



# Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association

July 2008

## Sophisticated User Decision Helps: But it Doesn't Let Manufacturers off the Hook

By Susan Barrett Harty

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A recent California Supreme Court decision adopting the "sophisticated user" doctrine -- essentially a common sense rule that a manufacturer does not need to warn knowledgeable users of known risks -- is good news for manufacturers whose products carry risks that should be known to the professionals who use them. Yet, it does not eliminate the need for manufacturers to continue following best practices when it comes to product warnings and other customer communications.

On April 3, the California Supreme Court recognized the "sophisticated user" doctrine as a defense in product liability cases. The ruling in *Johnson v. American Standard, Inc.* solidified the prevailing assumption that explicit product warnings are not necessary if the user understands or should understand the risks or dangers inherent in using the product.

The specific case was brought by a trained, certified HVAC technician who claimed that his exposure to hazardous gas used in HVAC systems caused him to develop pulmonary fibrosis. He argued that the manufacturer of the product was negligent and liable for failure to warn him of those hazards.

The Supreme Court disagreed, upholding a lower court ruling that, because the technician was certified and had received training that included warnings about the hazard, he should have understood the risks and acted accordingly. The Supreme Court further recognized that the buying customer has the responsibility to ensure its employees who routinely use the products in their occupations understand any known risks and hazards, reasoning, "[t]he failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers."

This decision is welcome news for manufacturers who sell their products in California or are subject to toxic tort or mass tort lawsuits. While other states already utilize the "sophisticated user" doctrine, California has been a dangerous jurisdiction for manufacturers due to large jury verdicts and an increasing number of plaintiffs from other states seeking to file their lawsuits there. The *Johnson* decision helps to temper the likelihood that plaintiffs will bring similar suits there in the future as it is anticipated that this defense can be

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Tech Tip: **Public Domain Citation Format**

Julie Koehne, Assistant Law Librarian

According to The Revisions to the Manual of Citations, "In order to make the opinions of the Supreme Court, courts of appeals, Court of Claims, and trial courts readily accessible to the public, the Supreme Court has developed a system for the posting, management, and retrieval of those opinions. Each opinion posted to the Supreme Court's website will be assigned its own unique number or "WebCite." The WebCite, in the form of "2002-Ohio-12345," is similar to the familiar Westlaw ("WL") and Lexis ("Ohio Lexis") citations. The Supreme Court's website can be accessed at <http://www.sconet.state.oh.us/>. The new opinions search index can be accessed at <http://www.sconet.state.oh.us/ROD/documents/>."

**Where did this citation come from?**

Rev. Iyabo Nadra, Plaintiff-Appellant, v. Susan Mbah and Mindy Grote, Defendants-Appellees.

No. 06AP-829

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2007 Ohio 501; 2007 Ohio App. LEXIS 448

February 6, 2007, Rendered

**SUBSEQUENT HISTORY:** Discretionary appeal allowed by *Nadra v. Mbah*, 114 Ohio St. 3d 1424, 2007 Ohio 2904, 868 N.E.2d 679, 2007 Ohio LEXIS 1527 (2007).  
 Motion denied by *Nadra v. Mbah*, 114 Ohio St. 3d 1522, 2007 Ohio 4598, 873 N.E.2d 320, 2007 Ohio LEXIS 2172 (2007).  
 Motion granted by *Nadra v. Mbah*, 2008 Ohio 246, 2008 Ohio LEXIS 246 (Ohio, Feb. 7, 2008).

**PRIOR HISTORY:** [\*\*1] Criminal Appeal from: Court of Common Pleas. TRIAL NO. 06AP-829.

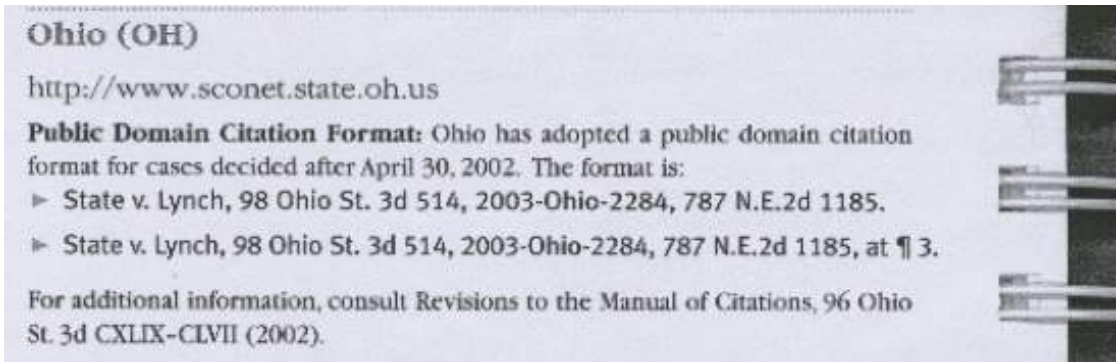
**DISPOSITION:** Judgment affirmed in part, reversed in part, and cause remanded.

Common Pleas' entry of summary judgment for defendants-appellees, Susan Mbah ("Mb") and Mindy Grote ("Grote") (collectively "appellants") is affirmed for the following reasons, we affirm in part and reverse in part.

[\*P2] On February 25, 2005, appellant filed a complaint in the Franklin County Court of Common Pleas, purporting to allege claims of fraud, breach of contract, and wrongful termination against Franklin County Children Services ("FCCS"), Susan Mbah ("Mb"), Mindy Grote ("Grote"), and FCCS worker, and Grote, an FCCS worker. Appellant's claims arise from the removal of Mbah and Grote from her custody on January 12, 2005, and her subsequent placement in the custody of the Franklin County Children Services, Division of Domestic Relations, and the Franklin County Children Services Juvenile Branch, alleging that Mbah, Grote, and FCCS abused, neglected, and dependent on Mbah and Grote.

**When did this happen?**

According to The Bluebook, A Uniform System of Citation 226 (18<sup>th</sup> ed. 2005), the change occurred May 1, 2002.



The Revisions to the Manual of Citations are available at The Ohio Supreme Court's website. [http://www.sconet.state.oh.us/ROD/pdf/Rev\\_Manual\\_Cit\\_02.pdf](http://www.sconet.state.oh.us/ROD/pdf/Rev_Manual_Cit_02.pdf)

applied to other failure to warn claims, including those in toxic tort and mass tort lawsuits.

While manufacturers should hail the *Johnson* decision as an important tool against frivolous lawsuits, in no way should manufacturers believe it completely absolves them of responsibility when it comes to disclosure of product hazards and good communication with customers.

As the Supreme Court recognized, not all warnings lead to user safety and requiring manufacturers to warn of every conceivable risk would "invite mass consumer disregard and ultimate contempt for the warning process." Thus, it is important that product manufacturers follow best practices when warning about product hazards or risks and strive to maintain the balance between necessary warnings and overwarning.

To ensure that product warnings comply with best practices, a company should:

- Review on a regular basis its existing warnings and ensure they reflect current safety, industrial hygiene, and medical knowledge;
- Understand the laws, regulations and legal decisions, including foreign regulations if the product is sold outside the United States, governing use, warnings, training, labeling and disposal;
- Check for published guidelines from state or federal agencies applicable to the product;
- Adhere to industry standards, including those developed by trade associations and standards organizations;

- Consult with legal, industry and human factors experts as necessary; and
- Review and update any training programs and product documentation to reflect proper product use and handling instructions for the product's intended user.

Once the warnings have been updated, it is essential to retain good records. Companies should always document the sources used to advise customers about product safety, especially training programs, instruction manuals and sales literature. Further, companies should retain records of communications with customers, so if there is a need for documentation, "sophisticated user" status can be established.

While the *Johnson* case should give manufacturers doing business in California some comfort, the best protection is to follow best warning practices and retain documentation establishing the same.

*Susan Barrett Harty is a partner in the Vorys Columbus office and a member of the litigation practice group. She develops strategies for the client's compliance with international hazardous material regulations, such as REACH, (Registration, Evaluation, Authorization and Restriction of Chemical Substances), RoHS (Restriction of Hazardous Substances Directive) and GHS (Globally Harmonized System of Classification and Labeling of Chemicals).*

<http://www.vssp.com/>

## Mining for Gold: Discovering e-Discovery

By Glenna Herald

Before the digitization of information, creating a single document took hours of hard work. Because of the time and labor involved in document production, the nature of information differed from the information we generate today. For example, before the digital revolution, information possessed the following characteristics:

- Documents tended to be more thoughtful in tone
- There were fewer documents generated
- The generated documents were easier to manage/destroy

These factors made the discovery of evidence less complicated for litigators, as fishing for information was done in a much smaller pond.

Today, however, the digitization of information makes it a great deal easier to create and exchange documents and correspondence. The consequences of less labor-intensive document construction follow.

- Documents tend to be more informal and less thoughtful in tone
- There are many more documents generated
- The generated documents are harder to manage/destroy

These factors contribute to the rough terrain of today's evidence discovery processes. One example of this is how computers have the ability to bury bits of information we think have been deleted. Therefore, a key piece of evidence that may have been destroyed in the pre-digital age, may not be destroyed today.

*Continued on next page*

## Member Benefits

All members have access to the following valuable resources and services:

**Circulation privileges** to borrow from over 40,000 print volumes for **up to 6 weeks** at a time

Access to extensive electronic databases from the Law Library, including **LexisNexis**, **Shepards'**, **CCH Omnitax**, **CCH Human Resources Group**, and **CCH Business Group** resources, **Hein Online Law Journals** and **Federal Register**, and over 70 **Aspen / LOISLaw** treatises in 16 substantive areas

**Wireless network** throughout the Law Library

Polycom **videoconferencing**

5 **meeting rooms** with speaker phones

Professional **reference service** by our law librarians, available via e-mail, telephone, and in person;

Free **document delivery** by fax or e-mail of print and electronic materials

Inexpensive **CLE seminars** throughout the year, on legal research and substantive topics

In addition, solos and members whose firm has a membership have **24 hour remote access** to Fastcase.com case law and Aspen/LOISLaw treatises

The information could be buried deep in the hard drive of a computer, waiting to be mined.

On the other hand, to mine this “deleted” information is quite costly and some litigants may choose not to pay for such an expensive mining expedition, as there are no guarantees. Although we believe we can access anything that has ever been typed onto the keyboard of a computer, by a glitch or a simple mistake, the information may be destroyed, never to be recovered. In short, all of these factors (and more) contribute to the rugged landscape of evidence discovery in the digital age.

However, there is help! To assist you in mapping your journey through the convoluted worlds of electronic discovery and digital evidence the law library offers you the following materials.

### Print Materials

*Electronic discovery: law and practice / Adam I. Cohen, David J. Lender.*  
Author: Cohen, Adam I., 1968-  
Call Number: KF8902.E42 C64

*Electronic evidence: law and practice / Paul R. Rice.*  
Author: Rice, Paul R.  
Call Number: KF8935 .R485 2005

*Records retention for enterprise knowledge management / by Stanley M. Gibson and Robert E. Braun*  
Author: Gibson, Stanley M.  
Call Number: KF6289.A1 T355 no. 86

*The new e-discovery rules: amendments to the Federal rules of civil procedure scheduled to take effect Dec. 1, 2006.*  
Call Number: KF8947 .N493 2006  
Status: Available

### Electronic database

*BNA's Digital Discovery and e-Evidence - This database can be accessed only from within either the Law Library (on its wired or wireless network) or Hamilton County buildings*

### Blogs

*Electronic Discovery Blog, written by W. Lawrence Westcott II, a senior consultant with Kahn Consulting, Inc ( <http://www.kahnconsultinginc.com/> ), a firm specializing in the legal, compliance and policy issues of information technology and information management.*

<http://www.electronicdiscoveryblog.com/>

*E-Discovery and many subcategories on llrx.com*

<http://www.llrx.com/category/1056>

[\(http://www.llrx.com/columns/emaildataconversion.htm\)](http://www.llrx.com/columns/emaildataconversion.htm)

*E-Discovery Team at*

<http://ralphlosey.wordpress.com/>

*written by attorney Ralph Losey, author of the ABA publication e-Discovery: Current Trends and Cases*



## New to the Law Library on Westlaw

By Mary Jenkins

In addition to the Ohio Practice Library and West's Forms Library, the Law Library has just added a number of Westlaw collections for use onsite. For a complete list of titles included in each of these products, contact Mary Jenkins, Law Librarian.

### Ohio Primary Law

- Ohio state case law
- Ohio state annotated statutes
- Ohio Administrative Code
- Ohio Attorney General Opinions

### Ohio Analytical Library

- Ohio Jurisprudence
- Ohio Pleading and Practice
- Ohio Legal and Business Forms



### Jury Verdicts

Summaries of jury verdicts, judgments, settlements, and arbitrations in U.S. state and federal courts

### Ohio Estate Planning

- All Ohio Estate Planning Forms & Checklists
- Merrick Rippner Probate Law
- Probate Law Journal of Ohio
- National Analytical Materials
- Estate Planning Law Reviews, Treatises, & Bar Journals
- IRS Tables Rates & Publications

### Analytical Library

- American Jurisprudence
- American Jurisprudence Pleading and Practice Forms Annotated
- American Jurisprudence Proof of Facts
- American Jurisprudence Trials
- American Law Reports
- Causes of Action

- Handbook of Federal Evidence
- Restatement of the Law
- Journals and Law Reviews Library

### Ohio Municipal Law

- Municipal
- Land Use, Zoning & Planning

### Kentucky Practice Series

- Appellate
- Business and Commercial
- Corporation Law with Forms
- Civil Procedure Forms
- Criminal Practice and Procedure
- Domestic Relations
- Family
- Litigation Combined
- Methods of Practice
- Probate Practice and Procedure
- Rules of Civil Procedure
- Real Property
- Substantive Criminal Law
- Trial Practice
- Tort Law
- Workers' Compensation with Forms

### Ohio Family Law

- FinPlan Divorce Planner and Math
- Baldwin's Ohio Practice - Domestic Relations Law
- Ohio Domestic Violence Law
- Ohio Jurisprudence – Family Law
- Ohio Juvenile Law
- Domestic Relations Journal of Ohio
- NBI Family Law CLE Material – Ohio
- Ohio Family Law Forms
- All States Family Law Forms
- American Law Reports – Family Law
- Bankruptcy and Domestic Relations Manual
- Child Custody Practice & Procedure
- Children and the Law: Rights and Obligations
- Determining Child & Spousal Support
- Equitable Distribution of Property
- Legal Rights of Children
- Qualified Domestic Relations Orders
- Value of Divorce Assets

Cincinnati Law Library Association offers free CLE!!!!

Cincinnati Law Library is offering a free CLE covering new content and features on Westlaw. We recently added significant Westlaw content so this is a good opportunity to see what the Law Library offers and how to use it. Our trainer will demonstrate Jury Verdicts (summaries of jury verdicts, judgments, settlements and arbitrations), Ohio and federal analytical sources, and anything else YOU want to know about. You will find this to be a good refresher or introduction to Westlaw.

**Who:** CLLA members, FREE; Non-members, \$35.00

**What:** What's New on Westlaw CLE with trainer Denise Fogel (1 Ohio CLE credit)

**When:** Friday, July 25 at 11:00 a.m. – 12:00 noon

**Where:** Cincinnati Law Library, Hon. Robert S. Kraft Boardroom

**How:** Let us know if you plan to attend as seating is limited. Call 513.946.5300.



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