR WELDING ENGINEERING SUPPLY COMPANY, INC.

John C. McCants, III
Thomas W. Tardy, III
Forman, Perry, Watkins, Krutz & Tardy
200 South Lamar Street
City Centre Building, Suite 100
Post Office Box 22608
Jackson, Mississippi 39225-2608

ATTORNEYS FOR GENERAL ELECTRIC CO.

Richard L. Forman
Tim Gray
Forman, Perry, Watkins, Krutz & Tardy, PLLC
Post Office Box 22608
Jackson, Mississippi 39225-2608

ATTORNEYS FOR TDY INDUSTRIES, INC

Honorable Bobby B. DeLaughter
Hinds County Circuit Court Judge
P. O. Box 327
Jackson, Mississippi 39205-0327

HINDS COUNTY CIRCUIT COURT JUDGE

This the 14th day of November, 2007.

Michael W. Ulmer

Michael W. Ulmer

APPENDIX

Attachment 1: *Tamraz v. Lincoln Electric Co.*, No. 1:04cv18948, Excerpts from transcript of Nov. 1, 2007 Hearing before Hon. Kathleen O'Malley

Attachment 2: *Boyd v. Lincoln Electric Co.*, No. 545413, *slip op.* (Ct. Common Pleas, Cuyahoga County, Ohio, July 9, 2007); and *Boyd v. Lincoln Electric Co.*, No. 545413, *slip op.* (Ct. Common Pleas, Cuyahoga County, Ohio, July 10, 2007).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - - - -

JEFFREY A. TAMRAZ, et al.	Case 1:04CV18948
	MDL Docket No. 1535
Plaintiffs,	
vs.	
	VOLUME 1
LINCOLN ELECTRIC COMPANY, et al.	
	PAGES 1 to 184
Defendants.	

- - - - -

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE

JUDGE KATHLEEN M. O'MALLEY, JUDGE OF SAID COURT,

ON THURSDAY, NOVEMBER 1ST, 2007,

COMMENCING AT 1:00 O'CLOCK P.M.

- - - - -

Court Reporter: JUDITH A. GAGE, RMR-CRR
801 WEST SUPERIOR AVENUE
SUITE 7-189
CLEVELAND, OHIO 44113
(216) 357-7238

- - - - -

APPEARANCES:
On Behalf of the Plaintiffs:
Climaco, Lefkowitz, Peca, Wilcox & Garofoli
BY: John R. Climaco
John A. Peca
Lisa Ann Gorshe
Dawn M. Chmielewski
55 Public Square, Suite 1950
Cleveland, Ohio 44113
(216) 621-8484
Scruggs Law Firm, P.A.
BY: David Shelton
120A Courthouse Square
Oxford, Mississippi 38655
(662) 281-1212
Barrett Law Offices
BY: Richard R. Barrett
404 Court Square North
Lexington, Mississippi 39095
(662) 834-2376
Rhoden, Lacy, & Colbert
BY: Frederick G. Davis
Thomas R. Rhoden
117 Park Circle Drive
Flowood, Mississipi 39232
(601) 932-1155

Kelley & Ferraro
BY: Eric C. Wiedemer
2200 Key Tower
Cleveland, Ohio 44114
(216) 575-0777
On Behalf of the Defendants:
Weisman, Kennedy & Berris
BY: R. Eric Kennedy
David C. Landever
1600 Midland Building
Cleveland, Ohio 44115
(216) 781-1111

APPEARANCES CONTINUED:
The Gloor Law Group
BY: D. Patterson Gloor
Stephen P. Ellenbecker
Donald Ivansek
225 West Wacker Drive, Suite 1700
Chicago, Illinois 60606
(312) 752-3700

Tucker, Ellis & West
Lawrence Wilson
1100 Huntington Building
Cleveland, Ohio 44115
(216) 592-5000

Philips Lytle, LLP
Nathan A. Schachtman
437 Madison Avenue, 34th Floor
New York, New York 10022

PROCEEDINGS

THE COURT: Good afternoon. We're having technical difficulties already, and the trial has not even started.

We're here for a final pretrial in this matter. Let me ask you how to pronounce the plaintiff's name. Everybody is saying Tamraz, but that is not how it is spelled.

MR. CLIMACO: Your Honor, I am one of those. I have been corrected by my co-counsel. It is Tamraz. That doesn't mean that a few times I won't say Tamraz.

THE COURT: I just realized that David and I have been for the last several days using the name, and then I looked at the spelling again this morning and realized we were not pronouncing it properly or appeared to be.

Okay. We have a number of issues to address. There are a number of motions in limine. We'll go through again some general pretrial matters. Most of you are very familiar with them. And we'll talk briefly about the summary judgment motions.

As with Goforth, I see very little reason for me to have argument on most of these issues. I might have a few questions relating to some of them, the ones that are new. But as to the bulk of these motions, they

either raise issues that we have seen in the past, even though sometimes there are some new arguments presented, or they raise issues with which even though not framed in the exact same way but with which I have sufficient familiarity that I think I can rule without much discussion.

I'm going to start with the motions, the pretrial motions. Pretty much we will go according to docket numbers with one exception, and that is I'm going to skip the first one, which is Docket Number -- I'm sorry, that's the second one. All right.

Let's start with Docket Number 55, which is the first of the pretrial motions, it is defendants' motion for order to exclude the plaintiffs' experts. This is simply a reiteration of arguments the defendants have made in the past with respect to a number of the plaintiffs' experts and specifically Cunitz, Longo, Parent and Rosen.

I have already addressed all the arguments presented by the defendants and the defendants' current briefing candidly concedes that. The defendants ask me to adopt all portions of my prior rulings that exclude any portions of that testimony, and to rethink those portions of my prior rulings that allow any portions of the testimony by those individuals. Plaintiffs simply

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specifically think he got wrong. But I don't think that needs to be litigated.
THE COURT: We're not going to try other people's cases here. But if there is a situation where Dr. Nausieda himself said, you know, I got it wrong, I mean, I don't know if there is, but --
MR. DAVIS: I don't have anything in mind. But I just thought that -- they may try to bring it in.
MR. KENNEDY: Your Honor, I think there are one or two he admitted where he was wrong. It is not our intention in this case to talk about his mistakes in other cases. We do reserve our right, though, to go down that road in further cases, but we don't intend to do that here.
THE COURT: Okay. Before I get to my least favorite topic, which is the Danish and Swedish studies, I'm going to just mention the summary judgment motions.
You will get a written order, if not tomorrow then probably over the weekend, confirming the Court's rulings, but essentially, the motions for summary judgment at docket numbers 51, 52, 53, and 54 are granted. The motion for summary judgment at Docket Number 50 is denied.
So on the breach of warranty claim, the strict liability design defect claims, and the aiding and

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abetting claims, the motion is granted.
The motion is also granted as it relates to negligent performance of a voluntarily undertaking. The motion is denied as it relates to punitive damages, and the Court has not yet addressed mainly because it slipped through the cracks the motion for judgment on the pleadings as to the common law fraud issue.
To the extent that that overlaps as it relates to aiding and abetting, then it would be moot as it relates to aiding and abetting, but we need to look at the common law fraud issue. As I said, I let that one slip through the cracks and didn't review it when David provided me with the materials for it so I'm not prepared to address that. But you will have written orders on all of those by the latest over the weekend.
It is almost ready, but there are a few additional things to address.
All right. Let me ask you about the Swedish -- well, the Danish study, let me back up.
As I understand it, the Danish study, Miss Cohen, no relation to the Special Master, found --
MR. SCHACHTMAN: There are a lot of Cohens, and to our knowledge, she is not related to any of the Cohens in this case.
THE COURT: She found a disk in her

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basement?
MR. SCHACHTMAN: Mr. Buckley, IEI's lawyer, undertook his own investigation, and previously, I was dealing solely with Dr. Fryzek, so when the Court asked us to ask the investigators what they might have, I got on the phone with John Fryzek, and John Fryzek assured me he didn't have the data, didn't think he could get the data in this country.
Mr. Buckley interviewed everybody who had touched that study in any way at IEI and in that process contacted Sarah Cohen, who is no longer with IEI. She is on the payroll but now is a doctoral student at UNC. Miss Cohen had backed up files from her hard drive to a CD, which she had in her basement. So, thus, the genesis of the basement CD.
That CD was subsequently produced, and it has been available since I think February of this year. When I took Dr. Wells' deposition on Tuesday, he has never been provided it, he has not asked for it, nobody has ever done anything with that CD, which has all the data runs that Dr. Fryzek and colleagues did.
And that's where it is.
THE COURT: Well, I doubt that nobody has ever done anything with it. Mr. Crosby probably spent plenty of time with that CD.

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MR. SCHACHTMAN: No testifying witness has done it. And we have not been put on notice that they have some reanalysis on the basis of that CD.
THE COURT: So despite the odd circumstances under which the material came in, the defendants position, there is no dispute now that the plaintiffs have the full dataset as relates to the study.
MR. SCHACHTMAN: There is a slight issue. Part of the study continues to grow. In other words, data continues to accumulate. And that CD represents a snapshot in time. And so the plaintiffs have available to them the data on which Dr. Fryzek and colleagues ran their analysis. If they went to Copenhagen today, the cohort registry is continuing to grow in terms of diagnoses and the like.
THE COURT: But there is not a new study issue.
MR. SCHACHTMAN: There is no new study.
MR. DAVIS: Your Honor, I'm not up to speed on this. There is volumes of stuff I don't know about this. I do know we want to be able to do is the same thing that we were told we could do in the Duke case. The facts that gave rise to the Court allowing us to cross-examine on the various points that Your Honor talked about prior to the trial starting are still true.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

In Re: Welding Rod Civil Actions Products Liability Litigation	)	Justice Francis E. Sweeney
Joseph Boyd, et al.,	)	Case No. 545413
Plaintiffs,	)	
v.	)	**ENTRY AND OPINION**
Lincoln Electric Co., et al.,	)	
Defendants.	)	

I. INTRODUCTION

The current litigation arises from a complaint filed by the above-captioned Plaintiff alleging that he is suffering from manganese-induced parkinsonism caused by his exposure to welding rod fumes during his career as a boilermaker from 1977 until mid-2004. Plaintiff has asserted causes of action for, among other things, conspiracy, fraud, fraudulent concealment, failure to warn, failure to test, aiding and abetting, and negligent performance of a voluntary undertaking.

For the foregoing reasons, Defendants' Motion for Summary Judgment on Count Eleven is granted.

II. LAW AND ARGUMENT

A. Standard of Review

Summary judgment may be granted only when it is demonstrated:

> " *** (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor."

Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64; Civ.R. 56(E). When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. Dresher v. Burt (1996), 75 Ohio St.3d 280. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing there is a genuine issue of material fact. Civ.R. 56(E); Riley v. Montgomery (1984), 11 Ohio St.3d 75. A material fact is one that would affect the outcome of the suit under the applicable substantive law. Needham v. Provident Bank (1986), 110 Ohio App.3d 817, citing Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242.

B. Negligent Performance of a Voluntary Undertaking

Plaintiff argues that Defendants voluntarily undertook the duty of providing the welding community with information regarding the possible hazards associated with welding, and in so doing, negligently failed to provide information that was accurate and honest. This claim rests on what is commonly referred to as the "Good Samaritan Doctrine," which is codified in Restatement (Second) of Torts, Section 324A:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> a) his failure to exercise reasonable care increased the risk of such harm, or
> b) he has undertaken to perform a duty owed by the other to the third person, or
> c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement of Torts (Second), Section 324A.

Plaintiff argues that the Defendants were members of two main trade organizations that voluntarily undertook to provide safety information to the welding community through its various subcommittees and task groups. These two groups are the National Electric Manufacturers Association ("NEMA") and the American Welding Society ("AWS"). Plaintiff point to depositions and the organization's own website to show that NEMA has been involved with the development of technical and regulatory standards within the industry, as well as played an advocacy role in the formulation of public policy. Plaintiff further points to resolutions and meeting minutes of AWS that seem to reflect that the organization undertook to create safety standards for warning welders, and then charged itself with the duty of promulgating those standards to the industry. Finally, Plaintiff directs the Court to the documentation that allegedly shows the "Industry Conspirators" knew of the harmful effects of manganese exposure, and negligently (although Plaintiff's language seems to indicate it was "purposefully") allowed publications to be manipulated, ignored testing, and withheld information that manganese exposure was harmful from the welding industry.

Defendants, on the other hand, argue that they should not be held liable for the action or inaction of NEMA or the AWS simply because they were members of both organizations. They argue that they have assumed no additional duty to the Plaintiff by way of their membership in a trade organization, and in making this argument direct the Court to the holdings of Judge O'Malley in Solis v. Lincoln Electric Co. (N.D. Ohio May 10, 2006), No. 04:CV-17363, 2006 WL 1305068, and a Montana Circuit Court in Hunt v. Air Prods. & Chemicals (Cir. Ct. Mo. Apr. 20, 2006), No. 052-9419, 2006 WL 1229082. Both are recent welding rod cases where similar arguments were made that certain defendants voluntarily assumed the duty of informing welders of the alleged dangers of manganese exposure by way of their membership in trade organizations. Judge O'Malley and the Montana Circuit Court both held that a defendant did not assume any additional duty to a plaintiff – beyond that imposed by traditional products liability law – simply by its involvement or membership in a trade organization.

The Court agrees with that rationale. Mere membership in a trade organization is not enough to impose liability on a defendant for the actions of that organization, specifically in this case, for Defendants to be held liable for NEMA and AWS undertaking a duty to provide safety information to the welding industry about the possible harmful effects of exposure to manganese. Plaintiff has provided no evidence that any of the Defendants were specifically involved in the decision-making by the organizations to undertake the duty of providing safety information, only broad allegations that they should be held liable because

of their membership. Following Plaintiff's logic, if the Court were to hold these Defendants liable, it would likewise be possible for every other member of either of these organizations to be held liable. Similarly, any person or entity involved in the formulation of these standards and warnings through the American National Standards Association could be held liable. Finding a party liable simply because of its membership in an organization is too simplistic and broad of a judgment, and would go against public policy.

For these reasons, the Defendants' Motion for Summary Judgment on Count Eleven is granted.

IT IS SO ORDERED.

_____

Justice Francis E. Sweeney
July 9, 2007

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

In Re: Welding Rod Civil Actions *Products Liability Litigation*	)	JUSTICE FRANCIS E. SWEENEY
Joseph Boyd, et al.,	)	Case No. 545413
Plaintiffs,	)	
v.	)	**ORDER**
Lincoln Electric Co., et al.,	)	
Defendants.	)	

Defendants' Motion for Summary Judgment on Count Ten is hereby granted.

IT IS SO ORDERED.

_____
Justice Francis E. Sweeney
July 10, 2007

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH and KATHALEEN BOYD, 16041 Coolidge Ave. East Liverpool, OH 43920	CASE NO.: CV-04-545413
PLAINTIFFS,	RELATED TO CONSOLIDATED CASE NO. 531703 JUSTICE FRANCIS E. SWEENEY
vs.	
Lincoln Electric Company c/o H. Jay Elliot 22801 St. Clair Ave. Cleveland, OH 44117	FIRST AMENDED COMPLAINT JURY TRIAL DEMANDED
and	
The BOC Group, Inc. f/k/a/ Airco, Inc. c/o C.T. Corporation System Inc. 1300 E. 9th St. Cleveland, OH 44114	
and	
TDY Industries Inc. f/k/a Teledyne f/k/a Allegheny Technologies, Inc. c/o C.T. Corporation System 1300 E. 9th St. Cleveland, OH 44114	
and	
Arcos Industries, L.L.C. f/k/a Arcos Alloys	

appropriate level.

159. In the mid to late 1970's, Defendants and other entities attempted to prevent ACGIH from lowering the TLV for Manganese from 5 mg/m^3 to 1 mg/m^3.

160. In the early 1990's, Defendants and other entities successfully thwarted OSHA's attempt to lower the PEL for Manganese from 5 mg/m^3 to 1 mg/m^3.

161. In the mid 1990's, Defendants and other entities, and in particular Lincoln Electric and Caterpillar, both individually, collectively, and through their membership, participation, and funding of AWS, NEMA, and "The Ferroalloys Association," attempted to prevent the ACGIH from lowering the TLV for Manganese from 1 mg/m^3 to 0.2 mg/m^3 although they knew that exposure at such levels was hazardous.

162. Defendants and other entities, through such conduct and actions, substantially associated and encouraged Warning Defendants not to adequately warn the Plaintiff of the adverse health effects of exposure to Manganese in welding fumes at such levels. Through such conduct, Defendants also acted in concert with Warning Defendants pursuant to their common plan to fail to warn Plaintiff and other welders, and further, as joint and concurrent tortfeasers with Warning Defendants in their failure to warn.

TENTH CLAIM--AIDING AND ABETTING, ACTING IN CONCERT, AND JOINT AND CONCURRENT TORTFEASERS IN THE FAILURE TO INVESTIGATE AND TEST THE HEALTH HAZARDS OF EXPOSURE TO MANGANESE IN WELDING FUMES

163. The Plaintiffs re-allege and incorporate the foregoing allegations as if fully rewritten herein.

164. All of these Defendants and other entities, both individually and

collectively, aided and abetted each other and Warning Defendants' tortious failure to investigate the welding consumables and machines the Plaintiff used for any adverse health hazards of exposure to manganese in welding fumes, under Restatement (Second) of Torts §876(b) as alleged herein.

165. Moreover, these Defendants and other entities also acted in concert with Warning Defendants in their tortious failure to investigate or test the welding consumables that the Plaintiff used for any adverse health effects of exposure to manganese in welding fumes pursuant to their common design or plan not to test welding consumables under Restatement (Second) of Torts § 876(a) as alleged herein.

166. Lastly, Defendants and other entities were joint and concurrent tortfeasers with Warning Defendants in their failure to investigate or test its welding consumables for any adverse health effects of exposure to manganese in welding fumes as alleged herein.

167. Since the 1930's, Defendants and other entities individually, collectively, and through their membership and participation in NEMA and AWS, knew of the association between exposure to manganese in welding fumes and neurological injury.

168. Since the mid 1970's, Defendants and other entities, and in particular Caterpillar, individually, collectively, through their membership and participation in AWS's "Safety and Health" Committee and sponsorship of AWS's "Effects of Welding on Health" publication, and through their membership in NEMA, knew that an epidemiological study was necessary to determine the extent and the prevalence of the association between exposure to manganese in welding fumes and neurological injury.

169. Defendants and other entities also knew that Warning Defendants had

failed to conduct such an epidemiological study or sufficiently test their welding consumables.

170. Defendants and other entities also knew that Warning Defendants and the rest of the welding industry looked to them, AWS Safety and Health Committee, and NEMA for guidance and leadership on whether an epidemiological study of neurological injury and exposure to welding fumes was necessary or warranted.

171. However, Defendants and other entities, individually, collectively, and through their membership and participation in AWS's "Safety and Health" Committee and NEMA, refused to develop, conduct, support, or fund such a necessary epidemiological study or otherwise test their welding consumables.

172. Defendants' and other entities' refusal to test their consumables or conduct, support, or fund an epidemiological study of the association between neurological injury and exposure to welding fumes substantially assisted, encouraged and justified Warning Defendants continual failure to investigate or test their products or conduct any epidemiological study. Defendants, through their refusal to conduct an epidemiological study, also acted in concert with Warning Defendants in their failure to investigate and test, pursuant to their common design not to investigate or test, and further, as joint and concurrent tortfeasers in Warning Defendants failure to investigate or test.

173. Such conduct and injury proximately caused Plaintiff injury and damage.

ELEVENTH CLAIM–LIABILITY TO PLAINTIFF FOR NEGLIGENT PERFORMANCE OF UNDERTAKING

174. The Plaintiffs re-allege and incorporate the foregoing allegations as if fully rewritten herein.