

56614-8

56614-8

80076-6

No. 56614-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Appellants,

v.

VIAD CORP.,

Respondent.

AMICI CURIAE BRIEF OF INGERSOLL-RAND COMPANY
AND LESLIE CONTROLS

1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

Mark B. Tuvim, WSBA No. 31909

Attorneys for Amici Ingersoll-Rand
Company and Leslie Controls

FILED
APR 11 2011
COURT OF APPEALS
DIVISION I
SEATTLE, WASHINGTON
[Signature]

ORIGINAL

TABLE OF CONTENTS

I.	IDENTITY AND INTEREST OF AMICI CURIAE.....	1
II.	STATEMENT OF THE CASE.....	2
III.	ARGUMENT	2
	A. Washington Law Limits Liability for Injury To Those Proximately Caused by a Manufacturer's Own Product.	2
	1. Appellants Fail to Establish a Legal Duty to Warn of Hazards Presented by Products Manufactured or Distributed by Others.	3
	2. Liability For External Insulation and Pipe Flange Connection Gaskets Rests With the Companies That Manufactured and Distributed Those Products, Not With Manufacturers of Equipment on Which They Were Installed.	6
	3. Respondent Equipment Manufacturers Are Not Legally Responsible for Replacement Gaskets or Packing They Did Not Manufacture or Distribute.....	14
	B. Plaintiffs' Proposed Expansion of Traditional Tort Liability Jurisprudence to Impose Liability for Exposure to or Failure to Warn About Another Manufacturer's Products Would Undermine Public Policy and Create Chaos.	17
IV.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Baughman v. General Motors Corp.</i> , 780 F.2d 1131 (4 th Cir. 1986) .	16, 17
<i>Berkowitz v. A.C.&S.</i> , 733 N.Y.S.2d 410 (App. Div. 2001)	5
<i>Bich v. General Electric Co.</i> , 27 Wn. App. 25, 614 P.2d 1323 (1980).....	5
<i>Blackwell v. Phelps Dodge Corp.</i> , 157 Cal.App.3d 372, 203 Cal.Rptr. 706 (1984)	10
<i>Bombardi v. Pochel's Appliance & TV Co.</i> , 9 Wn. App. 797, 515 P.2d 540, <i>modified</i> , 10 Wn. App. 23 (1973).....	7, 12
<i>Braaten v. Certainteed Corp.</i> , No. 25489 (Tex. Dist. Brazoria County – November 19, 2004).....	13
<i>Chicano v. General Electric</i> , 2004 WL 2250990 (E.D.Pa. 2004)	5
<i>Colter v. Barber-Greene Co.</i> , 525 N.E.2d 1305 (1988)	14
<i>Dooms v. Stewart Bolling and Co.</i> , 68 Mich.App. 5, 241 N.W.2d 738 (1976).....	17
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645, 782 P.2d 974 (1989).....	7
<i>Firestone Steel Products Co. v. Barajas</i> , 927 S.W.2d 608 (1996)	13
<i>Ford Motor Co. v. Wood</i> , 703 A.2d 1315 (Md. Ct. Spec. App. 1997)	14, 17
<i>Freeman v. I.B. Navarre</i> . 47 Wn.2d 760, 289 P.2d 1015 (1955).....	5
<i>Fricke v. Owens-Corning Fiberglass Corp.</i> , 618 So.2d 473 (La. Ct. App. 1993)	14
<i>Garman v. Magic Chef, Inc.</i> , 117 Cal.App.3d 634, 173 Cal.Rptr. 20 (1981).....	10
<i>Hamilton v. Beretta U.S.A. Corp.</i> , 96 N.Y.2d 222 (2001).....	4, 5

<i>Hayes v. Ariens Co.</i> , 462 N.E.2d 273 (1984).....	14
<i>King v. Seattle</i> , 84 Wn.2d 239, 525 P.2d 228 (1974)	4
<i>Koker v. Armstrong Cork</i> , 60 Wn. App. 466, 804 P.2d 659 (1991)	5
<i>Korin v. Owens Illinois, Inc.</i> , No. 3323 EDA 2003 (Pa. Super. August 2, 2004).....	5, 12
<i>Kuster v. Gould Nat. Batteries</i> , 71 Wn.2d 474, 429 P.2d 220 (1967).....	3
<i>Lindstrom v. A-C Product Liability Trust</i> , 424 F.3d 488 (6 th Cir. 2005)	14, 15
<i>Lockwood v. AC&S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987)	2, 7
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 125 Wn. App. 784 (2005)	7
<i>Mason v. General Motors Corp.</i> , 490 N.E.2d 437 (1986).....	14
<i>Mitchell v. Sky Climber, Inc.</i> , 396 Mass. 629, 487 N.E.2d 1374 (Mass. 1985)	14
<i>Niemann v. McDonnell Douglas Co.</i> , 721 F.Supp. 1019 (S.D. Ill. 1989)	15
<i>Palsgraf v. Long Island R.R. Co.</i> , 248 N.Y. 339 (1928).....	4
<i>Parkins v. Van Doren Sales, Inc.</i> , 45 Wn. App. 19, 724 P.2d 389 (1986).....	5
<i>Peterick v. State</i> , 22 Wn. App. 163, 589 P.2d 250 (1977), <i>overruled on other grounds, Stenberg v. Pacific Power & Light Co.</i> , 104 Wn.2d 710 (1985)	8
<i>Phillips v. A-Best Prods. Co.</i> , 665 A.2d 1167 (1995).....	12
<i>Powell v. Standard Brands Paint</i> , 166 Cal.App.3d 357, 212 Cal.Rptr.2d 395 (1985)	9
<i>Pulka v. Edelman</i> , 40 N.Y.2d 781 (1976).....	4, 5
<i>Rastelli v. Goodyear</i> , 79 N.Y.2d 289 (1992)	5, 11

<i>Robinson v. Reed-Prentice Div. of Package Machinery Co.</i> , 49 N.Y.2d 471, 403 N.E.2d 440 (1980).....	11
<i>Seattle First National Bank v. Tabert</i> , 86 Wn.2d 145, 542 P.2d 774 (1975).....	7, 8
<i>Sepulveda-Esquivel v. Central Machine Works, Inc.</i> , 120 Wn. App. 12, 84 P.3d 895 (2004).....	6, 14
<i>Snyder v. Med. Serv. Co. of E. Wash.</i> , 145 Wn.2d 233, 35 P.3d 1158 (1958).....	4
<i>Spencer v. Ford Motor Co.</i> , 41 Mich.App. 356, 367 N.W.2d 393 (1985).....	16
<i>Toth v. Economy Forms Corp.</i> , 391 Pa.Super. 383 (1990).....	5, 12
<i>Tulkku v. Mackworth Rees Division of Avis Industries, Inc.</i> , 101 Mich.App. 709, 301 N.W.2d 46 (1980).....	17
<i>Ulmer v. Ford Motor Co.</i> , 75 Wn.2d 522 (1969)	7
<i>Walton v. Harnischfeger</i> , 796 S.W.2d 225 (Tex. App. – San Antonio 1990).....	13
<i>Wells v. Vancouver</i> , 77 Wn.2d 800, 467 P.2d 292 (1970).....	5
<i>Wright v. Stang Mfg. Co.</i> , 54 Cal.App.4 th 1218 (1997)	5
Statutes	
RCW 7.72.010(3).....	6
Foreign Statutes	
S.C. Code Ann. § 15-73-10 <i>et seq.</i>	16
Other	
Restatement (Second) of Torts § 402A (“Section 402A”)	7, 9, 11, 12, 14, 17
W. Prosser, <i>The Law of Torts</i> , § 241 (4th ed. 1971).....	3

I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici Ingersoll-Rand Company (“Ingersoll-Rand”) and Leslie Controls (“Leslie”) submit this brief to assist the Court in determining the application of Washington law to equipment manufacturers and distributors to whose products – subsequent to their sale and distribution – asbestos-containing products manufactured, distributed, or otherwise placed in the stream of commerce by others are attached or installed.

Amici have a strong interest in this issue. For over one hundred and twenty-five years, Ingersoll-Rand has manufactured and/or marketed numerous types of multi-use products, including pumps and compressors; its customers have included the United States Navy and industrial facilities around the country and the world, including sites in the State of Washington. Leslie has manufactured and provided control valves and other equipment to naval and commercial vessels for decades. Both have become more frequent defendants in litigation in Washington and other states brought by plaintiffs alleging injury from exposure to asbestos-containing products affixed to or installed in their equipment subsequent to its sale and distribution. The decision in this case will have a significant effect on *Amici’s* liability under Washington law not for their own products, but for failing to warn about products manufactured and distributed by others.

II. STATEMENT OF THE CASE

Ingersoll-Rand and Leslie adopt the statements of the various respondents with respect to their respective issues.

III. ARGUMENT

A. Washington Law Limits Liability for Injury To Those Proximately Caused by a Manufacturer's Own Product.

Courts in Washington, and elsewhere, have rejected as a matter of law Appellants' novel theory of liability that respondents somehow had a duty to warn for another manufacturer's (a) insulation supplied and installed by third parties on the exterior of their equipment, (b) pipe flange connection gaskets, and/or (c) replacement internal gaskets/packing, despite the fact that respondents neither placed them in the stream of commerce nor earned a profit from their sale. Dismissal of Appellants' claims they were exposed to asbestos-containing products affixed to or installed in respondents' equipment is consistent with Washington law and the law of other jurisdictions around the country, and should be affirmed.

It is a bedrock principle of law, in Washington as in other states, that liability for injuries allegedly caused by a product does not extend to a defendant that was not part of the chain of distribution of that product. The Washington Supreme Court held in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987) that in order for there to be a triable issue of fact regarding proximate causation in an asbestos case, the

plaintiff must offer evidence supporting a reasonable inference that he or she was exposed to a particular defendant's asbestos-containing product that caused injury. In rejecting a "market share" theory of liability, the *Lockwood* court recognized:

Generally, under traditional product liability theory, the plaintiff must establish a reasonable connection between injury, the product causing the injury, and the manufacturer of a product. In order to have a cause of action the plaintiff must identify the particular manufacturer of the product that caused the injury.

Id. (emphasis added). Such evidence of proximate causation is required whether recovery is sought based on negligence, strict liability, or the failure to warn. *Kuster v. Gould Nat. Batteries*, 71 Wn.2d 474, 485, 429 P.2d 220 (1967); *see also* W. Prosser, *The Law of Torts*, § 241 (4th ed. 1971) (plaintiff must "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result.").

1. Appellants Fail to Establish a Legal Duty to Warn of Hazards Presented by Products Manufactured or Distributed by Others.

Appellants acknowledge their burden to demonstrate the existence of an actionable duty breached by respondent equipment manufacturers, but set out to craft a duty to warn myopically based on the foreseeability of hazards created by another's products and ignore the requisite "mixed considerations of logic, common sense, justice, policy, and precedent"

necessary under Washington law. See, e.g., *Snyder v. Med. Serv. Co. of E. Wash.*, 145 Wn.2d 233, 35 P.3d 1158 (1958). For support, Appellants cite the New York Court of Appeals opinion in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928). However, that Court has expressly rejected the same *Palsgraf*-based foreseeability argument raised here by Appellants:

Foreseeability should not be confused with duty. The principle expressed in [*Palsgraf*] is applicable to determine the scope of duty – only after it has been determined that there is a duty. Since there is no duty here, that principle is inapplicable. . . . When a duty exists, nonliability in a particular case may be justified on the basis that an injury is not foreseeable. In such a case, it can thus be said that foreseeability is a limitation on duty. In the instant matter, however, we are concerned with whether foreseeability should be employed as the sole means to create duty where none existed before. If a rule of law were established so that liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow. The liability potential would be all but limitless and outside boundaries of that liability, both in respect to space and the extent of care to be exercised, particularly in the absence of control, would be difficult of definition.

Pulka v. Edelman, 40 N.Y.2d 781, 785-786 (1976) (internal citations omitted); see also *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) (“Foreseeability, alone, does not define duty – it merely determines the scope of the duty once it is determined to exist.”) (citations omitted). Plaintiff’s citation to *King v. Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974), is similarly misplaced – *King* discusses only the lack of duty based on lack of foreseeability, not vice versa, and the authorities it cites clearly

treat foreseeability as a limitation on a duty's scope, not its basis.¹

Appellants also cite for support cases which require manufacturers and suppliers to warn of foreseeable hazard created by their *own* products which caused injury. None, however, support Appellants' novel theory that a product manufacturer must warn of hazards from products *other* than its own, and several expressly rejected the existence of such a proposed duty.² In fact, Appellants completely ignore such important alternative considerations as the placement of liability on those who produce and profit from the sale of the injury-causing product or substance or who make the decision to use it, or that deterrence of harmful conduct

¹ See, e.g., *Wells v. Vancouver*, 77 Wn.2d 800, 803, 467 P.2d 292 (1970) (“Generally, the duty to use ordinary care is *bounded* by the foreseeable range of danger.”) (emphasis added).

² See, e.g., *Koker v. Armstrong Cork*, 60 Wn.App. 466, 476-477, 804 P.2d 659 (1991) (duty to warn arises when product manufacturer “becomes aware or should be aware of dangerous aspect of *its* product...”) (emphasis added); *Freeman v. I.B. Navarre*, 47 Wn.2d 760, 772-73, 289 P.2d 1015 (1955) (“duty of care on the part of the manufacturer does not arise out of contract, but out of the fact of *offering goods on the market...*”) (emphasis added); *Bich v. General Electric Co.*, 27 Wn. App. 25, 32-33, 614 P.2d 1323 (1980) (rejecting existence of any duty by a transformer manufacturer to warn about a defective fuse installed in its product, and holding manufacturer liable because its own transformer exploded and caused injury); *Parkins v. Van Doren Sales, Inc.*, 45 Wn. App. 19, 25, 724 P.2d 389 (1986) (plaintiff injured by the “relevant” assembly line part purchased from Van Doren); *Wright v. Stang Mfg. Co.*, 54 Cal.App.4th 1218 (1997) (basing liability on deck gun’s propensity to generate water pressure which caused the mounting system to fail – not for any failure to warn about the mounting system itself). The conclusory decision in *Berkowitz v. A.C.&S.*, 733 N.Y.S.2d 410 (App. Div. 2001), lacks cogent analysis, completely fails to address contrary authorities, and is inconsistent with higher court decisions in *Rastelli v. Goodyear*, 79 N.Y.2d 289, 297 (1992) (rejecting “that one manufacturer has a duty to warn about another manufacturer’s products”), *Pulka*, and *Hamilton*. The unpublished decision of the federal district court in *Chicano v. General Electric*, 2004 WL 2250990 (E.D.Pa. 2004), completely ignores Pennsylvania court decisions in *Toth v. Economy Forms Corp.*, 391 Pa.Super. 383 (1990), and *Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. August 2, 2004), and has not been followed.

is best enhanced when liability is squarely placed on those in the best position to avoid injury rather than diffusing it among multiple parties with little connection to the injury-causing product, special expertise in its hazards, or ability to develop alternative lower risk products.

In short, Appellants fail to demonstrate existence of an actionable duty to warn of hazards created by another's asbestos-containing products. All claims against respondent equipment manufacturers based on such a duty to warn were properly dismissed as a matter of law.

2. Liability For External Insulation and Pipe Flange Connection Gaskets Rests With the Companies That Manufactured and Distributed Those Products, Not With Manufacturers of Equipment on Which They Were Installed.

Further contrary to Appellants' attempt to expand the scope of the duty to warn, Washington law limits tort liability to those defendants who manufacture or otherwise place in the stream of commerce a particular product that causes injury. The Washington Products Liability Act (WPLA) expressly limits liability to those in the chain of distribution of the "relevant product" – "that product or its component part or parts which gives rise to the product liability claim." RCW 7.72.010(3) (emphasis added). Washington common law has reaffirmed this principle. *See Sepulveda-Esquivel v. Central Machine Works, Inc.*, 120 Wn. App. 12, 18-19, 84 P.3d 895 (2004) (manufacturers of hook not liable for harm caused

by latching “mouse” that they did not manufacture and that was added to the hook at a later point in time by the plaintiff’s employer); *Seattle First National Bank v. Tabert*, 86 Wn.2d 145, 148-149, 542 P.2d 774 (1975) (recognizing liability of those in the chain of distribution); *Falk v. Keene Corp.*, 113 Wn.2d 645, 651, 782 P.2d 974 (1989) (*Tabert* approach favored when Legislature enacted WPLA); *Bombardi v. Pochel’s Appliance & TV Co.*, 9 Wn. App. 797, 806, 515 P.2d 540, *modified*, 10 Wn. App. 23 (1973) (“purpose of [products] liability is to ensure that the costs of injury resulting from defective products are borne by the makers of the products who put them in the channels of trade[.]”).³

³ Washington has adopted Restatement (Second) of Torts § 402A (“Section 402A”) with respect to the assignment of legal responsibility for products liability claims, including asbestos-related claims. *See, e.g., Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 532 (1969) (applying Section 402A to manufacturers of unreasonably dangerous products); *Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn. App. 784, 792 (2005) (applying Section 402A to claim against asbestos distributor). Section 402A(a)(1) provides in pertinent part:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

- (a) the seller is engaged in the business of selling such a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Under this rule, costs associated with a defective product are appropriately “placed upon those who market them, and [] treated as a cost of production.” Section 402A, comment c; *see also Bombardi*, 9 Wn. App. at 806 (imposition of liability on those in the chain of distribution justified policy “to ensure that the costs of injuries resulting from defective products are borne by the makers of products who put them in the channels of trade” and benefit financially from them); *Tabert*, 86 Wn.2d at 147 (“[a] manufacturer is strictly liable in tort when an article he places on the market . . .”) (emphasis added); *Falk*, 113 Wn.2d at 651 (WPLA incorporates *Tabert* approach), *Lockwood*, 109 Wn.2d at 245

Peterick v. State, 22 Wn. App. 163, 589 P.2d 250 (1977), *overruled on other grounds*, *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 719 (1985), is instructive. In exchange for stock, Rocket Research (“Rocket”) assigned to its subsidiary EXCOA the patent for a liquid explosive Rocket had developed. Plaintiffs’ decedents were EXCOA employees killed in an explosion at a test facility designed, owned, and operated by EXCOA, and their estates sued Rocket, claiming it was strictly liable under a products liability theory because it had failed to give adequate warnings concerning the explosive. The trial court dismissed plaintiffs’ claims against Rocket and the Court of Appeals affirmed, explaining that because Rocket had not manufactured the explosive or had knowledge unknown to others, it had no duty to warn:

The initial limitation of all such actions requires the common denominator of a manufacturer or seller. *See Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 45, 148-149, 542 P.2d 774 (1975). . . . The facts alleged by plaintiffs fail to establish either that Rocket was the manufacturer or that Rocket had any duty to warn plaintiffs’ decedents of dangers that officials in EXCOA were aware of. The plaintiffs have failed to show any causal link between the explosion and any acts or omissions of Rocket. The plaintiffs did not produce evidence to rebut the defendant Rocket’s denial of control in the manufacturing process or its denial of any duty to warn plaintiff’s decedents, and that claim properly was dismissed.

(“plaintiff must identify the particular manufacturer of the product that caused the injury.”) (emphasis added). This rule and its underlying rationale effectively preclude respondents’ liability for asbestos-containing products of others such as flange gaskets and exterior insulation in which it has no financial stake or return.

Id. at 192-193 (citations omitted). Appellants similarly failed to offer evidence that respondents manufactured the injury-causing asbestos-containing product or possessed knowledge of dangers unknown to others.

Washington's limitation of product liability to the chain of distribution is consistent with a legion of decisions from other jurisdictions that, like Washington, have adopted the precepts of Section 402A and refused to impose any duty to warn upon a defendant who did not design, manufacture, or distribute the product that caused injury. For example:

California: In *Powell v. Standard Brands Paint*, 166 Cal.App.3d 357, 212 Cal.Rptr.2d 395 (1985), plaintiff sued Standard Brands because a lacquer thinner manufactured by Grove Chemical exploded the day after he had used a Standard Brands lacquer thinner sold without any warnings, claiming he would not have used any thinners if Standard Brands had warned him of the dangers of their use. The California Court of Appeals affirmed summary judgment in favor of Standard Brands:

[I]t is clear the manufacturer's duty is restricted to warnings based on the characteristics of the *manufacturer's own product*. Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of the risks of these products. A manufacturer's decision to supply warnings, and the nature of any warnings, are therefore necessarily based upon and tailored to the risks of use of the manufacturer's own product. Thus, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are

the only risks he is required to know.

166 Cal.App.3d at 364 (citations omitted) (emphasis in original).

The same rule applies where a manufacturer's safe product is used in conjunction with another manufacturer's defective component part. In *Garman v. Magic Chef, Inc.*, 117 Cal.App.3d 634, 173 Cal.Rptr. 20 (1981), the Court of Appeals affirmed summary judgment to stove manufacturer Magic Chef where the plaintiff sought to impose liability for failing to warn about risks from another manufacturer's adjacent pipe and t-joint which leaked propane that was ignited by the stove's nearby flame:

[T]he makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe manner or in conjunction with another product which because of a defect or improper use is itself unsafe.

117 Cal.App.3d at 638 (emphasis added). As the Court explained, “[t]o say that the absence of a warning to check for gas leaks in other products makes the stove unsafe is semantic nonsense.” *Id.* Similarly in *Blackwell v. Phelps Dodge Corp.*, 157 Cal.App.3d 372, 203 Cal.Rptr. 706 (1984), the court specifically distinguished between the defendant supplier's acid and the defective tank manufactured and supplied by a third party which was used to transport the acid with respect to the duty to warn:

While failure to warn may create liability for harm caused by use of an unreasonably dangerous product, that rule does not apply where it was not any unreasonably dangerous condition or feature of defendant's product which caused the injury.

157 Cal.App.3d at 377 (emphasis added). As in these cases, Appellants offered no evidence that respondents had any role in the manufacture or distribution of the relevant products.

New York:⁴ In *Rastelli v. Goodyear Tire & Rubber*, 79 N.Y.2d 289, 591 N.E.2d 222 (1992), plaintiff alleged that tire manufacturer Goodyear negligently failed to warn of the danger of using the tire on a multi-piece rim which exploded when inflating a Goodyear tire. While a product manufacturer could indeed be held liable in strict liability or negligence under New York law for failure to provide adequate warnings regarding its own products, the New York Court of Appeals expressly:

decline[d] to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. Goodyear had no control over the production of the subject multi-rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode.

79 N.Y.2d at 297-298. As in *Rastelli*, there is no evidence that respondents had any role in placing asbestos-containing products in the stream of commerce or benefited from their sale – a test expressly recognized in Washington and under Section 402A as a basis for product

⁴ See *Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 49 N.Y.2d 471, 479, 403 N.E.2d 440 (1980), regarding application Section 402A in New York State.

liability. See *Bombardi*, 9 Wn. App. at 806; Section 402A, comment c.

Pennsylvania:⁵ In *Toth v. Economy Forms Corp.*, 391 Pa. Super. 383, 571 A.2d 420 (1990), plaintiff's decedent was killed when a wooden plank broke on a construction scaffold. Plaintiff alleged that the scaffold manufacturer had a duty to warn about the inherent dangers of using wooden planks on its metal product. The court rejected this argument:

[Plaintiff's] theory would have us impose liability on the supplier of metal forming equipment to warn of dangers inherent in wood planking it did not supply. Pennsylvania law does not permit such a result.

391 Pa. Super. at 388-389, 571 A.2d at 423. In *Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. August 2, 2004), the court faced circumstances where, as here, there was no evidence of asbestos manufactured or supplied by the defendant:

[T]here is no evidence that General Electric made any of the asbestos insulation on the General Electric products with which Korin came in contact. General Electric is not liable if it made a product that was later insulated with someone else's asbestos. The insulation here was all on the outside of the General Electric components.

Id. at 6. As in *Toth* and *Korin*, respondent equipment manufacturers owe no duty to warn about defective component parts they did not supply, even if they reasonably knew or should have known the defective component would likely be used with its own product.

⁵ Pennsylvania courts have formally adopted Section 402A. See, e.g., *Phillips v. A-Best Prods. Co.*, 665 A.2d 1167, 1170 (1995).

Texas: In *Walton v. Harnischfeger*, 796 S.W.2d 225 (Tex. App. – San Antonio 1990), plaintiff alleged crane manufacturer Harnischfeger failed to warn about or provide instructions for rigging a nylon strap which broke and caused a load of tin to fall and injure him. The Texas Court of Appeals held that an equipment manufacturer had no duty to warn of potential dangers associated with another manufacturer’s products:

Appellee did not manufacture, distribute, sell, or otherwise place the nylon straps or any other rigging material into the stream of commerce; appellee is not in the business of manufacturing or selling any rigging material; and rigging is a complex art that requires different loads to be rigged in a multitude of different ways. We hold that, under the facts of this case, appellee had no duty to warn or instruct users of its crane about rigging it did not manufacture, incorporate into its cranes, or place into the stream of commerce.

796 S.W.2d at 227-228. *See also Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 613-16 (1996) (manufacturer has no duty to warn about another company’s products, even though those products may be used in connection with manufacturer’s own products); *Braaten v. Certainteed Corp.*, No. 25489 (Tex. Dist. Brazoria County – November 19, 2004) (pump manufacturer not required “to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by [defendant]”) (prior case brought by Appellant Braaten).⁶

⁶ Cases from other jurisdictions that have refused to impose liability on one company for the hazards of another company’s products include:

3. Respondent Equipment Manufacturers Are Not Legally Responsible for Replacement Gaskets or Packing They Did Not Manufacture or Distribute.

Washington law is also clear that a manufacturer is not responsible for component or replacement parts installed or affixed later that it did not manufacture or distribute. *Sepulveda-Esquivel*, 120 Wn. App. at 18-19.

This result is consistent with decisions in products liability cases – including asbestos-related cases – brought in other jurisdictions with products liability standards analogous to those adopted in Washington. In *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005), the Sixth Circuit Court of Appeals affirmed summary judgment under federal maritime law, ruling that a merchant seaman could not hold equipment manufacturers liable for his asbestos-related injury because he lacked evidence that he had worked with original gasket and packing material

-
- **Louisiana:** *Fricke v. Owens-Corning Fiberglass Corp.*, 618 So.2d 473, 475 (La. Ct. App. 1993) (manufacturer had no duty to warn about asbestos product that it neither manufactured nor sold). Louisiana follows the rule in Section 402A. See *Weber v. Fidelity & Casualty Ins. Co.*, 250 So.2d 754, 755 (1971); *Chauvin v. Sisters of Mercy Health Sys.*, 818 So.2d 833, 841 (2002).
 - **Maryland:** *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1331-32 (Md. Ct. Spec. App. 1997) (expressly refusing to hold that a manufacturer “has a duty to warn of the dangers of a product that it did not manufacture, market, sell, or otherwise place into the stream of commerce”).
 - **Massachusetts:** *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (Mass. 1985) (refusing to hold manufacturer liable “for failure to warn of risks created solely in the use or misuse of the product of another manufacturer”). While Massachusetts had not formally adopted Section 402A, but its courts have reached essentially the same result using a U.C.C. breach of warranty analysis. See *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1313 (1988); *Mason v. General Motors Corp.*, 490 N.E.2d 437, 441 (1986); *Hayes v. Ariens Co.*, 462 N.E.2d 273, 277 (1984).

installed by the equipment manufacturers or that the equipment manufacturers themselves had supplied replacement gaskets and packing containing asbestos. As the Court explained:

Even if Lindstrom's testimony is sufficient to establish that he came into contact with sheet packing material containing asbestos in connection with an Ingersoll Rand air compressor, Ingersoll Rand cannot be held responsible for asbestos containing material that was incorporated into its product post-manufacture. Lindstrom did not allege that any Ingersoll Rand product itself contained asbestos. As a result, plaintiffs-appellants cannot show that an Ingersoll-Rand product was a substantial factor in Lindstrom's illness in Lindstrom's illness, and we therefore affirm the district court's grant of summary judgment in Ingersoll Rand's favor.

Lindstrom, 494 F.3d at 497.

In *Niemann v. McDonnell Douglas Co.*, 721 F.Supp. 1019 (S.D. Ill. 1989), the District Court held, applying Illinois law, that a military aircraft manufacturer was not responsible under claims for strict liability, negligence, or failure to warn plaintiff about asbestos chafing strips used inside the aircraft's engine cowling because the original asbestos strips installed by the aircraft manufacturer had been replaced before the plaintiff had worked on the aircraft. The Court reached this conclusion even though the original asbestos-containing strips were replaced by asbestos-containing strips from another manufacturer. *Id.* at 1029-1030.

The same result has been reached in cases involving replacement automotive parts (including asbestos-containing parts). In *Baughman v.*

General Motors Corp., 780 F.2d 1131 (4th Cir. 1986), plaintiff tire mechanic injured when a multi-rim replacement wheel exploded argued that General Motors failed to adequately warn of the dangers associated with multi-rim wheels manufactured by others it could accommodate. The Fourth Circuit rejected this reasoning in affirming summary judgment:

Since the exploding rim in question was a replacement component part and not original equipment, Baughman's position would require a manufacturer to test all possible replacement parts. If the law were to impose such a duty, the burden on a manufacturer would be excessive. While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers. The duty to warn must fairly fall upon the manufacturer of the replacement component part. Since GM may not properly be charged under the law with a duty to warn against replacement component parts, plaintiff's duty to warn theory cannot prevail.

Id. at 1132-33 (citation omitted).⁷ Similarly in *Spencer v. Ford Motor Co.*, 41 Mich.App. 356, 360, 367 N.W.2d 393 (1985), a truck mechanic injured when a multi-rim wheel exploded claimed that a Ford truck was defective because it accommodated another manufacturer's defective part installed on the truck subsequent to the truck's distribution. The Michigan Court of Appeals disagreed:

Though a vehicle manufacturer may be held liable for damages caused by a defective component parts supplied by

⁷ See S.C. Code Ann. § 15-73-10 *et seq.* (codifying Section 403A).

another, this duty has not yet been extended to component parts added to a vehicle subsequent to distribution. . . The threshold requirement of any products liability action is identification of the injury-causing product and its manufacturer. Failure of a component not supplied by the [vehicle] manufacturer does not give rise to liability on the manufacturer's part."

Id. at 360 (internal punctuation and citations omitted).⁸

The result is the same in litigation involving asbestos-containing automotive replacement parts. In *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. 1998),⁹ plaintiffs unable to prove who had manufactured brake pads instead sued Ford alleging exposure to replacement asbestos-containing brake products. Citing *Baughman* with approval, the court held that "a vehicle manufacturer [is liable only for defective component parts] incorporated...into its finished product," not those added later. *Id.* at 1331.

B. Plaintiffs' Proposed Expansion of Traditional Tort Liability Jurisprudence to Impose Liability for Exposure to or Failure to Warn About Another Manufacturer's Products Would Undermine Public Policy and Create Chaos.

By seeking to impose liability on respondents for products they did not place in the stream of commerce, Appellants ask this Court to engage

⁸ Michigan's doctrine of implied warranty of fitness which underlies its products liability jurisprudence "is virtually indistinguishable in concept and practical effect" from strict liability under Section 402A. *Tulku v. Mackworth Rees Division of Avis Industries, Inc.*, 101 Mich.App. 709, 722 n. 4, 301 N.W.2d 46 (1980); *see also, e.g., Doms v. Stewart Bolling and Co.*, 68 Mich.App. 5, 10-11, 241 N.W.2d 738 (1976).

⁹ Maryland adheres to Section 402A. *See Lightolier v. Moon*, 876 A.2d 100, 108 (2005); *Ellsworth v. Sherne Lingerie, Inc.*, 495 A.2d 348, 353 (1985).

in an unprecedented expansion of well-established fundamental tort law jurisprudence. A defendant that was not part of a product's chain of distribution is singularly ill-equipped to prevent or protect against any dangers associated with that product. For that reason, courts have limited such duties to those entities in the best position to know of a product's non-apparent risks – the manufacturers and distributors of such products. Yet Appellants seek to eliminate that rational limitation and extend liability well beyond the chain of distribution.

If adopted by this Court, Appellants' theory would lead to chaos. If respondents should have warned of the hazards of asbestos-containing insulation that was affixed to the exterior of its equipment, every supplier of equipment to a facility at which such insulation was used – from the suppliers of pumps and turbines to the suppliers of steel pipes and sheet metal – could be held liable for having failed to warn of the dangers of the insulation. Moreover, the duty to warn presumably would flow in both directions: an insulation or gasket manufacturer, with reason to know that its product may have been applied to or installed in respondents' equipment, would be obligated to warn of any hazards it believed to be associated with operation of the equipment. Every product supplier, in fact, would be required to warn of the foreseeable dangers of other products used at the facility, leading to an extraordinary and confusing

proliferation of warnings, many of them issued by entities that professed no expertise in the product hazards about which they were warning.¹⁰

The law simply does not go that far. Under longstanding principles of public policy underlying Washington tort law, responsibility for a product's dangers properly rests with companies in the chain of distribution of that product, and responsibility for the safety of the workplace rests with the employer. By affirming the dismissal of Appellants' claims here, this Court will not be undermining public policy or leaving claimants without a remedy. To the contrary, such a ruling will place responsibility for gaskets and insulation where it belongs and where it traditionally has rested – with the parties who participated in the manufacture and distribution of those products, and with the employer who selected, purchased, and installed the products. To hold otherwise would dilute those parties' responsibilities under the law and reduce their incentive to manufacture and distribute safe products and to provide a safe workplace. There is, quite simply, no logical parameter for the duty to

¹⁰ A ruling in Appellants' favor would reverberate far beyond the area of asbestos litigation and turn Washington into a destination for claims barred elsewhere. For example, under a rule that those in the chain of distribution of a product must warn users of all potentially foreseeable risks of their product's interaction with unsafe products or components, department stores would have to warn that the glassware they sell could be used to drink milk (good for most, but not all) and alcohol to excess, makers of extension cords would have to warn about risks associated with power drills and all other electric tools which could be plugged into their product, and gas stations would have to warn about the dangers from chain saws and other garden tool or construction equipment.

warn beyond them. Fundamental principles of public policy require that Appellants' novel theory of liability be rejected.

IV. CONCLUSION

The grant of summary judgment and dismissal of claims against respondents arising from Appellants' exposure to asbestos-containing insulation and replacement parts is consistent with the law of Washington and other states. Appellants offered no controlling or persuasive authority to the trial court which holds otherwise, and they offer none now. To the contrary, the law recognizes that a duty is bounded by foreseeability, not created by it, and that product liability is logically limited to those in the product's chain of distribution who manufacture, distribute, or otherwise place those products in the stream of commerce rather than the boundless breadth proposed by Appellants. Their novel theory of liability should be rejected and summary judgment affirmed.

RESPECTFULLY SUBMITTED this 20th day of June, 2006.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



Mark B. Tuvim, WSBA No. 31909
Attorneys for *Amici Curiae*
INGERSOLL-RAND COMPANY AND
LESLIE CONTROLS

No. 56614-8-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOSEPH A. SIMONETTA and JANET E. SIMONETTA,

Appellants,

v.

VIAD CORP.,

Respondent.

APPENDIX OF NON-WASHINGTON AUTHORITIES

1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

Mark B. Tuvim, WSBA No. 31909

Attorneys for Amici Ingersoll-Rand
Company and Leslie Controls

2197
1001-1000

ORIGINAL

Amici Ingersoll-Rand Company and Leslie Controls hereby submit the following non-Washington authorities in support of their amici curiae brief:

CASES

1. *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986)
2. *Berkowitz v. A.C.&S.*, 733 N.Y.S.2d 410 (App. Div. 2001)
3. *Blackwell v. Phelps Dodge Corp.*, 157 Cal.App.3d 372, 203 Cal.Rptr. 706 (1984)
4. *Braaten v. Certainteed Corp.*, No. 25489 (Tex. Dist. Brazoria County – November 19, 2004)
5. *Chicano v. General Electric*, 2004 WL 2250990 (E.D.Pa. 2004)
6. *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305 (1988)
7. *Dooms v. Stewart Bolling and Co.*, 68 Mich.App. 5, 241 N.W.2d 738 (1976)
8. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608 (1996)
9. *Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App. 1997)
10. *Fricke v. Owens-Corning Fiberglass Corp.*, 618 So.2d 473 (La. Ct. App. 1993)
11. *Garman v. Magic Chef, Inc.*, 117 Cal.App.3d 634, 173 Cal.Rptr. 20 (1981)
12. *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001)
13. *Hayes v. Ariens Co.*, 462 N.E.2d 273 (1984)
14. *Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. August 2, 2004)

15. *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488 (6th Cir. 2005)
16. *Mason v. General Motors Corp.*, 490 N.E.2d 437 (1986)
17. *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374 (Mass. 1985)
18. *Niemann v. McDonnell Douglas Co.*, 721 F.Supp. 1019 (S.D. Ill. 1989)
19. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928)
20. *Phillips v. A-Best Prods. Co.*, 665 A.2d 1167 (1995)
21. *Powell v. Standard Brands Paint*, 166 Cal.App.3d 357, 212 Cal.Rptr.2d 395 (1985)
22. *Pulka v. Edelman*, 40 N.Y.2d 781 (1976)
23. *Rastelli v. Goodyear*, 79 N.Y.2d 289 (1992)
24. *Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 49 N.Y.2d 471, 403 N.E.2d 440 (1980)
25. *Spencer v. Ford Motor Co.*, 41 Mich.App. 356, 367 N.W.2d 393 (1985)
26. *Toth v. Economy Forms Corp.*, 391 Pa.Super. 383 (1990)
27. *Tulkku v. Mackworth Rees Division of Avis Industries, Inc.*, 101 Mich.App. 709, 301 N.W.2d 46 (1980)
28. *Walton v. Harnischfeger*, 796 S.W.2d 225 (Tex. App. – San Antonio 1990)
29. *Wright v. Stang Mfg. Co.*, 54 Cal.App.4th 1218 (1997)

STATUTES

30. S.C. Code Ann. § 15-73-10 *et seq.*

RESPECTFULLY SUBMITTED this 20th day of June, 2005.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

A handwritten signature in black ink, appearing to read 'Mark B. Tuvim', written over a horizontal line.

Mark B. Tuvim, WSBA No. 31909
Attorneys for Amici Curiae
INGERSOLL-RAND COMPANY AND
LESLIE CONTROLS

Ronnie K. Baughman, Appellant v. General Motors Corporation, Appellee

No. 85-1579

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

780 F.2d 1131; 1986 U.S. App. LEXIS 21230; CCH Prod. Liab. Rep. P10,874

November 7, 1985, Argued

January 7, 1986, Decided

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the District of South Carolina, at Columbia. Clyde H. Hamilton, District Judge. (C/A 84-1520-15).

LexisNexis(R) Headnotes

COUNSEL:

Frederick A. Gertz (George A. Kastanes; Cheryl A. Forest; Gertz, Kastanes & Moore on brief) for Appellant.

Stephen G. Morrison (Richard H. Willis; Nelson, Mullins, Grier & Scarborough on brief) for Appellee.

JUDGES:

Chapman and Sneed, Circuit Judges and Hilton, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINIONBY:

CHAPMAN

OPINION:

[*1131] CHAPMAN, Circuit Judge:

This is an appeal from summary judgment entered for the defendant General Motors (GM), in a diversity action brought under *S. C. Code Ann. § 15-73-10* et seq. This statute is *Section 402A of the Second Restatement of the Law of Torts*, which the General Assembly of South Carolina has enacted. The plaintiff, Ronnie Baughman, sought to recover for injuries received when a multi-piece wheel from a 1979 GMC truck separated with explosive force. GM was granted summary judgment on the grounds that it did not design, manufacture, or place into the stream of commerce the wheel in question. From this decision Baughman appeals. [*2] We affirm.

[*1132] I

Baughman was a tire mechanic; he was employed by Newton Truck Rentals, Inc. at the time of his accident. On May 25, 1981, Baughman was changing a tire on a 1979 GMC truck. The tire was mounted on a CR-2 multi-piece wheel. Baughman removed the left outside rear wheel from the truck and disassembled the tire, tube, rim base and side ring. He then replaced the tire and tube and reassembled the rim base and side ring. Baughman put the wheel in a safety cage in case it separated during inflation. Once the tire was inflated, Baughman removed it from the cage and rolled it over to the truck. Baughman began to remount the wheel and it exploded, severely injuring him.

At the time of the accident, Baughman had over two and one-half years of continuous experience in servicing all types of multi-piece wheels. By his own estimate, he had changed over 10,000 tires before his accident. Baughman had read literature on safety procedures for mounting various types of multi-piece wheel assemblies and twice before he had seen multi-piece wheels explode.

GM only puts CR-3 wheels on its trucks, and there is no question that the CR-2 wheel which injured Baughman was not [*3] marketed by GM. The CR-3 is also a multi-piece wheel. The CR-3 and the CR-2 share the same rim base, but the CR-2 has a one-piece side ring and the CR-3 has a two-piece side ring. Baughman's expert testified that the locking mechanism which holds the wheels together is identical on the CR-2 and the CR-3, but he went on to testify that the CR-3 is less likely to explode because of its two-piece side ring design.

Baughman presented two theories of liability. First, in designing the GMC truck in question, GM selected a CR type wheel, and Baughman argues that all CR type wheels are unreasonably dangerous. Even though the wheel which caused his injury is not the wheel which

GM put on the truck, Baughman would base liability on the fact that it is a similar type of wheel. Second, Baughman also argues that GM failed to warn him that the wheel could explode after the tire was fully inflated.

GM moved for summary judgment. The district court granted the motion, holding that GM could not be liable for an allegedly defective wheel which it did not design, manufacture, or place into the stream of commerce. The district court also held that GM had no duty to warn of possible dangers posed by [**4] replacement parts that it did not design, manufacture, or place into the stream of commerce. The court went on to note that even if GM had such a duty, its failure to warn could not have been the proximate cause of Baughman's injuries since Baughman was already well aware of the dangers inherent in multi-piece truck wheels. Baughman appeals from this decision.

II

As GM neither designed nor manufactured the CR-2 rim, if GM is to be held liable then it must be upon the theory of assembler's liability. A manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part. The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product. *Nelson v. Coleman Company*, 249 S.C. 652, 155 S.E.2d 917 (1967). As a necessary corollary, the plaintiff must be able to show that the defendant sold or exercised control over the defective product. See *Ryan v. Eli Lilly & Company*, 514 F. Supp. 1004, 1006-07 (D.S.C. 1981). [**5]

Where, as here, the defendant manufacturer did not incorporate the defective [*1133] component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own.

Baughman asserts that the GMC truck is defective because it incorporates the CR type wheel. His position is that GM selected a CR type wheel for its truck, and should not escape liability for injuries caused by a CR type wheel simply because it is not the same wheel which GM put on the truck. This argument must fail for the reasons stated above. GM never had the opportunity to test or evaluate CR-2 wheels such as the one which injured Baughman, therefore GM is not liable for his injuries.

Baughman also argues that the GMC truck was defective because GM failed to adequately warn of the dangers associated with multi-piece wheel rims. Since the exploding rim in question was a replacement component part and not original [**6] equipment, Baughman's position would require a manufacturer to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement parts. If the law were to impose such a duty, the burden upon a manufacturer would be excessive. While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers. The duty to warn must properly fall upon the manufacturer of the replacement component part. See *Spencer v. Ford Motor Company*, 141 Mich. App. 356, 367 N.W.2d 393 (1985). Since GM may not properly be charged under the law with a duty to warn against replacement component parts, plaintiff's failure to warn theory of liability cannot prevail.

Summary judgment is appropriate where the material facts are not in dispute and a party is entitled to judgment as a matter of law. *Rule 56(c), Fed. R.Civ.P.* In the instant case there is no dispute as to the material facts and GM is entitled to judgment. [**7] The district court was correct in holding that GM cannot be liable for injuries caused by a wheel rim assembly which it did not design, manufacture, or place into the stream of commerce.

AFFIRMED.

Harold Berkowitz et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Gilbert V. Harrison et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Anthony Martine et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Robert Roth, Respondent, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Morton Schwartz et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Marcus Schwartz et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Anthony Tancredi et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.
Donnel G. Williams et al., Respondents, v. A.C. and S., Inc., et al., Defendants, and Dresser Industries, Inc., et al., Appellants.

5104

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

288 A.D.2d 148; 733 N.Y.S.2d 410; 2001 N.Y. App. Div. LEXIS 11567

November 29, 2001, Decided
November 29, 2001, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs sued defendants for asbestos related injuries. The Supreme Court, New York County (New York) denied defendants' motions for summary judgment. Defendants appealed the decision.

OVERVIEW: The appellate court held the inability of certain plaintiffs to identify a defendant as the manufacturer of the pumps containing the asbestos to which they were allegedly exposed did not require dismissal of their actions, where defendants' own witness conceded that the pumps were on a very high percentage of Navy ships during the relevant time period, and workers in a Navy yard testified that the pumps they saw on ships were manufactured by a defendant. An issue of fact as to whether these pumps contained asbestos was raised by defendants' admission that a defendant sometimes used gaskets and packing containing asbestos, and other evidence. Nor did it necessarily appear that the defendant had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. The appellate court held that while it might be techni-

cally true that the pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it was at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation.

OUTCOME: The orders were affirmed, without costs.

COUNSEL: [***1] For Plaintiffs-Respondents, Stephen Rackow Kaye.

For Defendants-Appellants: Ira G. Greenberg.

JUDGES: Concur--Nardelli J.P., Tom, Andrias, Lerner, Marlow, JJ.

OPINION: [*149] [**411] Orders, Supreme Court, New York County (Helen Freedman, J.), entered on or about June 18, 2001 (Appeal Nos. 5104, 5105, 5106, 5107, 5108, 5109 and 5111) and July 12, 2001 (Appeal No. 5110), which denied defendants-appellants' motions

288 A.D.2d 148, *, 733 N.Y.S.2d 410, **;
2001 N.Y. App. Div. LEXIS 11567, ***

for summary judgment, unanimously affirmed, without costs.

The inability of certain of plaintiffs to identify defendant Worthington as the manufacturer of the pumps containing the asbestos to which they were allegedly exposed does not require dismissal of their actions, where defendants' own witness conceded that Worthington pumps were on a very high percentage of Navy ships during the relevant time period, and workers in the Brooklyn Navy Yard testified at their depositions that the pumps they saw on ships in the Navy Yard were manufactured by Worthington (*see, Salerno v Garlock Inc.*, 212 AD2d 463). An issue of fact as to whether these pumps contained asbestos is raised by defendants' admission that Worthington sometimes used gaskets and packing containing [***2] asbestos; plaintiff Tancredi's production of a Worthington manual for the power plant where he worked referring to an asbestos component in one of its pumps at the plant; the testimony of defendants' witness that Worthington had "specifications for sale of product to the government which required asbes-

tos use"; the absence of evidence that Worthington deviated from the government's specifications in the pumps it installed in ships during the relevant [***412] time periods; and the testimony of certain of plaintiffs that they observed the hand making of asbestos gaskets. Nor does it necessarily appear that Worthington had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps. While it may be technically true that its pumps could run without insulation, defendants' own witness indicated that the government provided certain specifications involving insulation, and it is at least questionable whether pumps transporting steam and hot liquids on board a ship could be operated safely without insulation, which Worthington knew would be made out of asbestos (*compare, Rogers v Sears, Roebuck & Co.*, 268 AD2d 245, with [***3] *Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289). We have considered defendants' [*150] other arguments and find them unavailing.

Concur--Nardelli J. P., Tom, Andrias, Lerner and Marlow, JJ.

JAMES BLACKWELL et al., Plaintiffs and Appellants, v. PHELPS DODGE CORPORATION, Defendant and Respondent

No. B002786

Court of Appeal of California, Second Appellate District, Division One

157 Cal. App. 3d 372; 203 Cal. Rptr. 706; 1984 Cal. App. LEXIS 2212; CCH Prod. Liab. Rep. P10,240

June 20, 1984

SUBSEQUENT HISTORY: [*1]**

A petition for a rehearing was denied July 16, 1984, and appellants' petition for a hearing by the Supreme Court was denied August 21, 1984. Bird, C. J., was of the opinion that the petition should be granted.

PRIOR HISTORY:

Superior Court of Los Angeles County, No. SEC 35308, Ralph A. Biggerstaff, Judge.

DISPOSITION:

The judgment is affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Hawkins & O'Connell and Richard M. Hawkins for Plaintiffs and Appellants.

John Nouskajian, Jr., and Joseph R. Serpico for Defendant and Respondent.

JUDGES:

Opinion by Lillie, J., with Spencer, P. J., and Hanson (Thaxton), J., concurring.

OPINIONBY:

LILLIE

OPINION:

[*374] [**708] In this action to recover damages for personal injuries, plaintiffs appeal from judgment of dismissal entered in favor of defendant Phelps Dodge Corporation following the granting of defendant's motion for summary judgment.

Named as defendants, in addition to Phelps Dodge, were Union Tank Car Company and McKesson Chemical Company. The complaint contained three causes of action on behalf of each plaintiff. n1 The first cause of action [*375] alleged in pertinent part: "That on or about the 15th day of April, 1980, defendants and each of them operated, owned, [***2] maintained, managed, worked on, constructed, controlled, supervised and had custody of the premises known as the McKesson Chemical Company, located at Santa Fe Springs, California. [para.] That at said time and place defendants and each of them as above mentioned, controlled, managed and supervised said premises in such a negligent manner so as to proximately cause and permit a tank car to have pressure blowout, blowing sulphuric acid on the plaintiff, so as to proximately thereby cause plaintiff severe personal injuries" The second cause of action alleged: "That at all times mentioned herein, defendants and each of them sold, furnished, supplied and maintained a defective product in a defective container, and that the defective container permitted a pressure buildup, which pressure was released upon opening of the tank; that it was further defective in that there was no warning concerning the pressure, no instructions concerning how to relieve the pressure, no method or means for relieving the pressure, and no instructions as to the proper method of unloading the tank car, so as to proximately cause and permit a tank car to have a pressure blowout, blowing sulphuric acid [***3] on the plaintiff thereby causing plaintiff severe personal injuries" The third cause of action alleged: "That the defendants and each of them furnished and supplied a tank carload of sulphuric acid to plaintiff's employer, and as such were in control of the said tank car, which constituted a peculiar risk of injury to persons opening said tank car, and thereby caused plaintiff severe personal injuries"

157 Cal. App. 3d 372, *; 203 Cal. Rptr. 706, **;
1984 Cal. App. LEXIS 2212, ***; CCH Prod. Liab. Rep. P10,240

n1 The plaintiffs are three workmen who allegedly sustained personal injuries in attempting to unload a tank car filled with sulfuric acid, and the wife of one of those men. The complaint includes a cause of action on behalf of the latter plaintiff for damages for loss of consortium. Such cause of action is immaterial for purposes of this appeal, and we therefore ignore it.

In support of its motion for summary judgment defendant Phelps Dodge produced [**709] evidence n2 showing: The tank car mentioned in the complaint was designed, manufactured and owned by Union Tank and leased by Union Tank [***4] to McKesson, plaintiffs' employer, pursuant to a written lease. McKesson sent the car to defendant in Hidalgo, New Mexico, to be filled with sulfuric acid and returned to McKesson. After defendant loaded the acid into the tank car, the car went to McKesson's bulk chemical plant in Santa Fe Springs, California. There plaintiffs attempted to attach unloading fittings to the tank car in order to transfer the acid into a storage tank. One of the plaintiffs, apparently without first venting the tank car, unscrewed the unloading line thereby allowing the acid to escape and come into contact with plaintiffs. In response to an interrogatory asking what warnings or instructions they contended should have been on the tank car, plaintiffs stated: "There should have been warnings and instructions not to open the discharge cap without removing the cap off of the inlet line, since the discharge [*376] pipe went all the way to the bottom of the tank car; there is no way, when the cap is removed, that the pressure would be relieved without the contents spurring out. It is contended that there should be warnings to open the inlet cap first, which would let only air off, not material; that [***5] if these warnings and instructions were given to people using the tank cars, this accident would not have happened. It is also contended that both the inlet and the outlet openings should have had valves on them so that a hose or pipe could be attached thereto, so that no material could come out until the valve was opened. . . ."

n2 The evidence consisted of the declaration of defendant's attorney identifying and incorporating answers to interrogatories and a declaration of plaintiffs' attorney in opposition to a motion for summary judgment by McKesson, together with exhibits attached to that declaration.

In opposition to the motion for summary judgment plaintiffs submitted the declaration of their attorney stating: defendant knew that unless the sulfuric acid was unloaded in a certain manner it would cause severe per-

sonal injuries to those handling and unloading it; with such knowledge, defendant loaded the tank car with sulfuric acid and sent it to plaintiffs' employer; defendant gave no warning of the dangerous [***6] properties of the acid and how it should be unloaded; further, with knowledge of the type of tank car that was carrying the acid, defendant gave no instructions or warnings as to the fact that pressure could build up within the tank in transit, nor did defendant give any warning as to what vents or pipes should be used in unloading the acid; "no markings or decals or other instructions" were given to plaintiffs or to the recipients of the acid; when plaintiffs opened a pipe on top of the tank car for the purpose of unloading its contents, the pressure generated within the tank caused the acid to be ejected onto plaintiffs, injuring them severely.

(1) A defendant moving for summary judgment must show clearly that the plaintiff cannot prevail on any cause of action or theory pleaded by him. (*Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 127 [109 Cal.Rptr. 724].) In the present case the evidentiary materials submitted in support of and in opposition to the motion for summary judgment show that the facts are not in dispute. (2) Thus, there was no triable issue of fact. The only issues presented to the trial court [***7] were issues of law, which may be determined in summary judgment proceedings. (*Allis-Chalmers Corp. v. City of Oxnard* (1981) 126 Cal.App.3d 814, 818 [179 Cal.Rptr. 159].) (3a) The sole question on appeal is whether the trial court properly applied the law to the uncontroverted evidence in granting defendant Phelps Dodge's motion for summary judgment and dismissing the action as to that defendant.

The evidence shows that defendant supplied sulfuric acid to McKesson. For that purpose McKesson sent to defendant in New Mexico a tank car leased by McKesson from United Tank, which designed, manufactured and owned the car. After defendant loaded the tank car with sulfuric acid, the [*377] car was sent to McKesson's bulk chemical plant at Santa Fe Springs, California. [**710] As the result of pressure generated within the tank the acid therein was caused to spew out and come into contact with plaintiffs when they attempted to unload it from the tank. Defendant, with knowledge of the dangerous properties of sulfuric acid and the type of tank car used to transport it, did not warn plaintiffs of a possible accumulation of pressure within the tank nor [***8] instruct them on how safely to unload the acid.

Plaintiffs' first cause of action alleged that defendant "controlled, managed and supervised" McKesson's premises in such a negligent manner as to cause the tank car to have a pressure blowout, spraying acid on plaintiffs. The record establishes as a matter of law that plaintiffs cannot prevail against defendant on that cause of action.

157 Cal. App. 3d 372, *; 203 Cal. Rptr. 706, **;
1984 Cal. App. LEXIS 2212, ***; CCH Prod. Liab. Rep. P10,240

Defendant merely sent the carload of acid from its plant in New Mexico to McKesson in California. In no manner did defendant control, manage or supervise McKesson's premises.

While plaintiffs' second cause of action alleged that defendant sold "a defective product in a defective container," subsequent allegations leave no doubt that the product claimed to be defective was the tank car, not the acid. The tank car allegedly was defective because it permitted the formation of pressure in its cargo of acid, and contained neither warnings concerning such pressure nor instructions as to the proper method of unloading the acid from the tank. The third cause of action alleged that defendant supplied a tank carload of sulfuric acid to plaintiffs' employer, and "as such [was] in control" of the tank car. [***9] The evidence establishes that defendant had control of the tank car only while it was at defendant's facility; defendant relinquished control of the car upon its being filled with acid and sent from defendant's facility in New Mexico to McKesson's bulk chemical plant in California. From such evidence it appears that defendant had control of the car for a sufficient time to have had an opportunity to put appropriate warnings and instructions on it.

(4) A product may be defective if it is dangerous because it lacks adequate warnings or instructions. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 428 [143 Cal.Rptr. 225, 573 P.2d 443, 96 A.L.R.3d 1].) Where a manufacturer or supplier of a product is or should have been aware that the product is unreasonably dangerous absent a warning and such warning is feasible, strict liability in tort will attach if appropriate and conspicuous warning is not given. (*Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 772 [150 Cal.Rptr. 419].) While failure to warn may create liability for harm caused by use of an unreasonably dangerous product, that rule does not apply where it [***10] was not any unreasonably dangerous condition or feature of defendant's product which caused the injury. (*Garman v. Magic Chef, Inc.* (1981) 117 Cal.App.3d 634, 638 [173 Cal.Rptr. 20].)

[*378] (3b) The product alleged to have been dangerous, and hence defective, for lack of warnings and instructions was not the acid supplied by defendant, but the tank car in which the acid was shipped by defendant to McKesson; that car was manufactured and owned by Union Tank and leased by it to McKesson which sent the car to defendant for shipment of the acid. Put another way, it was not the product (acid) supplied by defendant, but the container (tank car) in which that product was shipped, which was allegedly defective for lack of warnings or instructions. Under these circumstances, defendant incurred no liability to plaintiffs for its failure to warn them of danger from formation of pressure in the

acid allegedly caused by defective design of the tank car, or to instruct them on how safely to unload the acid from the tank.

In support of a contrary conclusion plaintiffs cite *Gall v. Union Ice Company* (1951) 108 Cal.App.2d 303 [239 P.2d 48]. [***11] There, the plaintiffs' decedent was killed when he was struck by an exploding drum filled with sulfuric acid which contained no warning label. It appears that defendant both manufactured the acid and supplied the drum in which it was shipped to decedent's employer. In affirming judgment [**711] for plaintiffs the court quoted the following excerpt from a comment to section 388, Restatement, Torts: "g. The duty, which the rule stated in this Section imposes upon the supplier of a chattel for another's use, is to exercise reasonable care to give to those who are to use the chattel the information which the supplier possesses and which he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used . . ." (108 Cal.App.2d at p. 309.) That rule is inapplicable in the present case for, unlike the situation in *Gall*, defendant supplied only the acid; it did not furnish the allegedly defective container (tank car) in which the acid was shipped to plaintiffs' employer.

A well known treatise states: "In regard to the package or container in which a product is sold, the duty of reasonable care is also applicable to the seller [***12] of the product, as distinguished from the seller of the package or container." (63 Am.Jur.2d, *Products Liability*, § 294, p. 344.) Illustrative of this principle is *Hopper v. Charles Cooper & Co.* (1927) [104 N.J.L. 93 [139 A. 19, 55 A.L.R. 187]. There the plaintiff obtained some lead jugs from a florist and took them to defendant to be filled with hydrofluoric acid. Upon plaintiff's request defendant selected the two best jugs for that purpose and filled them with acid. Shortly after the jugs were placed in plaintiff's car the cork blew out of one of them and acid was sprayed on plaintiff, injuring him. The explosion was caused by the acid's coming into contact with siliceous matter in the jug. It was held that the fact that plaintiff furnished the jugs in which the acid was placed did not relieve defendant of the duty of ascertaining that the jugs were clean and suitable for such use. [*379] (139 A. at pp. 21-22.) A like conclusion does not follow in the present case.

The tank car (container) was alleged to be defective because it permitted the formation of pressure in its cargo of sulfuric acid, and contained no warning of such pressure [***13] or instructions on how properly to unload the acid. The evidence shows without dispute that McKesson furnished the car and sent it to defendant in New Mexico to be filled with acid and returned to McKesson in California. Thus, only if defendant affixed appropriate warnings and instructions to the tank car

157 Cal. App. 3d 372, *; 203 Cal. Rptr. 706, **;
1984 Cal. App. LEXIS 2212, ***; CCH Prod. Liab. Rep. P10,240

would they have reached the persons who were to unload the acid from the tank. The car was leased by McKesson from Union Tank pursuant to a written lease which included the following provision: "8. . . . No lettering or marking of any kind shall be placed upon said cars by Lessee without written permission of Lessor, provided, however, Lessee may cause said cars to be stencilled, boarded or placarded with letters not to exceed two inches (2") in height to indicate to whom the cars are leased." In his declaration in opposition to the motion for summary judgment plaintiffs' attorney stated: "Plaintiffs' investigation has revealed that since this accident, warnings concerning pressure in the tank cars have been painted on the tank cars as follows: [para.] 'Contents May Be Under Pressure. Do Not Open Without Appropriate Protection.'" It was not stated who furnished such warning. [***14] (5) Although the declarations of the party resisting a motion for summary judgment are to be liberally construed in his favor, a summary judgment is proper if the declarations of the moving party state facts which justify a judgment in his favor and the counterdeclarations do not supply evidence to create a triable issue of fact. (*Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 971 [140 Cal.Rptr. 510].) In determining whether a triable issue of fact is raised, the court may consider inferences reasonably deducible from all of the evidence before it. (*Code Civ. Proc.*, § 437c, subd. (c); *DeSuza v. Andersack* (1976) 63 Cal.App.3d 694, 698 [133 Cal.Rptr. 920].) (3c) The trial court here reasonably could infer from such evidence that the warning was painted on the tank cars either by the lessor-owner, Union Tank, or the lessee, McKesson (with lessor's permission), but not by defendant. The uncontroverted fact that defendant neither owned nor leased the tank car in question establishes that defendant was without authority to put on [**712] the car the warnings and instructions the [***15] absence of which allegedly made the car a defective product. Thus, as a matter of law, defendant can-

not be liable to plaintiffs for having failed to provide such warnings and instructions.

Plaintiffs argue that a duty on the part of defendant to give appropriate warning and instructions was created by federal regulations governing transportation of hazardous materials. (49 C.F.R. § 173.30 et seq. (1981).) We [*380] do not agree. The regulations upon which plaintiffs rely n3 prescribe the procedure to be followed for the safe transportation of dangerous articles in tank cars, and require removal and replacement of certain tank car safety devices which show signs of deterioration. Plaintiffs sustained personal injuries in attempting to unload acid from the tank car after it had reached its destination, not while it was in the process of transportation. Further, the tank car was alleged to be defective not because of deteriorated parts, but because it allowed its cargo of sulfuric acid to become pressurized and lacked appropriate warnings and instructions on how properly to unload the acid.

n3 Such regulations provide in pertinent part: "When tanks are loaded and prior to shipping, the shipper must determine to the extent practicable, that the tank, safety appurtenances and fittings are in proper condition for the safe transportation of the lading. . . ." (§ 173.31 (b)(1).)

"Safety relief devices of the frangible disc or fusible plug type used on tanks of classes DOT-106A or 110A must be inspected before each loaded trip of tank by removing at least one vent for visual inspection; if it shows signs of deterioration, all devices must be removed and inspected and those which do not meet the requirements must be renewed." (§ 173.31 (b)(4).)

[***16]

The judgment is affirmed.

NO. 25489

FILED
AT 4:03 O'CLOCK P M.

11-19-04

VERNON BRAATEN
Plaintiff

§

IN THE DISTRICT COURT OF BRAZORIA Co., Texas
BY M. H. DEERE DEPUTY

V.

§

BRAZORIA COUNTY, TEXAS

CERTAINTIED CORPORATION, et al §

149th JUDICIAL DISTRICT

ORDER

On November 19, 2004, the Court considered the Amended No-Evidence Motion for Summary Judgment filed by Goulds Pumps, Inc. After reviewing the Motion and hearing arguments of counsel, it was decided that:

The Motion is GRANTED as to any alleged duty of Goulds Pumps, Inc. to warn of the dangers associated with asbestos solely because asbestos was installed on or around pumps manufactured by Goulds Pumps, Inc.

Signed this 19th day of November, 2004.



Judge Robert May

**RAYMOND CHICANO and LINDA CHICANO v. GENERAL ELECTRIC
COMPANY, et al.**

CIVIL ACTION NO. 03-5126

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

2004 U.S. Dist. LEXIS 20330

October 5, 2004, Decided

DISPOSITION: Defendant's motion for summary judgment was denied. Plaintiff's motion for substitution of parties and amendment of complaint was granted.

Raymond Chicano's estate. However, for the sake of simplicity, I will consider the plaintiff to be Raymond Chicano.

COUNSEL: [*1] For RAYMOND CHICANO, LINDA CHICANO, H/W, Plaintiffs: LEE B. BALEFSKY, KLINE & SPECTER, PHILADELPHIA, PA.

For GENERAL ELECTRIC COMPANY, ET AL, Defendant: EDWARD MICHAEL KEATING, III, NANCY D. GREEN, HOLLSTEIN KEATING CATTELL JOHNSON & GOLDSTEIN PC, PHILADELPHIA, PA.

JUDGES: THOMAS N. O'NEILL, JR., J.

OPINIONBY: THOMAS N. O'NEILL, JR

OPINION: O'NEILL, J.

MEMORANDUM

Plaintiff, Raymond Chicano, filed a complaint on June 9, 2003 against defendant General Electric Company alleging that he sustained personal injuries as a result of exposure to asbestos-containing materials, which insulated marine steam turbines manufactured and supplied by GE, and that GE failed to warn of the dangers posed by such exposure. The case was removed to this Court on September 10, 2003 pursuant to 28 U.S.C. § 1442(a)(1). Before me now is defendant's motion for summary judgment, plaintiff's response, and defendant's reply thereto. Also before me is plaintiff's motion for substitution of parties and amendment of complaint. n1

n1 Linda Chicano asserts a cause of action in her own right and, as of the date of this opinion, will be substituted as personal representative of

[*2]

BACKGROUND

Raymond Chicano worked as a sheet metal mechanic at the New York Shipyard in Camden, NJ from 1959 to 1962. At the Shipyard, Chicano worked aboard the United States Navy aircraft carrier, USS Kitty Hawk, installing ventilation duct work in various quarters of the ship, including its boiler rooms, where Chicano spent about 40% of his work time. In addition to the duct work, the ship's boiler rooms housed giant turbines, generators, and pumps, all of which were installed prior to Chicano's employment at the Shipyard. The turbines aboard the Kitty Hawk were manufactured by GE. At the time of Chicano's employment, the turbines were already insulated or were in the process of being insulated with an asbestos-containing material bearing the name Johns-Manville. Although Chicano did not work on the turbines, generators, or pumps, he worked in and around them in a dusty and dirty environment. There was visible dust and white flakes from the insulation material on the floor, equipment, and in the air where he was working. The dust gathered on his face and clothes; he breathed in the dust. Chicano was diagnosed on October 9, 2002 with mesothelioma and died on June 17, 2004 at the [*3] age of 64.

GE manufactured and supplied marine steam turbines for the USS Kitty Hawk under contract with the Department of the Navy. The contract was administered by the Navy Sea Systems Command ("NAVSEA") under the authority of the Secretary of the Navy. NAVSEA personnel exclusively developed the ship designs and plans for the USS Kitty Hawk, as well as the comprehensive and detailed guidelines and specifications for all of

the ship's equipment, including the marine steam turbines. NAVSEA personnel also supervised and approved the plans of the various suppliers of the ship's component parts, including GE, and enforced their compliance with Navy specifications.

The marine steam turbines at issue were specifically designed for a particular vessel or class of vessels. The turbines for each vessel or class were not interchangeable; they were custom built under the direction and control of the Navy. Prior to the construction of the ship, there was an extensive set of specifications, known as Mil-Specs, which comprised thousands of pages and governed all aspects of the ship's design and construction. These Mil-Specs specified that certain materials were to be used, including asbestos-containing [*4] thermal insulation. The specifications for GE's marine steam turbines included further specifications for certain components and materials to be used for and with the turbines, e.g. specific metals, bearings, and gaskets. These specifications also called for: (1) notes, cautions, and warnings to be used to emphasize important and critical instructions as were necessary; (2) safety notices where the high voltages or special hazards were involved; and (3) routine and emergency procedures, and safety precautions.

The turbines required thermal insulation to operate properly and safely. However, GE did not include any insulation materials, asbestos or otherwise, with its turbines when they were shipped to the Navy. Nor did GE supply the Navy with any separate thermal insulation. GE did not specify any insulation material to be used to insulate its turbines. The Navy's specifications called for asbestos insulation to be used on the turbines. Nevertheless, GE knew that its turbines would be insulated with asbestos-containing materials and knew that they were, in fact, insulated with asbestos-containing materials. Before the Kitty Hawk was built and before Chicano worked on the ship, both [*5] the Navy and GE knew that asbestos posed certain health risks. GE was required to give warnings regarding its turbines and to provide detailed manuals regarding proper safety, installation, and operation. GE supplied warnings regarding its turbines, but did not supply warnings of the dangers of asbestos. Chicano was never warned about the dangers of asbestos and had no knowledge regarding the safety, installation, or operation of the turbines. After they were installed, GE had a continuing obligation to service and/or inspect the turbines.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affi-

davits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes [*6] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*.

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." *Id.* In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. *Id.* However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See *Celotex*, 477 U.S. at 324. The non-moving party must raise [*7] "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. *Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50 (citations omitted).

DISCUSSION

After consideration of all of the issues, viewing the facts in the light most favorable to plaintiff, and applying governing law, I conclude that a fact finder could reasonably return a verdict in favor of plaintiff. Accordingly, defendant's motion for summary judgment will be denied.

Asbestos litigation claims are governed by substantive state tort law. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366 (3d Cir. 1990). Plaintiff has asserted a Pennsylvania strict products liability claim alleging that GE's turbines aboard the Kitty Hawk constituted defective products under a failure to warn theory. I apply substantive Pennsylvania tort law to plaintiff's claims.

Plaintiff argues [*8] that the turbines were defective because, although GE only supplied the turbines and not the asbestos-containing products that insulated them, GE

failed to warn Chicano, in the turbine safety manual or otherwise, of the dangers of the asbestos-containing products that would be used to insulate its turbines aboard the Kitty Hawk. Plaintiff asserts that GE had a duty to warn of the dangers of asbestos because: (1) the turbines required thermal insulation to operate safely; (2) GE knew that the Navy would insulate them with an asbestos-containing product; and (3) GE knew that asbestos-containing products posed significant health risks, including the possibility of mesothelioma. In response, GE asserts that it does not have a duty to warn regarding products it did not produce and that its products were neither the cause-in-fact nor the proximate cause of plaintiff's injuries.

I. Chicano's Exposure to Asbestos

As a preliminary matter, plaintiff must establish that his injuries were caused by a product of the particular manufacturer or supplier. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (Pa. 1975). In the asbestos context, plaintiff must [*9] "present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer's product." *Eckenrod v. GAF Corp.*, 375 Pa. Super. 187, 544 A.2d 50, 52 (Pa. Super. Ct. 1988); see also *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 376 (3d Cir. 1990) (rejecting the "fiber drift theory"). GE argues that it did not manufacture its marine steam turbines with any asbestos materials and, therefore, Chicano could not have inhaled asbestos fibers from its turbines. However, GE's argument overlooks the fact that its products are component parts of finished products, because the turbines cannot function properly or safely without thermal insulation. The products from which Chicano inhaled asbestos fibers are properly understood to be the turbines covered with asbestos-containing insulation, as fully functional units. Chicano inhaled dust and white flakes shed by the insulation material covering GE's marine steam turbines. Thus, there is at least a genuine issue of material fact as to whether Chicano inhaled asbestos fibers from the integrated products.

GE further argues that plaintiff has failed to present evidence that he was sufficiently exposed [*10] to the asbestos-containing material to meet the "frequency, regularity, and proximity test" of *Eckenrod v. GAF Corp.*, 375 Pa. Super. 187, 544 A.2d 50 (Pa. Super. Ct. 1988). Although the Pennsylvania Supreme Court has yet to establish a standard for exposure to asbestos, the Court of Appeals has predicted that the Pennsylvania Supreme Court would adopt Eckenrod's frequency, regularity, and proximity test. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 (3d Cir. 1990); see also *Lilley v. Johns-Manville Corp.*, 408 Pa. Super. 83, 596 A.2d 203, 209-10 (Pa. Super. Ct. 1991); *Godlewski v. Pars Mfg. Co.*, 408 Pa. Super. 425, 597 A.2d 106, 110 (Pa. Super.

Ct. 1991); *Samarin v. GAF Corp.*, 391 Pa. Super. 340, 571 A.2d 398, 404 (Pa. Super. Ct. 1989).

In Eckenrod, the Pennsylvania Superior Court held that "a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product's use." *Eckenrod*, 544 A.2d at 52. Moreover, to withstand summary judgment under the Eckenrod standard, plaintiff must present evidence to [*11] show: (1) that defendant's product was frequently used; (2) that plaintiff regularly worked in proximity to the product; and (3) that plaintiff's contact with the product was of such a nature as to raise a reasonable inference that he inhaled asbestos fibers emanating from it. See, e.g., *Coward v. Owens-Corning Fiberglas Corp.*, 1999 PA Super 82, 729 A.2d 614, 622 (Pa. Super. Ct. 1999) ("The evidence must demonstrate that plaintiff worked, on a regular basis, in physical proximity with the product, and that his contact was of such a nature as to raise a reasonable inference that he inhaled asbestos fibers that emanated from it.").

GE's turbines, with the asbestos-containing insulation, were an integral part of the ship's source of propulsion power and were frequently used by the Navy on board the USS Kitty Hawk. GE argues that Chicano did not work sufficiently frequently or regularly in the vicinity of the insulated boilers to meet the Eckenrod test. This argument is unavailing. Chicano worked every day for three years in and around the insulated turbines in a dirty environment where dust and white flakes from the insulation material covered his clothes [*12] and his face. Chicano could not help but breathe the dust as he worked on the ventilation ducts. Although not conclusive, this exposure is sufficient to raise a reasonable inference that he inhaled asbestos fibers emanating from the insulation surrounding the turbines.

This case is analogous to *Lilley v. Johns-Manville Corp.*, 408 Pa. Super. 83, 596 A.2d 203 (Pa. Super. Ct. 1991). In *Lilley*, the Pennsylvania Superior Court upheld the trial court's denial of defendant asbestos manufacturer's motion for judgment non obstante verdicto because plaintiff, who contracted asbestosis, presented sufficient evidence of exposure to asbestos to meet the Eckenrod test. *Id.* The Court held that the evidence adduced at trial was sufficient to meet the Eckenrod test because plaintiff presented evidence: (1) that he had worked in close quarters with asbestos products; (2) that asbestos dust was omnipresent in the area; and (3) that a number of his asbestos products were used at plaintiff's company during the pertinent time frame. *Id.* As in *Lilley*, Chicano presented evidence that he worked in and around the insulated turbines in a dirty and dusty environment where [*13] white flakes from the insulation material filled the air and coated the floor, equipment, and his clothes.

The present case is distinguishable from *Eckenrod*. In *Eckenrod*, the Court affirmed a grant of summary judgment in favor of defendant asbestos manufacturers because plaintiff failed to provide sufficient evidence of decedent's exposure to defendants' products. 375 Pa. Super. 187, 544 A.2d 50. Although plaintiff presented evidence that defendant's asbestos-containing products were sent to the furnace area of plaintiff's employer and that plaintiff worked somewhere in the vicinity of those products, the Court concluded that the evidence "did not elaborate on the nature or length of the exposure or the brand of products available." *Id.* at 52. In contrast to *Eckenrod*, Chicano did elaborate on the nature and length of his exposure as he presented evidence that he spent 40% of his time working in and around the insulated turbines in cramped boiler rooms. Thus, there is at least a genuine issue of material fact as to whether plaintiff has met the *Eckenrod* standard, and therefore whether the insulation around the turbines was the cause of Chicano's mesothelioma.

II. Strict [*14] Liability

Under principles of strict liability, a seller is strictly liable for injury caused by a defective condition in his product, even if he exercised all reasonable care in its design, manufacture, and distribution. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (Pa. 1975); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853, 854 (Pa. 1966), adopting § 402A Restatement (Second) of Torts (1965).ⁿ² The Pennsylvania Supreme Court has held that in a strict product liability action, plaintiff bears the burden of demonstrating: (A) that defendant had a duty to warn of the dangers inherent in his product; (B) that the product was defective or in a defective condition; (C) that the defect causing the injury existed at the time the product left the seller's hands; and (D) that the defective product was the cause of plaintiff's injuries. See, e.g., *Pavlik v. Lane Limited/Tobacco Exporters Int'l*, 135 F.3d 876, 881 (3d Cir. 1998); *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 575 A.2d 100, 102 (Pa. 1990); *Schriner v. Pa. Power & Light Co.*, 348 Pa. Super. 177, 501 A.2d 1128, 1132 (Pa. 1985); [*15] *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (Pa. 1978); *Berkebile*, 337 A.2d at 898; § 402A Restatement (Second) of Torts. These elements will be addressed in turn.

ⁿ² Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

A. Duty to Warn [*16]

A manufacturer of a product has a duty to provide those warnings or instructions that are necessary to make its product safe for its intended use. See, e.g., *Mackowick*, 575 A.2d at 102; *Azzarello*, 480 Pa. 547, 391 A.2d 1020; *Berkebile*, 337 A.2d at 903 ("Where warnings or instructions are required to make a product nondefective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risks and inherent limits of the product."); see also *Restatement (Second) of Torts § 402A, comment h* ("Where . . . [the seller of a product] has reason to anticipate that danger may result from a particular use . . . he may be required to give adequate warning of the danger, and a product sold without such warning is in a defective condition."). The duty to provide a nondefective product is not delegable. *Berkebile*, 337 A.2d at 903.

GE argues that it has a duty to warn only of the dangers inherent in the product it supplied, i.e. marine steam turbines. Plaintiff argues that "GE, as the manufacturer of the turbines, [*17] had a duty to distribute the product with sufficient warnings to notify the ultimate user of the dangers inherent in the product[.]" including inevitable insulation with an asbestos-containing product.

In support of this argument, plaintiff asks me to follow the New York Supreme Court's holding in *Berkowitz v. A.C. & S., Inc.*, 288 A.D.2d 148, 733 N.Y.S.2d 410 (N.Y. App. Div. 2001). In *Berkowitz*, the Court affirmed the denial of defendant pump manufacturer's motion for summary judgment and held that there were genuine issues of material fact because defendant may have had a duty to warn concerning the dangers of asbestos, which it had neither manufactured nor installed on its pumps. *Id.* at 148. Although the pumps could function without insulation, the governmental purchaser of the pumps had

provided certain specifications involving insulation of the pumps, and the Court found it questionable whether the pumps--transporting steam and hot liquids on board Navy ships--could be operated safely without insulation, which defendant knew would be made out of asbestos. Id.

Citing Berkowitz, plaintiff argues that GE as a manufacturer of component parts--the turbines--had [*18] a duty to warn of the dangers associated with the use of the finished products--the insulated turbines--which it knew to have a defective condition--asbestos insulation. I need not decide whether to follow Berkowitz because there is ample Pennsylvania law on this subject.

Generally, under Pennsylvania law, a manufacturer's duty to warn may be limited where it supplies a component of a product that is assembled by another party and the dangers are associated with the use of the finished product. See, e.g., *Jacobini v. V. & O. Press Co.*, 527 Pa. 32, 588 A.2d 476, 478 (Pa. 1991). A review of Pennsylvania law and its federal interpretations suggests that a component part manufacturer does not have a duty to warn of dangers inherent in the ultimate product where: (1) the component itself is not dangerous; (2) the manufacturer does not have control over the use of its component after sale; (3) the component is a generic component part, not designed for a particular type of finished product; and (4) the manufacturer could not reasonably foresee that its component would be put to a dangerous use. See, e.g., *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1309 (3d Cir. 1995); [*19] *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 112 (3d Cir. 1992); *J. Meade Williamson and F.D.I.B., Inc. v. Piper Aircraft Corp.*, 968 F.2d 380, 385 (3d Cir. 1992); *Jacobini*, 588 A.2d at 479; *Wenrick v. Schloemann-Siemag, A.G.*, 523 Pa. 1, 564 A.2d 1244, 1247 (Pa. 1989). Particular emphasis has been placed on the foreseeability inquiry. See *Colegrove v. Cameron Mach. Co.*, 172 F. Supp. 2d 611, 629 (W.D. Pa. 2001) ("Only if the component's use was foreseeable does the manufacturer of that component have a duty to warn of dangers associated with the component.").

In the case at bar, there is at least a genuine issue of material fact as to whether GE had a duty to warn of the dangers of the asbestos-containing material that was used to insulate its turbines. GE's marine steam turbines by themselves were not dangerous products. Although the turbines could not be operated properly or safely without thermal insulation and they were shipped to the Navy without thermal insulation, the turbines were not dangerous because GE supplied ample warnings of the hazards involved with installing and operating the turbines. [*20] GE did not have control over the use of its turbines after they were sold to the Navy. Although GE had a continuing obligation to service and/or inspect the turbines, GE

did not control what form of insulation would cover its turbines. However, there is at least a genuine issue of material fact as to whether the turbines were generic components or designed for a particular type of finished product and whether GE could reasonably foresee that its turbines would be combined with asbestos-containing insulation, which together constituted a defective product, absent appropriate warnings of the dangers of asbestos.

A review of the case law in this area is instructive. The paramount Pennsylvania case is *Wenrick v. Schloemann-Siemag, A.G.*, 523 Pa. 1, 564 A.2d 1244 (Pa. 1989). In *Wenrick*, the Supreme Court of Pennsylvania upheld the lower court's decision to grant judgment non obstante verdicto in favor of defendant switch manufacturer because it did not have a duty to warn regarding the placement of its switch, which activated a hydraulic loader that crushed plaintiff's husband. Id. Plaintiff settled with the manufacturer of the hydraulic loader and asserted negligence [*21] and strict liability claims against the manufacturer of the switch alleging: (1) that the switch activating the loader was defective because the switch was unguarded and placed near the steps; and (2) that the switch manufacturer should have warned the hydraulic loader manufacturer of the danger of locating the switch near the steps. Id. at 1246. The Supreme Court concluded that the switch manufacturer did not have a duty to warn because it had not placed the switch there, it had no control over the placement of the switch, and it had no knowledge as to the placement of the switch. Id. at 1247. This case has come to be cited for the basic proposition that a component part manufacturer has no duty to warn of dangers associated with the finished products into which its component was incorporated; however, as discussed below, this proposition has been qualified by later cases. See, e.g., *Colegrove v. Cameron Mach. Co.*, 172 F. Supp. 2d 611, 629 (W.D. Pa. 2001) (discussing the development of the *Wenrick* principle). The present case is distinguishable from *Wenrick* because although GE did not produce the insulation that covered its turbines or control [*22] what form of thermal insulation covered them GE knew that its turbines would be covered with an asbestos-containing material.

Most analogous to the case at bar is *Fleck v. KDI Sylvan Pools*, 981 F.2d 107 (3d Cir. 1992). In *Fleck*, the Court of Appeals affirmed a jury verdict against defendant manufacturer of a swimming pool replacement liner that lacked warnings of the pool's depth. Id. Plaintiff dove head first into a three foot deep pool, broke his neck, and was rendered a quadriplegic. Id. He sued the replacement liner manufacturer claiming that the replacement liner was defective because it lacked depth warnings. Id. The replacement liner manufacturer argued that it had no duty to warn because its replacement liner

was a component part incorporated into a final product. *Id.* Rejecting this argument, the Court held that the replacement liner manufacturer had a duty to warn because the danger from the replacement liner lacking depth warnings was foreseeable to the manufacturer of that component. *Id.* at 118. The dangers associated with a replacement liner that lacked depth warnings were reasonably foreseeable because the replacement [*23] liner had but one use-to be incorporated into a completed swimming pool. *Id.* The Fleck court also distinguished "generic component parts," where the Wenrick principle does apply, from "separate products with a specific purpose and use," where the Wenrick principle is inapplicable. *Id.* Thus, with generic component parts, "it would be unreasonable and unwarranted to recognize liability in such a tenuous chain of responsibility[,]" but with single purpose parts, a duty to warn may arise. *Id.* Like the replacement liner that lacked depth warnings, the marine steam turbines that required thermal insulation were specifically designed for a particular purpose-to be insulated with an asbestos-containing material and propel a particular aircraft carrier, the USS Kitty Hawk. Thus, there appears to be a genuine issue of material fact as to whether GE had a duty warn of the asbestos insulation used to insulate its turbines, which were designed for a particular purpose.

The distinction between this case and *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3d Cir. 1995), is particularly instructive. In *Petrucelli*, the Court of Appeals applied the [*24] Wenrick principle to hold that a rotor crusher manufacturer was not liable for a failure to warn of the danger of a discharge conveyer belt, which were both connected in a recycling machine, because it could not reasonably have foreseen that the conveyer belt would pull in people's body parts. *Id.* Plaintiff sued the manufacturer of the rotor crusher in strict liability after his arm was amputated when it was pulled into a discharge conveyer belt on a recycling machine, which was designed and built by another company but incorporated defendant's rotor. *Id.* at 1309. Plaintiff was not injured by the rotor, but argued that the rotor was defective because it lacked warning systems that could alert someone standing near the discharge conveyer belt if the machine was activated. *Id.* The Court identified the issue as "whether it is reasonably foreseeable to a component manufacturer that failure to affix warning devices to its product would lead to an injury caused by another component part, manufactured by another company, and assembled into a completed product by someone other than the initial component manufacturer." *Id.* Answering in the negative, the Court [*25] concluded that defendant's duty to warn was limited because it could not be expected to foresee the danger from the discharge conveyer belt, which it neither manufactured nor assembled with its rotor, and therefore could not be liable for failing to

warn of this danger. *Id.* Like the defendant rotor crusher manufacturer, GE merely created component parts-the turbines-and its component parts were not the cause of Chicano's mesothelioma. However, the rotor crusher manufacturer did not know that its component part would be connected to a defective discharge conveyer belt, whereas GE knew that the Navy would use asbestos-containing products to insulate their turbines. Although Chicano's mesothelioma allegedly was caused by the asbestos-containing insulation, which was manufactured by an entirely different company and assembled into completed products by the Navy, there is at least a genuine issue of material fact as to whether it was reasonably foreseeable to GE that a failure to include a warning regarding the use of asbestos-containing products to insulate its turbines would lead to asbestos-related illness.

This case is also distinguishable from *Jacobini v. V. & O. Press Co.*, 527 Pa. 32, 588 A.2d 476 (Pa. 1991). [*26] In *Jacobini*, the Supreme Court of Pennsylvania reversed the lower court and held that defendant manufacturer of a die set was not strictly liable to plaintiff, who was injured when the power press he operated expelled a die and various materials being shaped by the die. *Id.* Evidence demonstrated that plaintiff's injuries could have been prevented by a barrier guard that had been removed. *Id.* Plaintiff sued the manufacturer of the press and the manufacturer of the die set in strict liability alleging that each manufacturer should have included a warning to use its product only with the barrier guard attached, and its failure to warn rendered the product defective. *Id.* The Supreme Court concluded that plaintiff's evidence was insufficient to support a verdict because plaintiff's expert testified that plaintiff should have been warned of the need for a separate safety device, one, which had it been installed, would not have prevented his injuries. *Id.* Nevertheless, the Court continued in dicta to opine that, even if plaintiff had produced sufficient evidence, the die set manufacturer's duty to warn was limited where "the manufacturer supplies a mere component of a [*27] final product that is assembled by another party and dangers are associated with the use of the finished product." *Id.* at 479 (citing *Wenrick*). "This is especially true where the component itself is not dangerous, and where the danger arises from the manner in which the component is utilized by the assembler of the final product, this being a manner over which the component manufacturer has no control." *Id.* at 479. The Court concluded by adding:

[Defendant] cannot be expected to foresee every possible risk that might be associated with use of the completed product, the die, which is manufactured by another

party, and to warn of dangers in using that completed product in yet another party's finished product, the power press. To recognize a potential for liability through such a chain of responsibility would carry the component part manufacturer's liability to an unwarranted and unreasonable extreme.

Id. at 480. Unlike the die set manufacturer, who created a generic set of dies for use on a variety of printing presses, GE specifically designed its turbines to function on a particular aircraft carrier with a view to having the turbines covered in asbestos-containing [*28] insulation. Thus, there is at least a genuine issue of material fact as to whether GE could be expected to foresee that the asbestos-containing material would be used to insulate its turbines. Therefore, GE's duty to warn may not be limited because it knew of the danger from asbestos-containing insulation, which it neither manufactured nor assembled with its turbine.

B. Defective Condition

A product may be found defective if it "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that makes it unsafe for the intended use." *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1027 (Pa. 1978). "There are three different types of defective conditions that can give rise to a strict liability claim: design defect, manufacturing defect, and failure to warn defect." *Phillips v. A-Best Prods. Co.*, 542 Pa. 124, 665 A.2d 1167, 1170 (Pa. 1995). Asbestos-containing products are unavoidably unsafe products and can only be made safe through the provision of adequate warnings. See *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 372 (E.D. Pa. 1982). A product is [*29] defective due to a failure to warn where the product was "distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product." *Mackowick v. Westinghouse Elec.*, 525 Pa. 52, 575 A.2d 100, 102 (Pa. 1990). In this case, plaintiff contends that GE's marine steam turbines were defective in that they were sold without adequate warnings regarding the health hazards of the asbestos-containing products used to insulate the turbines. In response, GE argues that its turbines were not defective because they included more than adequate warnings regarding proper safety, installation, and operation of the turbines themselves.

The initial determination of "whether a warning is adequate and whether a product is 'defective' due to inadequate warnings are questions of law to be answered by the trial judge." *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 575 A.2d 100, 102 (Pa. 1990); see also *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d

1020, 1026 (Pa. 1978) ("It is a judicial function to decide whether, under the plaintiff's averment of the facts, recovery would be justified; and only after this judicial [*30] determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of complaint."). In determining the adequacy of a warning, courts have noted that:

A manufacturer may be liable for failure to adequately warn where its warning is not prominent, and not calculated to attract the user's attention to the true nature of the danger due to its position, size, or coloring of its lettering. A warning may be found to be inadequate if its size or print is too small or inappropriately located on the product. The warning must be sufficient to catch the attention of persons who could be expected to use the product, to apprise them of its dangers, and to advise them of the measures to take to avoid these dangers.

Pavlik v. Lane Ltd./Tobacco Exporters Int'l, 135 F.3d 876, 887 (3d Cir. 1998) (quoting *Nowak v. Faberge USA, Inc.*, 32 F.3d 755, 759 (3d Cir. 1994)).

I decline to make this determination as a matter of law because this factor hinges on GE's duty to warn regarding the asbestos-containing products used to insulate its turbines. As discussed, above, I conclude that there is at least a genuine [*31] issue of material fact regarding GE's duty to warn. To the extent that GE had a such a duty, there is at least a genuine issue of material fact as to whether GE breached this duty by failing to warn Chicano of the inherent dangers of the asbestos-containing products that insulated its turbines.

C. Defective When the Products Left the Seller's Hands

The defective condition must have existed at the time the product left the manufacturer's hands. See, e.g., *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 901 (Pa. 1975). No substantial changes were made to the turbines between the time that they were shipped by GE and when they were received by the Navy. No additional instructions or warnings were added or removed from the turbine manuals or the turbines themselves. Once they were received by the Navy, the turbines were only changed to the extent that they were installed on the aircraft carrier and insulated with an asbestos-containing product. This factor is connected to the analysis of a component part manufacturer's duty to warn. To the extent that GE had a duty to warn regarding the asbestos-containing product used to insulate its tur-

bines [*32] as a component manufacturer, there is at least a genuine issue of material fact as to whether the turbines were defective, due to inadequate warnings, when they were shipped to the Navy.

D. Causation

Plaintiff must establish that the lack or inadequacy of a warning was both the cause-in-fact and proximate cause of his injuries. *Pavlik v. Lane Ltd./Tobacco Exporters Int'l*, 135 F.3d 876, 881 (3d Cir. 1998). Cause-in-fact, or but for cause, requires proof that the harmful result would not have occurred but for the conduct of defendant and proximate cause requires proof that defendant's conduct was a substantial contributing factor in bringing about the harm alleged. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366-67 (3d Cir. 1990). The act or omission need not be the only cause of the injury, but it must be a discernible cause. *Whitner v. Von Hintz*, 437 Pa. 448, 263 A.2d 889, 893 (Pa. 1970).

In the failure to warn context, causation analysis focuses on the additional precautions that might have been taken by the end user had an adequate warning been given. *Pavlik*, 135 F.2d at 882. Thus, a plaintiff asserting [*33] a failure to warn theory "must demonstrate that the user of the product would have avoided the risk had he or she been warned of it by the seller." *Phillips v. A-Best Prods. Co.*, 542 Pa. 124, 665 A.2d 1167, 1171 (Pa. 1995). Although the Pennsylvania Supreme Court has yet to address this issue, the Court of Appeals has predicted that the Pennsylvania Supreme Court will adopt the "heeding presumption" to establish legal causation. See *Pavlik*, 135 F.2d at 883; *Coward v. Owens-Corning Fiberglas Corp.*, 1999 PA Super 82, 729 A.2d 614, 619-21 (Pa. Super. Ct. 1999) (applying the heeding presumption). "In cases where warnings or instructions are required to make a product non-defective and a warning has not been given, plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning." *Coward*, 729 A.2d at 621. Thus, plaintiff is entitled to the presumption that he would have heeded GE's warning of the dangers associated with the asbestos-containing products used to insulate its turbines.

The heeding presumption is rebuttable, however. If defendant produces evidence that the injured [*34] plaintiff was either fully aware of the risk of bodily injury, the extent to which his conduct could contribute to that risk, or other similar evidence to demonstrate that an adequate warning would not have been heeded, "the presumption is rebutted and the burden of production shifts back to plaintiff to produce evidence that he would have acted to avoid the underlying hazard had defendant provided an adequate warning." *Coward*, 729 A.2d at 621 (citing *Pavlik*, 135 F.2d at 883). GE asserts that the presumption is rebutted because Chicano could not have

heeded a warning he never would have seen. GE argues that even if GE had provided a warning in its turbine manual that asbestos-containing insulation might be used to insulate its turbines Chicano never would have had the purpose or opportunity to read the manual. GE further argues: "To make plaintiff's argument work, she would need to provide evidence that a sheet metal worker assigned to ventilation duct work would try to locate a turbine manual somewhere in a ship the size of a skyscraper, convince the chief engineer officer to let him take the manual, actually begin reading a manual that has nothing [*35] to do with his job, and then locate in a manual of hundreds of pages the part on thermal insulation." GE's argument reveals its misunderstanding of the presumption. The key to rebutting the heeding presumption is production of evidence to show that plaintiff would not have heeded an adequate warning. See *Pavlik*, 135 F.2d at 887 (discussing factors in determining adequacy of warnings). GE has produced no such evidence. A warning hidden in an enormous expanse, guarded by a naval officer, and buried in a voluminous text is not sufficiently adequate to warn of the dangers inherent in the insulated turbine. See *id.* Thus, there is at least a genuine issue of material fact as to whether Chicano would have heeded an adequate warning of the dangers inherent in the insulated turbines.

III. Government Contractor Defense

GE argues that as a government contractor it is immune under the government contractor defense recognized by the Supreme Court in *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988). In *Boyle*, the Supreme Court announced a two step approach for applying the government contractor defense. *Id.* Initially, [*36] I must determine whether the state's tort law is in significant conflict with the federal interests associated with federal procurement contracts. *Id.* The imposition of liability on GE creates a significant conflict with the federal interests associated with federal procurement contracts because the liability cost of products liability suits arising out of the contract will be passed on to the government, which is the consumer. See *id.* at 507 (reasoning that the imposition of liability on a government contractor "will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price."). Where there is such a conflict, I must apply a three-prong test to determine when state tort law will be displaced by federal common law in a suit against a military contractor. *Id.*

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States ap-

proved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use [*37] of the equipment that were known to the supplier but not to the United States.

Id. at 507-08. If the contractor meets all three prongs, the government contractor defense is established and defendant manufacturer is immune from liability under state tort law. *Carley v. Wheeled Coach*, 28 V.I. 310, 991 F.2d 1117, 1119 (3d Cir. 1993) (extending the government contractor defense to nonmilitary contractors). Defendant bears the burden of proving each element of the defense. *Beaver Valley Power Co. v. National Engineering & Contracting Co.*, 883 F.2d 1210, 1217 n.7. Where defendant has moved for summary judgment, defendant must establish that there is no genuine issue of material fact as to each element of the defense. *Id.*

The first prong of the defense requires defendant to show that United States has established or approved reasonably precise specifications. *Boyle*, 487 U.S. at 507-08. The government contractor defense is available to a contractor that participates in the design of the product, so long as the government examined the design specifications and exercised ultimate responsibility for making the final decisions. *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir. 1985). [*38] In the case at bar, GE has demonstrated that the government established an extensive set of specifications, which governed all aspects of the aircraft carrier's design and instruction, including specifications for the components and materials to be used in the turbines. The government specifications also called for notes, cautions, and warnings, and safety notices where special hazards are involved.

The second prong of the defense requires defendant to show that the products manufactured by defendant conformed to those specifications. *Boyle*, 487 U.S. at 507-08. GE has shown that its turbines conformed to all the Navy's stringent specifications regarding the turbines themselves. However, GE did not include any notes, cautions, warnings, or safety notices regarding the hazards of asbestos-containing materials. GE argues that the specifications regarding warnings and safety notices did not require it to provide warnings regarding products over which it had no control and did not supply. However, as discussed above, there is at least a genuine issue of material fact as to whether GE had a duty to supply such warnings regarding the dangers associated with the asbestos-containing [*39] products that it knew would cover its turbines. Accordingly, there is at least a genuine

issue of material fact that GE did not conform to the Navy's specifications for the turbines.

The third prong of the defense requires defendant to show that it warned the United States about the dangers in the use of the products that were known to the supplier but not to the United States. *Id.* Defendant can also satisfy this prong by showing that the government knew as much or more than defendant contractor about the hazards of the equipment. See *Beaver Valley*, 883 F.2d at 1216. GE has produced evidence that the Navy was fully aware of the dangers of asbestos and that the Navy's knowledge exceeded any knowledge that GE had at the time.

Although GE has satisfied the first and third prongs of the government contractor defense, there is at least a genuine issue of material fact as to whether GE has satisfied the second prong. Accordingly, there is at least a genuine issue of material fact as to whether GE has met the government contractor defense.

IV. Plaintiff's Motion for Substitution of Parties and Amendment of Complaint

Since Mr. Chicano's death, his wife, Linda, [*40] has been duly appointed by the Register of Wills of Delaware County, Pennsylvania as executrix of his estate. Plaintiff requests that her name, Linda R. Chicano, be substituted as Personal Representative of the Estate of Raymond A. Chicano, and thus, change the caption to Linda R. Chicano, Executrix of the Estate of Raymond A. Chicano, deceased, and Linda R. Chicano, in her own right. In addition, plaintiff requests that the complaint be amended to allege damages under the Pennsylvania Wrongful Death Act, *Pa. R. Civ. P. 2202(b)*. Plaintiff's motion for substitution of parties and amendment of complaint will be granted.

An appropriate order follows.

THOMAS N. O'NEILL, JR., J.

ORDER

AND NOW, this 5th day of October, 2004 upon consideration of defendant's motion for summary judgment, and plaintiff's response thereto, and plaintiff's motion for substitution of parties and amendment of complaint, and for the reasons set forth in the accompanying memorandum, IT IS HEREBY ORDERED as follows:

1. Defendant's motion for summary judgment is DENIED.

2. Plaintiff's motion for substitution of parties and amendment of complaint is GRANTED. Linda R. Chicano is substituted as Personal Representative [*41] of the Estate of Raymond A. Chicano and the caption shall hereafter read "LINDA R. CHICANO, Executrix of the

Estate of Raymond A. Chicano, and LINDA R.
CHICANO, in her own right v. GENERAL ELECTRIC
COMPANY, et al."

THOMAS N. O'NEILL, JR., J.

DAVID E. COLTER v. BARBER-GREENE COMPANY & another n1

n1 New England Road Machinery Company.

No. 4422

Supreme Judicial Court of Massachusetts, Suffolk

403 Mass. 50; 525 N.E.2d 1305; 1988 Mass. LEXIS 211; CCH Prod. Liab. Rep. P11,905; 8 U.C.C. Rep. Serv. 2d (Callaghan) 375

October 7, 1987 July 20, 1988

PRIOR HISTORY: [***1]

CIVIL ACTION commenced in the Superior Court Department on September 12, 1979.

The case was tried before *Andrew Gill Meyer, J.*

The Supreme Judicial Court granted a request for direct appellate review.

DISPOSITION:

So ordered.

LexisNexis(R) Headnotes

COUNSEL:

Richard L. Neumeier Andre A. Sansoucy & John W. Brister with him) for Barber-Greene Company.

Edward Barrett Jacqueline Sullivan with him) for New England Road Machinery Company.

Neil Sugarman for the plaintiff.

JUDGES:

Hennessey, C.J., Wilkins, Abrams, Nolan, & O'Connor, JJ. O'Connor, J. dissenting in part.

OPINIONBY:

ABRAMS

OPINION:

[**1307] [*51] On December 5, 1978, David E. Colter suffered severe [***3] arm injuries while greasing the gears of a twin screw sand classifier owned and operated by Colter's employer, Marshfield Sand &

Gravel Company (Marshfield). n2 The machine was manufactured by a division of Barber-Greene Company (Barber-Greene) which sold it to Worcester Sand & Gravel Company (Worcester). Worcester traded the machine to New England Road Machinery Company (New England), which later sold it to Marshfield. Colter sued Barber-Greene, Worcester, and New England asserting causes of action for negligence, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular use. n3 The jury found Barber-Greene to have been 36% negligent, found New England to have been 15% negligent, found Worcester not to have been negligent, n4 and found Colter to have been 49% contributorily negligent. On the warranty count, the jury found that Barber-Greene and New England each had breached its implied warranty of merchantability and had proximately caused Colter's injuries. However, the jury also found that Colter's recovery was barred because he had actual knowledge of the machine's defective condition, but nonetheless proceeded unreasonably to [***4] use the machine.

n2 Colter's employer was not a party to his action.

n3 Colter has not appealed from the judgment for Worcester.

n4 During trial, Colter waived the counts alleging breach of the implied warranty of fitness and waived his claim for breach of implied warranty of merchantability against Worcester.

Barber-Greene and New England moved for judgment notwithstanding the verdict or for a new trial, arguing that the finding on the warranty count was inconsistent with and negated [*52] the finding that Barber-

Greene's and New England's negligence proximately caused Colter's injuries. n5 [**1308] The trial judge ruled that New England and Barber-Greene were entitled to judgment in their favor. Colter subsequently filed a motion for relief from judgment on the basis of *Richard v. American Mfg. Co.*, 21 Mass. App. Ct. 967 (1986). n6 The judge allowed the motion and entered judgment for Colter. New England and Barber-Greene appealed. This court granted Barber-Greene's application for direct [***5] appellate review. We conclude that there is sufficient evidence on the issue whether the negligent design of the sand classifier proximately caused Colter's injuries to submit that claim to the jurors. We agree with Barber-Greene that the evidence on negligent failure to warn is insufficient. Because the jurors were not asked to apportion Colter's negligence between the two theories of negligence, there must be a new trial on negligent design.

n5 After the jury returned their verdicts, Barber-Greene also asserted that the answers to questions 4 and 17 were inconsistent because, in response to question 4, the jury concluded that Barber-Greene's negligent failure to warn was a proximate cause of Colter's injuries, but in response to question 17 found that failure to equip the machine with adequate warnings was not a proximate cause of the injuries. The trial judge instructed the jury to deliberate further. The jury changed their answer to question 17 and concluded that Barber-Greene's failure to equip the machine with warnings proximately caused Colter's injuries.

n6 In *Richard*, the Appeals Court rejected the proposition that "a finding of unreasonable use in a warranty count precludes a finding, on a negligence count, that the defendant's negligence was a proximate cause of the plaintiff's injuries." *Id.* at 968 n.1.

[***6]

At the time of his accident, Colter was employed as a manager at Marshfield's quarry in Weymouth. Marshfield operated quarrying equipment at this location including the twin screw sand classifier involved in Colter's accident. The twin screw classifier consisted of a rectangular hopper containing two screw augers. The screws were driven by a set of bevel gears which ran at a speed of approximately twenty to thirty revolutions per minute. The gears, which were powered by an electric motor, were mounted on a steel frame approximately twenty feet above ground. A conveyor belt fed wet sand into the hopper. The screws carried the sand upward to

another conveyor [*53] belt. The action of the screws removed the water from the sand; the water poured out the low end of the machine.

Barber-Greene's specifications called for a guard to cover the bevel gears, and they did not sell the machine without one. When Worcester purchased the machine involved in Colter's accident in 1952, the purchase included a bevel gear guard. By the time New England took the twin screw sand classifier from Worcester in trade, there was no guard on the machine and the owner's manual which showed the guard [***7] in place was missing as well. New England sold the machine to Marshfield in 1969 without the guard or the owner's manual. New England did not inform Marshfield that the machine's bevel gears should be covered. Although Barber-Greene manufactured replacement guards, Marshfield never obtained a guard for the gears.

Colter began his employment with Marshfield in 1971 as a concrete salesman assigned to Marshfield's Cohasset office. n7 In 1975, Colter was promoted to the position of safety director at the Weymouth plant. In the summer of 1977, Marshfield moved the sand classifier to Weymouth and mounted it on the twenty-foot high steel structure. Although Colter was generally aware of the dangers of exposed gears, he was not aware that the machine required a guard. Personnel from the United States Bureau of Mine Safety and Health Administration frequently inspected the Weymouth facility, but never instructed Colter to obtain a bevel gear guard for the sand classifier because the gear box was mounted above ground.

n7 During Colter's assignment to the Cohasset office, the twin screw sand classifier was operating in Cohasset. Colter's position at that time did not require him to assist the machine's operation.

[***8]

On the day of the accident, Colter arrived at work sometime between 10:30 and 11 A.M. The plant's operation had started late that day because the cold weather had frozen some pipes. Shortly after lunch, Colter passed the "wet end of the plant" and heard a loud screaming "steel-on-steel" noise emanating from the gears of the sand classifier. Colter had never heard the machine make this kind of noise and, because the noise was so loud, he feared that the machine would come apart. Colter knew [**1309] that the company's operations at that time were [*54] critical, and that, if the sand classifier broke, it would put Marshfield's client out of business. Responding to what he believed to be an emergency situation, n8 Colter instructed another em-

403 Mass. 50, *; 525 N.E.2d 1305, **;
1988 Mass. LEXIS 211, ***; CCH Prod. Liab. Rep. P11,905

ployee to get him a grease gun. After obtaining the grease gun, Colter drove a front-end loader to the steel structure supporting the sand classifier. Colter climbed onto the structure, and stood in the middle of the conveyor belt on two angle irons. He injected grease into the gears on one side and the noise stopped. Before Colter descended from the machine, his jacket caught in the gears, pulling in his arms. Colter suffered severe injuries [***9] requiring the amputation of his right arm below the elbow, amputation of his left index finger and causing substantial loss of function in his left arm.

n8 Colter testified that Marshfield's employees generally used three methods of attending to problems with the sand classifier. First, an employee could shut down the sand classifier while leaving the rest of the machines running. Colter said that this option was not feasible because material would continue to feed into the sand classifier while it was turned off. Second, an employee could shut down the entire plant, grease the gears and restart the machinery, a process which would have taken about one hour. Third, an employee could turn off the top loader where material is fed onto the first conveyor and let the system run until it is empty. This method would have taken fifteen minutes and was the usual method used at Marshfield.

1. *Sufficiency of the evidence.* Barber-Greene contends that the judge denied erroneously its motion for a directed verdict on the [***10] negligence counts because there was insufficient evidence that its conduct proximately caused the plaintiff's injuries. In determining whether the jury were warranted in finding Barber-Greene negligent, "[t]he question is whether the evidence, construed most favorably to the plaintiff, could not support a verdict for the plaintiff." *Poirier v. Plymouth*, 374 Mass. 206, 212 (1978). The plaintiff is entitled to judgment if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." *Raunela v. Hertz Corp.*, 361 Mass. 341, 343 (1972), quoting *Kelly v. Railway Express Agency, Inc.*, 315 Mass. 301, 302 (1943). To withstand a motion for a directed verdict on the issue of proximate causation, the plaintiff need only demonstrate [*55] that there was a greater likelihood that the harm of which the plaintiff complains was due to causes for which the defendant was responsible. *Mullins v. Pine Manor College*, 389 Mass. 47, 58 (1983). The plaintiff need not eliminate all possibility [***11] that the defendant's conduct was not a cause, but need only introduce evidence from which reasonable jurors could

conclude that it was more probable than not that the injuries were caused by the defendant's conduct. *Id.* We have reviewed the evidence in the light most favorable to the plaintiff and we conclude there is no error.

On the issue of negligent design, Colter alleged that the design of the twin screw classifier was defective in two major respects. First, Colter argued that the sand classifier was defectively designed because it used outdated power transmission elements which required manual greasing rather than using fully enclosed elements which rotated in their own lubricating bath. The latter design eliminated the need to guard against injury from greasing the gears because the gears were self-lubricating. Given that the machine involved in Colter's accident used exposed power transmission elements, Colter argued that the sand classifier was deficient in a second respect, namely that the guard that covered the exposed gears was improperly designed. Colter argued that the gear guard was defective because it contained large openings that would allow sand and dirt [***12] to enter the gears thus ensuring that the guard would need frequent removal for cleaning, greasing, and other maintenance. Colter also argued that the gear guard was too cumbersome to be removed and replaced easily and that the guard, by its own improper design, invited permanent removal.

[**1310] Colter presented the expert testimony of Egor Paul, a professor of mechanical engineering, who stated that the sand classifier itself was defectively designed because the power transmission elements were exposed to the dirty, sandy environment of the gravel yard and thus required frequent cleaning and greasing. Paul stated that designs which fully enclosed the power transmission elements in a self-lubricating bath had been available since the 1930's, and that these designs eliminated the need for greasing the transmission elements.

[*56] Paul's testimony was corroborated by Amelio Salera, the president of New England, who stated that his company did not manufacture and sell open-gear sand classifiers because the company considered the closed-gear model to be more safe. Salera stated that he considered the enclosed gear design to be safer because it reduced the number of times any worker risked [***13] contact with exposed gears. James Mueller, manager of marketing services for Barber-Greene, stated that Barber-Greene manufactured sand classifiers with enclosed gearboxes in the 1950's, and that one of the reasons for the enclosed design related to safety concerns.

As regards the gear guard itself, Colter contended that the guard was defective because the gear guard did not completely enclose the gears, but left an opening at the bottom and two additional cutouts in the guard. Professor Paul testified that because the machine was in-

403 Mass. 50, *; 525 N.E.2d 1305, **;
1988 Mass. LEXIS 211, ***; CCH Prod. Liab. Rep. P11,905

tended for use in a sandy, dusty environment, the openings guaranteed that the gears would need frequent greasing. James Mueller stated that Barber-Greene expected that the sand classifier's gear guard could need to be removed twice a month so that the machine could be washed, greased, and serviced. Although Worcester's representative stated that he did not know what happened to the gear guard, on cross-examination Barber-Greene's representative recognized that the sand classifier's gears might need washing as many as 624 times between the machine's manufacture in 1952 and Colter's accident in 1978. Worcester's representative, Matteo Trotto, testified [***14] that the gears never were washed while Worcester owned the machine, but that they were greased and repaired. Trotto stated that he did not know whether the guard was removed for the greasing, but that the repairs possibly would have required the guard's removal.

Because the guard would need to be removed frequently, Colter argued that the guard was negligently designed because it was not easily removed and replaced. The gear guard designed by Barber-Greene weighed approximately sixty pounds and was attached to the sand classifier by five bolts. Two workers were required to remove and replace the guard. The gears were mounted on the high end of the machine, and Barber-Greene [*57] acknowledged that the gears could be mounted as high as forty feet off the ground. Professor Paul stated that a proper design would have included a hinged opening or access panels which would have allowed a worker to grease the gears without removing the guard. The plaintiff's expert testified that design considerations appropriately account for the frequency of removal. Barber-Greene never tested the guard to determine the ease of removal.

We hold a manufacturer liable for defectively designed [***15] products because the manufacturer is in the best position to recognize and eliminate the design defects. See *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 796 (1987). "In evaluating the adequacy of a product's design, the jury should consider, among other factors, 'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.'" *Back v. Wickes Corp.*, 375 Mass. 633, 642 (1978), quoting *Barker v. Lull Eng'r Co.*, 20 Cal. 3d 413, 431 (1978). "[T]here is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance [**1311] of the machinery." *Uloth v. City Tank Corp.*, 376 Mass. 874, 881 (1978). As the Appeals Court

has noted, it is the jury's function to determine "whether the circumstances of the guard's removal and the plaintiff's subsequent injury [***16] were reasonably foreseeable." *Fahey v. Rockwell Graphics Sys., Inc.*, 20 Mass. App. Ct. 642, 648 (1985). n9

n9 Barber-Greene argues that we should apply the principles of *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471 (1980), in which a divided New York Court of Appeals held that a manufacturer may not be held liable, either on a theory of strict products liability or on a theory of negligence, if, after the product has left the control of the manufacturer, "there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries." *Id.* at 475. Barber-Greene asserts that the *Robinson* case should be applicable even where the alteration and risk of injury are reasonably foreseeable. However, *Robinson* does not reflect Massachusetts law. We have held that a product's manufacturer "must anticipate the environment in which its product will be used, and it must design against reasonably foreseeable risks attending the product's use in that setting." *Back v. Wickes Corp.*, *supra* at 640-641. *Bernier v. Boston Edison Co.*, 380 Mass. 372, 378 (1980). We decline to overrule *Back* and *Bernier* by accepting Barber-Greene's contention that a manufacturer need not consider the environment in which the product will be used in designing and manufacturing safety devices. See *Fahey*, *supra* at 647.

[***17]

[*58] Based on the evidence, the jury were entitled to find that Barber-Greene had negligently designed the twin screw sand classifier. The jury could have found that the open gear design was defective because it allowed sand and dirt to enter the machinery, thus necessitating frequent cleanings and greasings. The jury could have found that the enclosed gear design provided a safer alternative to the open-gear sand classifier. The evidence was undisputed that Barber-Greene manufactured an enclosed gear sand classifier in 1952, and Barber-Greene's representative could not say which design was more expensive.

The jury also could have found that the open guard was defective as well. Moreover, the jury could have found that, because the guard lacked any access panels or doors through which an individual could clean or grease the gears, the guard had to be removed each time the bevel gears required attention. Because the gear guard

403 Mass. 50, *; 525 N.E.2d 1305, **;
1988 Mass. LEXIS 211, ***; CCH Prod. Liab. Rep. P11,905

was so cumbersome, the jury could have concluded that it was entirely foreseeable that a purchaser of the machine would remove the guard permanently. In the absence of any testimony as to what actually happened to the gear guard while the sand classifier [***18] was in Worcester's possession, the jury were entitled to infer n10 that the guard was removed [*59] for greasing and repair and was not replaced because it was too cumbersome, not efficient, and too costly in the labor required to remove and replace the gear guard. n11

n10 We disagree with the dissenting opinion that the jury's verdicts were based solely on "mathematical odds" and not on a preponderance of the evidence. The dissenting opinion takes a far too narrow view of the inferences we permit the jury to draw in determining whether there was sufficient evidence supporting the verdicts. See *Poirier v. Plymouth*, 374 Mass. 206, 212 (1978). There was evidence that Barber-Greene expected that the guard would be removed for greasing, washing, and repairs. There was also evidence that Worcester may have removed the guard for repairs, and that, over the years, a number of replacement parts were ordered from Barber-Greene, and that installation of these parts would have required the guard's removal. Thus, there was evidence from which the jury reasonably could have inferred that the guard was removed for a reason foreseeable to Barber-Greene and because of the guard's defective design, it was not replaced. Contrast *Goffredo v. Mercedes-Benz Truck Co.*, 402 Mass. 97, 102-104 (1988).

[***19]

n11 We reject the defendant's contention that *Fahey v. Rockwell Graphic Sys., Inc.*, is distinguishable from this case. In *Fahey*, the Appeals Court reversed the judge's granting of the defendant's motion for a directed verdict because there was evidence that a guard was removed because it interfered with production. *Fahey, supra* at 648. Barber-Greene argues that, in this case, there was no evidence as to why the sand classifier's guard was removed. Although there was no direct evidence of the reason for the guard's removal in this case, the jury were entitled to decide "whether the circumstances of the guard's removal and the plaintiff's subsequent injury were reasonably foreseeable." *Id.* Ample evidence supported this inference, including an admission from Worcester's president that the guard would have to be removed for repair. One of the plain-

tiff's theories of liability was premised on the argument that the design of the gear guard impeded the easy maintenance of the machine's transmission elements, and that it was likely that a user of the machine permanently would discontinue using the guard for the sake of efficiency and convenience. The plaintiff here sought to prove that like the defendant in *Fahey*, Barber-Greene manufactured a machine with a guard that impeded productivity and that a better design was available. It is incumbent on a manufacturer to anticipate the environment in which its product will be used, and a guard which invites its own removal within the anticipated work environment is not reasonably designed. See *id.* at 647-648.

[***20]

[**1312] On the issue of its negligent failure to warn of the hazards of cleaning the bevel gears without shutting down the machine's operation, Barber-Greene contends that Colter's admitted knowledge of the dangers inherent in greasing the machine without the guard relieves the company of liability because Barber-Greene's failure to warn was not the proximate cause of Colter's injuries. As this court has recognized, where the danger presented by a given product is obvious, no duty to warn may be required because a warning will not reduce the likelihood of injury. *Uloth, supra* at 880. See also *Fiorentino v. A.E. Staley Mfg. Co.*, 11 Mass. App. Ct. 428, 436 (1981). Colter admitted he knew it was dangerous to grease the gears while operating the machine. In these circumstances, a warning would not reduce the likelihood of injury. We therefore agree with Barber-Greene that it was entitled to a judgment on this theory as a matter of law.

[*60] 2. *Proximate cause.* On the warranty count, the jury found that Barber-Greene had breached its warranty of merchantability with respect to the design, manufacture, and sale of the sand classifier and [***21] that New England had breached its warranty of merchantability with respect to the sale of the machine. The jury found that the defendants' breaches had proximately caused Colter's injuries, but found that Colter had actual knowledge of the defective condition of the sand classifier, and that he had proceeded unreasonably to use the machine, thus injuring himself. This finding precluded Colter's recovery on the warranty count. As explicated in this court's decision in *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342 (1983), a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty. See *Allen v. Chance Mfg. Co.*, 398 Mass. 32, 34 (1986). n12 Barber-Greene and New England contend that the jury's affirmative answer to a question on unreasonable

403 Mass. 50, *; 525 N.E.2d 1305, **;
1988 Mass. LEXIS 211, ***; CCH Prod. Liab. Rep. P11,905

use on the warranty count also relieves them from negligence liability because, for both counts, Colter's own conduct was the proximate cause of his injuries. We do not agree.

n12 This doctrine will be referred to hereinafter as the *Correia* doctrine or the doctrine of unreasonable use.

[***22]

Barber-Greene and New England principally rely on language in *Correia* to support their contention that Colter's unreasonable use of the sand classifier is, for purposes of negligence, a bar to recovery. This court stated, "[T]he user's negligence does not prevent recovery except when he unreasonably uses a product that he knows to be defective and dangerous. In such circumstances, the user's conduct alone is the proximate cause of his injuries, as a matter of law, and recovery is appropriately denied. In short, the user is denied recovery, not because of his contributory negligence or his assumption of the risk but rather because his conduct is the proximate cause of his injuries." *Correia, supra at 356*.

Although there is a certain logic to the defendants' argument that a finding of unreasonable use in a warranty count negates a finding of proximate cause on a negligence count, the argument is flawed because it equates proximate cause with sole [*61] cause. An examination of the principles underlying liability in negligence and liability in warranty indicates that, while sole proximate cause is a component of the warranty inquiry, negligence liability [***23] does not [**1313] focus on a sole cause of the plaintiff's injuries.

It is a well-settled proposition that actions for negligence and for breach of warranty impose distinct duties and standards of care. The basic elements of a products liability action founded on negligence are duty, breach of duty, cause in fact, and proximate cause. Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 *Utah L. Rev.* 267, 268. The focus of the negligence inquiry is on the conduct of the defendant. We impose liability when a product's manufacturer or seller has failed to use reasonable care to eliminate foreseeable dangers which subject a user to an unreasonable risk of injury. *Correia, supra at 354. Smith v. Ariens Co.*, 375 *Mass.* 620, 624 (1978). *Uloth, supra at 878*. See Prosser & Keeton, *Torts* 683 (5th ed. 1984); Twerski, *From Defect to Cause to Comparative Fault -- Rethinking Some Product Liability Concepts*, 60 *Marq. L. Rev.* 297, 298 (1977). "[A] finding of negligence [is] a statement by the jury about the product and about the manufacturer as well. It signifie[s] that the product [***24] was unreasonably dangerous because of its design or because of its

failure to be accompanied by an adequate warning, or both. It also signifie[s] that an ordinarily prudent manufacturer would have recognized the product's shortcomings and would have taken appropriate corrective measures." *Hayes v. Ariens Co.*, 391 *Mass.* 407, 410 (1984).

Liability for breach of warranty stands on a much different footing. In Massachusetts, liability for breach of warranty of merchantability is governed by *G. L. c. 106, § § 2-314 -- 2-318* (1986 ed.), and this court has noted that these provisions are congruent, in all material respects, with the principles expressed in *Restatement (Second) of Torts § 402A* (1965), the Restatement's definition of a seller's strict liability for harm suffered by a user or consumer of a seller's product. *Correia, supra at 353. Hayes, supra at 412. Back v. Wickes Corp., supra at 640*. Unlike negligence liability, warranty liability "focuses on [*62] whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller." *Correia, supra at 355. [***25] Hayes, supra at 413*. Because a breach of warranty does not require a defendant's misconduct, n13 a defendant may be liable on a theory of breach of warranty of merchantability even though he or she properly designed, manufactured, and sold his or her product. See *Restatement (Second) of Torts § 402A* comment a (1965); *Correia, supra at 353; Hayes, supra at 413*. Clearly, liability based on a theory of strict liability differs significantly from liability based on negligence. "A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability." *Hayes, supra at 410*.

n13 "[T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products." *Re-*

403 Mass. 50, *, 525 N.E.2d 1305, **;
1988 Mass. LEXIS 211, ***, CCH Prod. Liab. Rep. P11,905

statement (Second) of Torts § 402A comment c (1965), quoted in *Correia*, *supra* at 354-355.

[***26]

In a negligence case, the conduct of the plaintiff which will serve to bar recovery is governed by statute. Our comparative negligence statute provides that the plaintiff's contributory negligence shall not bar recovery if the plaintiff's negligence [**1314] was not greater than the total amount of negligence attributable to the parties against whom recovery is sought. The plaintiff's negligence, if less than the amount attributable to the defendant or defendants, only serves to diminish recovery by the proportion of negligence attributable to the plaintiff. *G. L. c. 231, § 85* (1986 ed.). Thus, in a negligence action, the trier of fact must focus on the conduct of both the defendant and the plaintiff [*63] in determining the extent of each party's responsibility for the plaintiff's injuries. The plaintiff's conduct is not viewed as the sole proximate cause of the injury and does not bar recovery completely unless the plaintiff is more than fifty per cent responsible for his or her own injuries.

Defined most simply, contributory negligence in products liability cases consists of the plaintiff's failure to discover the product's defect or to guard against the possibility that such a [***27] danger exists. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 *Vand. L. Rev.* 93, 106 (1972); Epstein, *supra* at 270. Essentially, we require the plaintiff to act reasonably with respect to the product he or she is using. The plaintiff's contributory negligence is measured objectively.

In warranty, as in negligence, a plaintiff's conduct may bar recovery from a liable defendant. "The absolute bar to the user for breach of his duty balances the strict liability placed on the seller. Other than this instance, the parties are not presumed to be equally responsible for injuries caused by defective products, and the principles of contributory or comparative negligence have no part in the strict liability scheme." *Correia*, *supra* at 355-356. Because warranty liability focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the user or the seller, "the only duty imposed on the user is to act reasonably with respect to a product which he knows to be defective and dangerous. When a user unreasonably proceeds to use a product which he knows to be defective and dangerous, [***28] he violates that duty and relinquishes the protection of the law. It is only then that it is appropriate to account for his conduct in determining liability. Since he has voluntarily relinquished the law's protection, it is further appropriate that he is barred from recovery." *Id.* at 355. The plaintiff's conduct implies consent to the risk and

thus is viewed as the sole proximate cause of the injury. Noel, *supra* at 129.

Applying the unreasonable use doctrine to actions sounding in negligence is foreclosed by the Commonwealth's comparative negligence statute. That statute provides that a plaintiff's [*64] recovery shall not be barred by his or her contributory negligence unless the plaintiff's negligence is greater than the amount of negligence attributable to the parties against whom recovery is sought. *G. L. c. 231, § 85* (1986 ed.). The statute clearly defines the amount of contributory negligence that will bar the plaintiff's recovery. The defendants' suggestion that proof of unreasonable use in warranty should bar completely the plaintiff's recovery in negligence would, in effect, ordain that the plaintiff's unreasonable use of a product is, as [***29] a matter of law, negligence greater than that of the defendants and the sole proximate cause of the injury. That determination is, however, for the finder of fact to make on a case-by-case basis and is not properly decided by the courts as a rule of law. In a negligence action, it is the function of the triers of fact to determine the percentage of fault attributable to the plaintiff, and the triers of fact are entitled to make that determination based on their perception of the relative fault of the parties. A jury may "find that the plaintiff was barred because of his unreasonable action. That such unreasonable conduct on the part of the plaintiff may in this case also have been found by the jury to be contributory negligence . . . does not eradicate the distinction in the defenses to the two counts. Under the negligence count, the plaintiff is not barred unless his negligence is greater than the negligence of the persons against whom recovery is sought." (Footnote omitted.) *Richard v. American Mfg. Co.*, [**1315] 21 *Mass. App. Ct.* 967, 968 (1986). Accord *Briney v. Sears, Roebuck & Co.*, 782 *F.2d* 585, 589 (6th Cir. 1986) (applying Ohio [***30] law and holding that, while plaintiff's recovery under a warranty theory was barred by his unreasonable use of the product, plaintiff was entitled to trial on his negligence claim under Ohio's comparative negligence statute). n14

n14 We think the similarity of the subjective element of the *Correia* defense and the doctrine of assumption of the risk may preclude application of the *Correia* defense to negligence. We note that, under our law, conduct which may bar a plaintiff's recovery in an action for breach of warranty is essentially stated in *Restatement (Second) of Torts § 402A* comment n (1965). *Correia*, *supra* at 357. *Allen v. Chance Mfg. Co.*, 398 *Mass.* 32, 34 (1986). As is indicated in comment n, the doctrine of unreasonable use is commonly understood to be the doctrine of assump-

tion of the risk. Our comparative negligence statute expressly abolished assumption of the risk as a defense to actions founded on negligence. *G. L. c. 231, § 85*. We accept, as we must, that legislative judgment and decline to reintroduce assumption of the risk in negligence actions by permitting a conclusion of unreasonable use to bar a plaintiff's recovery.

[***31]

[*65] We conclude that the jury's findings that Colter unreasonably proceeded to use the twin screw sand classifier after becoming aware of its defective condition does not bar recovery on his negligence claim as a matter of law. Nevertheless, we believe that application of some type of apportionment principles to warranty cases may be fairer than the current system, and may make results in negligence and warranty counts in the same case more consistent with each other. "[G]iven the wide variety of possible solutions," see *Correia, supra* at 356, and the serious policy considerations involved, the Legislature is the appropriate forum to select from among the competing proposals. n15 The case is remanded to the Superior Court for further proceedings consistent with this opinion.

n15 For example, in requiring apportionment principles in warranty cases, the Legislature would have to consider how to maintain the duty imposed on sellers to "prevent the release of any product in a defective condition unreasonably dangerous to the user or consumer" into commerce. See *Correia, supra* at 356. Other considerations such as a definition of product defect, allocations of burdens of proof, and reevaluations of affirmative defenses necessarily require a choice among various proposals. That choice is for the Legislature. The policy considerations vary and, in some circumstances, conflict. The Legislature with its broad investigatory power is the appropriate forum for resolution of these issues. See *Negron v. Gordon*, 373 Mass. 199, 207 (1977).

[***32]

So ordered.

DISSENTBY:

O'CONNOR (In Part)

DISSENT:

O'CONNOR, J. (dissenting in part).

I agree that the jury's finding that Colter unreasonably used the machine, knowing it to be defective, does not bar Colter from recovery against Barber-Greene or New England on a negligence theory. I also agree that, as a matter of law, Barber-Greene was entitled to judgment on Colter's claim of negligent failure to warn. Therefore, [*66] the court would be correct in remanding the case for retrial of the negligent design claim against Barber-Greene had the evidence been sufficient to warrant a finding that Barber-Greene's negligent design caused Colter's injury. However, in my view, although there was evidence of negligent design, there was no evidence of a causal relationship between that negligence and Colter's injury. Therefore, I would order the entry of a judgment for Barber-Greene, and I would remand the case solely for retrial of the negligence claims against New England. n1

n1 New England's only argument on appeal is that Colter is barred from recovery on a negligence theory by the jury's finding that Colter unreasonably used the machine, knowing it to be defective, an argument that the court properly rejects. Since, unlike Barber-Greene, New England has advanced no other argument, New England is not entitled to judgment. However, the jury's assessment of Colter's forty-nine per cent and New England's fifteen per cent negligent contribution to the accident cannot stand. A new trial should be ordered in which the jury should determine the comparative negligence, if any, of Colter and New England.

[***33]

When Worcester purchased the machine in 1952, it was equipped with a gear guard. By the time New England took the machine from Worcester, the guard was missing. The court concludes that, "[i]n the absence of any testimony as to what actually happened [**1316] to the gear guard while the sand classifier was in Worcester's possession, the jury were entitled to infer that the guard was removed for greasing and repair and was not replaced because it was too cumbersome, not efficient, and too costly in the labor required to remove and replace the gear guard." *Ante* at 58-59. I disagree. It is true that the jury could have found that a reasonably prudent manufacturer would have designed the machine differently so as to reduce the need to remove the guard in order to make repairs. It is also true that the jury could have found that a reasonably prudent manufacturer would have designed the machine differently so as to eliminate the need to remove the guard in order to clean and grease the gears, and that the jury could have found that Barber-Greene reasonably could have foreseen that,

due to efficiency and cost considerations, a user of the machine would choose not to replace the guard after [***34] removing it. It follows [*67] that, if there had been evidence in this case that the guard had been removed in order to facilitate repairs or the cleaning and greasing of gears, which would have been unnecessary had the alternative design been employed, and if there had been evidence that the guard had not been restored due to concerns about efficiency and cost, the jury would have been warranted in finding that Barber-Greene's negligence caused Colter's injury. However, there was no such evidence. As the court says, *ante* at 58, there was an "absence of any testimony as to what actually happened to the gear guard"

On the evidence, it is entirely speculative whether the guard was off the machine for any of the reasons set forth above. Therefore, although the jury could have found that Barber-Greene took a foreseeable risk in designing its machine, the jury could only have speculated that the injuries suffered by Colter were within that risk. The void in the evidence ought to be fatal to the plaintiff's case against Barber-Greene. As the court has previously stated, "[i]t is . . . necessary for [a] plaintiff to prove [not only] that the defendant took a [***35] risk with respect to the plaintiff's safety that a person of ordinary prudence would not have taken, [but also] that the plaintiff suffered a resulting injury that was within the foreseeable risk." *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 330 (1982).

The court asserts that this case is indistinguishable from *Fahey v. Rockwell Graphics Syss., Inc.*, 20 Mass. App. Ct. 642 (1985). In my view, the cases are critically distinguishable. The distinction focuses on the very point expressed above. In *Fahey*, the evidence not only disclosed that removal of a machine guard to facilitate speedy production was a risk foreseeable by the manufacturer, but it also disclosed that the plaintiff's injury resulted from the guard being removed for that very reason. *Id.* at 645. Unlike here, the injury was shown to have been within the foreseeable risk. As the court correctly notes, *ante* at 58-59 n.10, the Appeals Court concluded in *Fahey* that the jury were entitled to decide "whether the circumstances of the guard's removal and the plaintiff's subsequent injury were reasonably foreseeable." *Id.* at 648. [***36] However, in this case, the jury were not in position to do that because, [*68] without knowing what the circumstances of the guard's removal were, there being no evidence in that regard, the jury could not have inferred whether those circumstances were foreseeable.

Based on the plaintiff's best evidence, a gambling man with an appreciation of mathematical probabilities

might be willing to bet that the guard was removed in order to facilitate repairs or other maintenance that would not have been necessary in the absence of Barber-Greene's negligence, and was left off the machine as a means of efficiency and economy. However, Colter had the burden of proving by a preponderance of the evidence that his injury was within that foreseeable risk. He did not sustain that burden. Mere mathematical odds, no matter how favorable to a proposition, do not constitute proof thereof by a preponderance of the evidence.

[**1317] "It has been held not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is [***37] colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. . . . The weight or preponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable *in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there*" (citations omitted) (emphasis added). *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, 250 (1940). *Sargent* was an action on a policy of life insurance. A majority of the court concluded that the evidence warranted a jury finding "*not merely that there was a greater chance that the insured met his death by accident falling within the policy than that he met a different fate, but that death by accident within the policy was in fact indicated by a preponderance of the evidence*" (emphasis added). *Id.* at 251. [***38]

[*69] The view we expressed in *Sargent* continues to be the law of the Commonwealth. *Stepakoff v. Kantar*, 393 Mass. 836, 843 (1985). See P.J. Liacos, *Massachusetts Evidence* 38 (5th ed. 1985). Proof of mathematical probabilities is not enough. Although the jury were warranted in finding that Barber-Greene took a foreseeable risk concerning Colter's safety that an ordinarily prudent manufacturer would not have taken, the evidence was insufficient to warrant the further finding that Colter's injury was within that risk. I would order the entry of judgment for Barber-Greene, and, as explained at the outset of this opinion, I would remand the case for retrial of Colter's negligence claims against New England.

LEXSEE 68 MICH.APP. 5

**DOOMS v. STEWART BOLLING AND COMPANY; SANDERS v. STEWART
BOLLING AND COMPANY**

Docket Nos. 19957, 22207

Court of Appeals of Michigan

68 Mich. App. 5; 241 N.W.2d 738; 1976 Mich. App. LEXIS 672

December 4, 1975, Submitted
March 23, 1976, Decided

SUBSEQUENT HISTORY: [*1]**

Leave to appeal denied, 397 Mich .

PRIOR HISTORY: Appeal from Wayne, Harry J. Dingeman, Jr., J.

DISPOSITION:

Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellee employees brought a personal injury action against appellant manufacturer after they suffered severe hand injuries on a rubber milling machine during the course of their employment. A jury returned verdicts against the manufacture in favor of both employees. The Wayne Circuit Court (Michigan) granted the motion of one of the employees for additur or a new trial on the issue of damages. The manufacturer rejected additur and appealed.

OVERVIEW: The manufacturer argued that the trial court committed reversible error when it instructed the jury on three possible theories of recovery, including strict liability. The court refused to sanction an instruction on strict liability in tort in a products liability action, concluding that such a theory was unnecessary and that adding more labels would have enhanced the chance of causing confusion. The court, however, found that the instruction on strict liability in tort as well as on implied warranty was, at most, redundant and concluded that the instruction was not prejudicial to the manufacturer. The court also held that the trial court (1) did not err when it instructed the jury that contributory negligence on the part of the employees was not a defense to breach of implied warranty; (2) did not abuse its discretion in granting one employee's motion for an additur or, in the

alternative, a new trial as to damages; and (3) did not commit reversible error by refusing the jury's request to view the rubber milling machine.

OUTCOME: The court affirmed the judgment and ordered a new trial for one of the employees on the question of damages only.

LexisNexis(R) Headnotes

Torts > Products Liability > Negligence
Torts > Products Liability > Breach of Warranty

[HN1] In Michigan a plaintiff may proceed under at least two tortious theories of recovery in product liability: negligence and implied warranty.

Torts > Products Liability

[HN2] A plaintiff must prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains. When able to do that, then and only then may he recover against the manufacturer of the defective product.

Torts > Products Liability > Plaintiff's Conduct
Torts > Products Liability > Breach of Warranty

[HN3] Contributory negligence, as it is characteristically understood in the common law of negligence, is not a defense to a breach of warranty action. Something more than mere negligence must be shown to bar recovery, something approaching "assumption of the risk" or disregard of known danger.

Civil Procedure > Relief From Judgment > Additurs & Remittiturs

68 Mich. App. 5, *, 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

Civil Procedure > Relief From Judgment > Motions for New Trial

[HN4] Mich. Gen. Ct. R. 527.1(4) (1963) permits the court to grant a new trial where the verdict is "clearly or grossly inadequate". Mich. Gen. Ct. R. 527.6 (1963) provides: When a finding is made that the only error in the trial is the inadequacy or excessiveness of the verdict, the court may deny a motion for new trial on condition that within 10 days the non-moving party consents in writing to the entry of judgment of an amount found by the judge to be the lowest or highest amount respectively which the evidence will support. Mich. Gen. Ct. R. 527.1 (1963) authorizes the grant of a new trial to all or any of the parties and on all or part of the issues.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Relief From Judgment > Motions for New Trial

[HN5] The grant or denial of a new trial is within the discretion of the trial court. More fundamentally, appellate courts will reverse a grant or denial of a new trial grounded upon inadequate damages only where the trial court has "palpably" abused its discretion.

Civil Procedure > Relief From Judgment > Motions for New Trial

Torts > Damages > Damages Generally

[HN6] Appellate courts do not favor the practice of granting partial new trials in personal injury cases, despite authorization from Mich. Gen. Ct. R. 527.1 (1963), owing to the fact that liability and damage issues are commonly interwoven. The only exception to this notion that the supreme court has thus far recognized is where "liability is clear." Additionally, a departure from the notion against granting partial new trials is justified where the circumstances of the case establish that justice will be fully and better served.

Evidence > Procedural Considerations > Rulings on Evidence

Civil Procedure > Jury Trials

[HN7] Mich. Gen. Ct. R. 513 (1963) states: Upon application of either party or upon its own initiative, the court may order an officer to conduct the jury as a whole to view any property or place where a material fact occurred. Under Rule 513, the determination of the trial court is made discretionary. Likewise, under well established case law a trial judge may, in his discretion, refuse to permit the jury to view the premises where the injured party claims the accident occurred.

COUNSEL:

Rains, Block & Dean, for plaintiffs.

Harvey, Kruse & Westen, P.C. (by *James D. Hunter*), for defendant Stewart Bolling & Company.

Martin, Bohall, Joselyn, Halsey & Rowe, for defendant Michigan Mutual Liability [***7] Insurance Company.

JUDGES:

J. H. Gillis, P. J., and Allen and M. J. Kelly, JJ. J. H. Gillis, P. J., concurred. M. J. Kelly, J. (*concurring*).

OPINIONBY:

ALLEN

OPINION:

[*9] [**740] The Court is presented with relatively significant questions pertaining to the law of product liability in Michigan. The circumstances foreshadowing this appeal began when plaintiffs, Messrs. Doods and Sanders, suffered severe hand injuries on a rubber milling machine during the course of their employment at Detroit Rubber Company on 3 June 1969. n1 Each plaintiff commenced separate suits against Stewart Bolling and Company (the manufacturer of the machine) and Michigan Mutual Liability Insurance Company (the insurer of plaintiffs' employer). The cases were subsequently consolidated. Plaintiffs claimed Stewart Bolling was liable on the grounds that the machine did not have adequate safety devices incorporated into the design, and that the safety trip cable on the machine was inaccessible to the operator at critical points. Plaintiffs claimed liability against Michigan Mutual on the theory that it had breached its contract of workmen's compensation insurance in failing to warn of the unsafe condition [***8] of the machine after having undertaken an inspection. Proof was presented on both sides, and the jury returned verdicts against Stewart Bolling -- \$ 300,000 for Doods and \$ 50,000 for Sanders. [**741] It rendered a verdict of no cause of action in [*10] favor of Michigan Mutual. Stewart Bolling moved for a new trial which was denied. Plaintiff Sanders filed motions for *additur* and new trial. The trial judge ordered defendant Stewart Bolling to stipulate to an *additur* of \$ 150,000 as to Sanders or proceed to a new trial on the issue of damages. This appeal followed.

n1 It seems that as Doods, the regular operator, was running the machine, his left hand adhered to sticky rubber and became entangled in the rollers of the machine. He went for the safety

68 Mich. App. 5, *, 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

trip cable but was unable to reach it. Sanders responded to Dooms' yells, tried to render assistance, and his right hand became caught in the machine. Eventually, Dooms manipulated the position of his body so as to reach the safety cable and stop the machine; however, not before both men had suffered serious physical harm.

[***9]

I.

Was it reversible error for the trial court in a product liability suit to instruct on strict liability?

Stewart Bolling claims error occurred when the trial judge instructed the jury on three possible theories of recovery: negligence, implied warranty, and strict liability. It argues that our Supreme Court has never suggested that one could recover for personal injury by asserting a claim of strict liability against a manufacturer, and maintains that the instruction on strict liability amounted to directing verdicts for plaintiffs.

Plaintiffs refer the Court to the substance of the instruction. They argue essentially that it isn't prejudicial error for a trial judge to put a strict liability label on an otherwise recognized cause of action.

It is undisputed that [HN1] in Michigan a plaintiff may proceed under at least two tortious theories of recovery in product liability: negligence and implied warranty. *Spence v Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich 120, 135; 90 NW2d 873 (1958), *Manzoni v Detroit Coca-Cola Bottling Co.*, 363 Mich 235, 241; 109 NW2d 918 (1961), *Kupkowski v Avis Ford, Inc.*, 395 Mich 155; 235 NW2d 324 (1975). However, the debate continues [***10] with respect to whether the product liability theory styled strict liability in tort exists in this state. [*11] In *Baker v Rosemurgy*, 4 Mich App 195, 200; 144 NW2d 660 (1966), the Court seems to have recognized the theory:

"Plaintiff's theory of strict liability in tort falls also. Even if the test set forth in 2 Restatement of the Law of Torts, 2d § 402a, for this special form of liability were applied to a rifle, plaintiff's own conduct again defeats a cause of action."

Moreover, a Federal court and legal commentators refer to Michigan as a strict liability jurisdiction. n2 On the other hand, a recent panel of this Court in *Rutherford v Chrysler Motors Corp.*, 60 Mich App 392, 394 fn 1; 231 NW2d 413 (1975), noted that the doctrine of strict liability in tort is nonexistent in Michigan. In *Cova v Harley Davidson Motor Co.*, 26 Mich App 602, 612; 182 NW2d

800 (1970), the Court appeared willing to assent to its *de facto* existence but disapproved of the label "strict liability". Throughout the opinion in *Williams v Detroit Edison Co.*, 63 Mich App 559; 234 NW2d 702 (1975), this Court used the terms implied warranty in law synonymously with strict [***11] liability in tort, noting that which of the two labels ought to be used need not be decided to resolve the case. Finally, we mention in passing that the Michigan Supreme Court has not directly endorsed any tortious theories of recovery in product liability beyond that of negligence and implied warranty.

n2 See *Cova v Harley Davidson Motor Co.*, 26 Mich App 602, 612 fn 20; 182 NW2d 800 (1970), *Williams v Detroit Edison Co.*, 63 Mich App 559, 566 fn 1, 568-569 fn 4; 234 NW2d 702 (1975).

We believe that sound reasons militate against adding another theory to the law of product liability in this state. Therefore, we refuse to sanction an instruction on strict liability in tort in a product liability case. First and foremost, we believe [*12] such a theory is unnecessary. As will be shown, it appears inconceivable that a plaintiff might fail to recover under our tort warranty of fitness theory, yet recover under a strict liability in tort theory. Secondly, as emphasized in *Cova, supra*, and *Chestnut [***12] v Ford Motor Co.*, 445 F2d 967 (CA 4, 1971), adding more labels most likely enhances the chance of causing confusion. It would seem that the law of product liability is plagued by semantical pitfalls, and the Court does [**742] not desire to contribute to this legal quagmire. n3

n3 One can fully appreciate the wisdom of Judge (now Justice) Levin in *Cova v Harley Davidson Motor Co., supra*, 614, when he suggests that:

"Indeed, it might be helpful if we abandoned the continued use in this context of our present and misleading terminology of warranty and representation, express and implied, and strict liability in tort, and simply refer to the manufacturer's liability by the neutral term 'product liability'."

The question remains whether the giving of an instruction on strict liability in the instant case requires that we reverse. We begin with the instruction involved:

"We come now to the third theory upon which the plaintiffs bring this suit * * * [t]hat has to do with this matter of strict liability [***13] of a seller of a

68 Mich. App. 5, *; 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

product for physical harm to the user or consumer. It's the law that anyone who sells any product in a defective, *unreasonably dangerous* condition to the user, or consumer is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to the property: first, the seller is engaged in the business of selling such a product; and, secondly, that it's specifically expected to, or does reach the user or consumer without substantial change of the condition it's sold. The rules which I have just given you apply, although first, the seller has exercised all possible care in the preparation and sale of his product; and secondly, that the user or consumer has not bought the product from, or entered into any contractual relations with the seller. Now, in your [*13] consideration of the foregoing, you should apply the instructions heretofore given in connection with the burden of proof and proximate cause. In negligence cases, with regard to the claim of product defect, it is the law of our state that the plaintiff must show you that there was, in fact, a defect in the product at the time it left the possession and control of the defendant. [***14] Therefore, if plaintiff has not proven to your satisfaction that there was a defect in existence at the time it left the possession and control of the defendant, or that any such defect was not a proximate cause of the accident, you should find in favor of the defendant in connection with this theory of the plaintiff. If there has been a modification of the machine from the time it left the possession and control of the defendant Bolling, and that modification was the sole cause of the accident and injury in these cases, or in either case, you should return a verdict in favor of the defendant, accordingly." (Emphasis added.)

The first part of the instruction parallels the language in Restatement Torts 2d, § 402A. The remainder described those elements a plaintiff must prove to establish a prima facie case in product liability, irrespective of the theory of liability:

"Common to most products liability cases, regardless of the theory of liability, is the nature of certain proofs required to support a finding of liability. In *Piercefield v Remington Arms Co, Inc*, 375 Mich

85, 98-99; 133 NW2d 129 (1965), this Court commented on the nature of these proofs.

"As made clear [***15] above, [HN2] a plaintiff relying upon the rule must prove a defect attributable to the manufacturer and causal connection between that defect and the injury or damage of which he complains. When able to do that, then and only then may he recover against the manufacturer of the defective product.'

"While the Court in *Piercefield, supra*, was concerned with a breach of warranty theory, the above elements [*14] of liability are equally applicable to a lawsuit sounding in negligence." *Caldwell v Fox*, 394 Mich 401, 409-410; 231 NW2d 46 (1975). n4

n4 Compare *Awedian v Theodore Efron Mfg Co*, 66 Mich App 353; 239 NW2d 611 (1976).

What distinction, other than defenses, exists between the theory of implied warranty in law, the theory of negligence [**743] and strict liability? n5 The key appears to lie in the term defect. When proceeding under a theory of negligence, the element of defect is established by proofs that the manufacturer failed to do what a reasonably prudent person would do or did what [***16] a reasonably prudent person would not have done under the circumstances. Under implied warranty imposed by law a defect is established by proof that the product is not reasonably fit for the use intended, anticipated or reasonably foreseeable. See Michigan Standard Jury Instructions, 25.21 and 25.23. Under the strict liability in tort theory in Restatement Torts 2d, § 402A, a product not only must be defective (presumably any defect), it must also be in an "unreasonably dangerous condition". This Court opines that if the condition of a product is unreasonably dangerous as well as defective (strict liability theory) then the product would necessarily be unfit for the use anticipated or reasonably foreseeable (implied warranty in law theory).

n5 The term "strict liability in tort" as used in this opinion and as used in prior opinions (*see Williams and Cova, supra*) refers to strict liability in tort as defined in Restatement Torts 2d, § 402A. It does not refer to what often is the lay

68 Mich. App. 5, *, 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

understanding of such term, viz: liability without fault or absolute liability.

[***17]

We cannot conceive that had the jury found the rubber milling machine to be in a defective and unreasonably dangerous condition, it could still find the machine reasonably fit for the use anticipated or reasonably foreseeable. Conversely, we [*15] cannot conceive that if the jury determined the machine was reasonably fit for the use anticipated or reasonably foreseeable (thus rejecting implied warranty) it could nevertheless find that the machine was defective and unreasonably dangerous (thus finding strict liability). As was stated by this author in *Williams*, supra:

"* * * [T]he application of the doctrine of implied warranty may have the same or substantially the same results as applying the doctrine of strict tort liability. 54 ALR3d at 1083." n6 63 Mich App at 567.

Therefore, the Court finds that the instruction on strict liability in tort as well as implied warranty was, at most, redundant, and concludes that the instruction was not prejudicial to defendant. Any prejudice which might have occurred by reason of a lay jury interpreting strict liability as liability without fault -- which is precisely what defendant contends did occur -- was precluded [***18] by the trial court's definition of strict liability in terms identical to the definition used in the Restatement and in prior decisions of this Court. Added support for our position stems from the language of our Supreme Court in *Cook v Darling*, 160 Mich 475, 481; 125 NW 411 (1910):

"It seems to be a well-settled doctrine in this State that where property is bought for a particular purpose, and only because of its supposed fitness for that, and where articles are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life and the failure of consideration is so complete that, [*16] where there is not an express warranty, there is an implied warranty that the goods are fit for the purpose for which they were bought, and that articles of food are fit for consumption. In such cases the vendor is held to a strict accountability."
n7

n6 This is not to say that the scope of strict liability in tort as provided in § 402A of the Restatement equals the scope of our fitness warranty. It does not. A particular product could be unfit for the use intended without being unreasonably dangerous.

[***19]

n7 See Doelle, *Product Liability Law in Michigan*, 54 Mich State B J 866, 874 (Nov, 1975).

II.

Is contributory negligence a defense to a theory of recovery based upon the tort warranty of fitness?

Over defendant Stewart Bolling's objection, the trial judge instructed the jury that if it found Stewart Bolling "liable for a [**744] breach of implied warranty in regard to the rubber milling machine, then I further instruct you that any contributory negligence on the part of either plaintiff is not a defense". On appeal, defendant takes the position that this is not the law in Michigan, *Baker v Rosemergy*, 4 Mich App 195, 200; 144 NW2d 660 (1966), *Casey v Gifford Wood Co*, 61 Mich App 208, 218; 232 NW2d 360 (1975), and that the court erred reversibly when it gave such instruction in lieu of an instruction on plaintiffs' misuse of the machine as requested by defendant. Defendant argues that the record supports negligence on plaintiffs' part. Plaintiffs counter that no reversible error was committed because the defense of contributory negligence is inapplicable to an action [***20] grounded upon implied warranty, *Kujawski v Cohen*, 56 Mich App 533; 224 NW2d 908 (1974), and because the court instructed that plaintiffs had to establish that there was a reasonable use when a hazardous condition leading to injury arose.

In *Kujawski v Cohen*, supra, 542, a panel of this Court ruled as follows:

[*17] [HN3] "Contributory negligence, as it is characteristically understood in the common law of negligence, is not a defense to a breach of warranty action. Something more than mere negligence must be shown to bar recovery, something approaching 'assumption of the risk' or disregard of known danger. *Barefield v La Salle Coca-Cola Bottling Co*, 370 Mich 1, 5; 120 NW2d 786, 789 (1963); *Baker v Rosemergy*, 4 Mich App 195, 200; 144 NW2d 660, 663 (1966)."

68 Mich. App. 5, *; 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

The *Kujawski* rule makes sense when it is considered that a defendant's negligence is not pertinent to an action based upon implied warranty. This does not mean that a defendant is precluded from offering evidence to establish misuse of a product:

"[W]arrantors are not to be held as guarantors against injury to consumers resulting from the consumer's misuse of the product." *Barefield v La* [***21] *Salle Coca-Cola Bottling Co, supra*, at 5.

However, the question of a plaintiff's product misuse as it relates to implied warranty is better directed to the question of proximate cause rather than contributory negligence as that term is defined in an ordinary negligence case. See Annotation, *Contributory Negligence or Assumption of Risk as Defense to Action for Personal Injury, Death, or Property Damage Resulting From Alleged Breach of Implied Warranty*, 4 ALR3d 501. Also see *Imperial Die Casting Co v Covil Insulation Co*, 264 SC 604; 216 SE2d 532 (1975).

If the proximate cause of a plaintiff's injury is found to have stemmed from his own conduct, such as misuse of a product, and not from the product's lack of fitness, he may not recover since the proofs have failed to establish a causal connection between the defect and injury. *Casey v Gifford* [*18] *Wood Co, supra*, at 218. n8 Moreover, if the failure of a manufacturer to provide a product reasonably fit for the use intended or reasonably foreseen is found to be a proximate cause of the injury to plaintiff, the fact that plaintiff's misuse concurred with the defect to cause the harm will not bar recovery [***22] under a theory of implied warranty unless it can be said that plaintiff voluntarily and unreasonably proceeded to encounter the known risk. n9 *Baker v Rosemurgy*, [**745] *supra*, at 200.

n8 In retrospect this author concedes that when he wrote in *Casey, supra*, p 218, "Contributory negligence remains a defense. In this regard, we are well aware that the jury may have determined * * * the proximate cause of the injury was plaintiff's own negligence" he inadvertently conveyed the impression that in all implied warranty actions contributory negligence was a defense. As stated in the discussion above the author only intended to state that plaintiff's own negligence, if found to be the cause of the accident, remains a defense.

n9 "Where a person must work in a place of possible danger, the care which he is bound to

exercise for his own safety may well be less, due to the necessity of giving attention to his work, than is normally the case." *Byrnes v Economic Machinery Co*, 41 Mich App 192, 202; 200 NW2d 104 (1972).

[***23]

In the instant case, the record is devoid of evidence tending to show that it was the plaintiffs' conduct rather than the defect which caused the harm. Further, the court instructed the jury that to recover under implied warranty plaintiffs had to prove, among other things, "that the rubber milling machine was not reasonably fit for the use or purposes anticipated or reasonably foreseeable by the defendant in one or more of the ways claimed by the plaintiffs", and "that the failure to provide an adequate safety device was a proximate cause of the injury to the plaintiffs". Moreover, it instructed that "if the failure to provide an adequate safety device was not a proximate cause of the injuries" verdict should be for defendant.

We thus conclude that the lower court did not err in instructing the jury that contributory negligence [*19] was not a defense to implied warranty, and that the gist of what defendant was trying to get across in its requested instruction on misuse, to the extent the evidence supported it, was adequately covered by the instructions given.

III.

*Did the trial court abuse its discretion in granting a motion by one of the plaintiffs for an additur or, [***24] in the alternative, a new trial as to damages?*

[HN4] GCR 1963, 527.1(4) permits the court to grant a new trial where the verdict is "clearly or grossly inadequate". GCR 1963, 527.6 provides:

"When a finding is made that the only error in the trial is the inadequacy or excessiveness of the verdict, the court may deny a motion for new trial on condition that within 10 days the non-moving party consents in writing to the entry of judgment of an amount found by the judge to be the lowest or highest amount respectively which the evidence will support."

GCR 1963, 527.1 authorizes the grant of a new trial "to all or any of the parties and on all or part of the issues".

In the instant case, the jury awarded plaintiff Dooms \$ 300,000, and plaintiff Sanders \$ 50,000. Counsel for Sanders moved for *additur* or new trial. The trial court ordered defendant Stewart Bolling to stipulate to an *ad-*

68 Mich. App. 5, *, 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

ditur of \$ 150,000, so that the total verdict in favor of Sanders would be \$ 200,000, or, in the alternative, to submit to a new trial on damages only. Stewart Bolling refused to stipulate to the *additur* and was granted leave to appeal on the propriety of the trial court action.

Defendant [***25] suggests that *additur* is not allowed in Michigan since it constitutes an improper invasion [*20] of the jury's province. *Goldsmith v Detroit, Jackson & Chicago R Co*, 165 Mich 177; 130 NW 647 (1911), *Lorf v City of Detroit*, 145 Mich 265; 108 NW 661 (1906). However, these cases were handed down long before the adoption of GCR 1963, 527.6. Several recent decisions recognize the use of *additur* or *remittitur* to cure an inadequate or excessive verdict. *Pippen v Denison Div of Abex Corp*, 66 Mich App 664; 239 NW2d 704 (1976), *Barger v Galazen*, 61 Mich App 182; 232 NW2d 354 (1975), *Soave Construction Co v Lind Asphalt Paving Co*, 56 Mich App 202, 205; 223 NW2d 732 (1974), *Dougherty v Rezolin, Inc*, 48 Mich App 636; 210 NW2d 899 (1973), *Nicholaides v Demetri*, 38 Mich App 102; 195 NW2d 793 (1972). Moreover, the issue in this case is not whether *additur* is permissible. The trial court ordered a new trial on the question of damages unless the defendant agreed to the *additur*. Since defendant refused to stipulate to the *additur*, the question on appeal concerns the trial court's action in granting a new trial on the grounds that the \$ 50,000 [***26] damage award to plaintiff Sanders was clearly inadequate.

Although the question of damages is one of fact for the jury, n10 as noted earlier, [**746] under the court rules, a party may be granted a new trial on the basis that damages awarded were inadequate or excessive. [HN5] The grant or denial of a new trial is within the discretion of the trial court. n11 More fundamentally, appellate courts will reverse a grant or denial of a new trial grounded upon inadequate damages only where the trial court has "palpably" abused its discretion. *Brown v Arnold*, [*21] 303 Mich 616, 627; 6 NW2d 914 (1942). n12 Where, as here, the reason given for granting a new trial -- clearly inadequate damages -- is legally recognized, the question becomes whether by any reasonable interpretation of the record there is support for the decision. *Benmark v Steffen*, 9 Mich App 416, 422; 157 NW2d 468 (1968). See also *Williams Panel Brick Mfg Co v Hudson*, 32 Mich App 175; 188 NW2d 235 (1971).

n10 *Scho v Socony Mobil Oil Co, Inc*, 360 Mich 353; 103 NW2d 469 (1960), *Lawrence v Tippens*, 53 Mich App 461, 466; 219 NW2d 787 (1974).

[***27]

n11 *Arnsteen v United States Equipment Co*, 390 Mich 776 (1973).

n12 See decisions cited in *Benmark v Steffen*, 9 Mich App 416; 157 NW2d 468 (1968).

The instant trial court listed the following as determinative in granting its order:

"The case before the Court presents a truly unique situation in that it involves two cases consolidated for trial involving two men with serious and remarkably similar injuries. Notwithstanding the obvious similarities, there was a tremendous discrepancy in the jury's verdict, i.e., Mack Dooms received \$ 300,000.00 and Willie Sanders \$ 50,000.00. In view thereof it appears to be incumbent upon this Court to examine into whether or not there existed sufficient differences in damages to justify this tremendous variation, and also if there were errors in the trial or circumstances which existed which unfairly prejudiced Willie Sanders.

"Upon a review of the record in a comparison of the damages suffered by each plaintiff the following seems significant:

"Each man suffered a crushing injury to one hand.

"Each man is right-handed, but Mack Dooms [***28] suffered injury to his left hand and Willie Sanders to his right.

"Each man's injury resulted in partial amputation of the effected hand.

"According to medical testimony each man has lost effective use of the hand involved.

"Mack Dooms required more surgical procedures following the injury.

"Each man has suffered a loss of earning capacity and loss of earnings.

[*22] "Mack Dooms was able to return to his former employer, although at a lesser pay.

"Willie Sanders was not able to return permanently to his former employer and was without employment for a much longer period of time than Mack Dooms. The employment which he finally ob-

68 Mich. App. 5, *; 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

tained was at a substantially reduced wage.

"In summary of the above, it becomes clear to this Court that there existed nothing in the record of these cases to justify the extremely large difference in the two verdicts."

The Court agrees with defendant Stewart Bolling that the record shows plaintiff Dooms' injury to be relatively more severe than Sanders' which resulted in a greater degree of suffering and called for more medical attention. Moreover, the lower court tended to over-emphasize the fact that Sanders was off work for a longer period. [***29] The record seems to indicate that the period of unemployment was due in part to the disposition as well as the capacity of Sanders. Conversely, there were, as the court below points out, striking similarities between the two injuries. Further, it was Sanders who lost effective use of the hand he used the most by nature. Yet, the damages awarded amounted to approximately 16% of what Dooms was awarded. We cannot say that the trial court abused its discretion in finding that a significantly larger sum was supported by the record, and that plaintiff was entitled to a new trial on the grounds that the damage award was clearly inadequate.

[**747] Defendant questions the authority of the trial court to grant plaintiff Sanders a new trial limited to the issue of damages. It is true that, as a rule of thumb, [HN6] appellate courts do not favor the practice of granting partial new trials in personal injury cases, despite authorization from GCR 1963, 527.1, owing to the fact that liability and damage issues [*23] are commonly interwoven. *Kistler v Wagoner*, 315 Mich 162; 23 NW2d 387 (1946), *Bias v Ausbury*, 369 Mich 378, 383; 120 NW2d 233 (1963). The only exception to this notion [***30] that the Supreme Court has thus far recognized is where "liability is clear". *Trapp v King*, 374 Mich 608; 132 NW2d 640 (1965). See also *Doutre v Niec*, 2 Mich App 88, 90; 138 NW2d 501 (1965).

An additional exception seems to have been posited in *Mulcahy v Argo Steel Construction Co*, 4 Mich App 116, 130; 144 NW2d 614 (1966). A departure from the notion against granting partial new trials is justified where the circumstances of the case establish that justice will be fully and better served. In this light, due consideration must be given to the decision of the trial court who presided over the case. The focal point of liability in the instant case depended upon whether the rubber milling machine was equipped with adequate safety devices. There was substantial proof presented to show it was not. It appears evident from the evidence that were the case retried on all the issues, the result would not be

different on the question of liability. Under the circumstances of this case, we believe that the lower court did not err in granting a new trial limited to damages, and that the interest of justice would not be served by incurring the added time and expense necessary for [***31] a full-blown retrial.

IV.

Did the trial court commit reversible error by refusing the jury's request to view the rubber milling machine?

During its deliberations the jury made a written request to see the machine. The request was denied by the trial judge and on appeal appellant [*24] contends the denial constitutes reversible error. [HN7] GCR 1963, 513 states:

"Upon application of either party or upon its own initiative, the court may order an officer to conduct the jury as a whole to view any property or place where a material fact occurred." (Emphasis supplied.)

Under the rule the determination of the trial court is made discretionary. Likewise, under well established case law a trial judge may, in his discretion, refuse to permit the jury to view the premises where the injured party claims the accident occurred. *Leonard v Armstrong*, 73 Mich 577, 581; 41 NW 695 (1889), *Mulliken v City of Corunna*, 110 Mich 212, 214; 68 NW 141 (1896). We find no abuse of discretion. The record is replete with photographs, blueprints and drawings of the machine. Further, the record shows that material changes had been made in the machine subsequent to the accident. [***32] The safety trip wire had been lowered some six inches. Given these circumstances the trial court may well have concluded that permitting a view would in itself have caused confusion and have been grounds for error.

We have reviewed the remaining assignments of error presented by the parties on appeal, and concluded that they either have not been properly preserved for appellate review, or are so insubstantial as to need no formal discussion.

The verdict of no cause of action against defendant Michigan Mutual Liability Company in each of the consolidated cases is affirmed. Costs to Michigan Mutual Liability Company against plaintiff Dooms. The verdict against defendant Stewart Bolling and Company in favor of plaintiff Dooms is affirmed with costs to plaintiff. A new trial on the question of damages only is ordered in

68 Mich. App. 5, *; 241 N.W.2d 738, **;
1976 Mich. App. LEXIS 672, ***

Sanders v [*25] *Stewart Bolling and Company*, with costs to plaintiff Sanders.

Affirmed, costs as indicated above.

CONCURBY:

KELLY

CONCUR:

M. J. Kelly, J. (*concurring*).

I concur in Judge Allen's opinion because I feel that under all of the circumstances of [**748] this fiercely contested trial all parties were well represented and had what I perceive [***33] to be a fair trial. I do not agree with the statement that "the record is devoid of evidence tending to show that it was the plaintiffs' conduct rather than the defect which caused the harm". There was evidence from which the jury could have found plaintiffs guilty of contributory negligence. However the jury obviously did not. An appellate court cannot give more weight to that evidence than did the jury. If the jury had, however, found no cause of action, I would likewise vote not to disturb that verdict.

We are taking a critical step here in affirming the Sanders remand for re-trial on the issue of damages only.

I feel compelled to mention this because I think we should make it clear to the bench and bar that we are opting for a rule which would vest discretion in the trial court where liability has been determined favorably to plaintiff and adverse to defendant to order a new trial on the basis of damages only where the damage award was either clearly inadequate or clearly excessive. We do not go that far in this holding because we are sustaining a jury verdict as to liability and damages in favor of Doods who had by far the greater familiarity with this machine and who [***34] would be more likely to have been no caused than Sanders who had been placed on this machine only the day of the accident, and whose [*26] injuries resulted from an impulsive attempt to save his fellow man from catastrophe.

Had this same jury not assessed these awards I would vote differently. In my opinion \$ 50,000 for the loss of use of a hand is not per se inadequate. It is the comparison which offends. The jury must have been influenced by one or more of the prejudicial factors mentioned by the trial judge in his opinion filed January 24, 1974. His on-the-scene perspective is far the better one in the overall analysis of this issue. I cannot say there was a clear abuse of discretion.

**FIRESTONE STEEL PRODUCTS COMPANY, FORMERLY A DIVISION OF
THE FIRESTONE TIRE & RUBBER COMPANY, ACCURIDE CORPORATION,
THE FIRESTONE TIRE & RUBBER COMPANY, AND
BRIDGESTONE/FIRESTONE, INC., PETITIONERS v. MANUEL BARAJAS
AND LUISA BARAJAS, RESPONDENTS**

No. 95-0382

SUPREME COURT OF TEXAS

*927 S.W.2d 608; 1996 Tex. LEXIS 79; 39 Tex. Sup. J. 848; CCH Prod. Liab. Rep.
P14,695*

October 11, 1995, Argued

June 28, 1996, Delivered

PRIOR HISTORY: **[**1]** ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.

LexisNexis(R) Headnotes

COUNSEL: For PETITIONERS: Boyce, Ms. Maria Wyckoff, Maloney, Mr. James Edward, Eastus, Mr. Matthew P., Baker & Botts, Houston, TX.

For RESPONDENTS: Edwards, Mr. William R., Edwards Terry Baiamonte & Edwards, Corpus Christi, TX.

JUDGES: JUSTICE BAKER delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE CORNYN, JUSTICE SPECTOR, JUSTICE OWEN, and JUSTICE ABBOTT join. JUSTICE ENOCH filed an opinion, concurring in part and dissenting in part. JUSTICE ENOCH, concurring and dissenting.

OPINIONBY: JAMES A. BAKER

OPINION: **[*611] THE BARAJASES' SUMMARY JUDGMENT FIRESTONE'S SUMMARY JUDGMENT**

This is a wrongful death case based on allegations of negligence, strict products liability, and civil conspiracy against Firestone Steel Products Company and others. The trial court granted summary judgment for Firestone. The court of appeals reversed and remanded the cause for trial. *895 S.W.2d 789*. We reverse the court of appeals' judgment and render judgment for Firestone. We

hold that in the circumstances of this case, the original **[**2]** designer of a general product concept that is copied, modified and used by a manufacturer is not liable for injuries resulting from the use of the manufacturer's product.

I. THE BACKGROUND FACTS

A. THE WHEEL DESIGN

In the late 1950's, Firestone designed and patented a new single-piece wheel known as the 15 degree bead seat taper. For the first time, the design permitted installation of a tubeless tire on a wheel. Firestone's initial 15 degree bead seat taper wheel was a 22.5-inch wheel for heavy trucks. The design made it possible to use tubeless tires, instead of tube-type tires, on trucks. Firestone allowed the entire industry to use the design without charging a license fee under its patent.

Firestone's original design was for larger size tires and rims used for 18-wheel semi-tractor trailer rigs. In the mid-1960's, Firestone developed a 15 degree bead seat taper wheel with a 16.5-inch nominal diameter. Truck owners could use this wheel on lighter trucks such as 3/4- or 1-ton pick-ups. Firestone's innovation was not a single wheel design, but a dual wheel with two tires side by side. This wheel is used only with 8- or 9-inch tires, and only for dual-wheel applications. **[**3]**

Firestone patented its design. However, it granted royalty-free licenses of its design for domestic manufacture of tires and wheels. Firestone sought to profit, not from licensure of its patent, but from industry use of products that would help build customer demand for Firestone's own products.

Kelsey-Hayes Company modified Firestone's original 15 degree bead seat taper wheel design to design its own wheel. Kelsey-Hayes' design changed Firestone's original patented wheel design by making it 16.5 inches in diameter, by making it narrower to fit only 6- or 6.75 inch tires, and by making it with a "hump bead." Kelsey-Hayes' design was only for a single wheel by itself, not a dual wheel. Kelsey-Hayes manufactured its own 16.5 hump bead wheel. Firestone did not participate in the manufacture or marketing of Kelsey-Hayes' tires in any way, and did not collect a royalty from Kelsey-Hayes for use of Firestone's patented design.

B. THE ACCIDENT

In the early 1970's, the tire and wheel industry began receiving reports of accidents occurring when tire mounters tried to mount and inflate 16-inch tires on 16.5-inch wheels. The Rubber Manufacturers Association, a tire industry group that [**4] monitors after-market problems, developed sidewall warnings for 16-inch tires.

One morning, Jimmy Barajas apparently attempted to fix a flat tire on a 3/4-ton pickup. He apparently tried to put a 16-inch tire made by General Tire Company on a 16.5-inch wheel made by Kelsey-Hayes Company. The tire exploded, fatally injuring Jimmy. No one witnessed the accident.

C. THE LITIGATION

1. IN THE TRIAL COURT

Jimmy's parents, Manuel and Luisa Barajas, sued Firestone, General Tire, Kelsey-Hayes, the Budd Company, and others for their son's wrongful death. They alleged that Firestone was liable for Jimmy's death [**612] based on claims of strict products liability and negligence. The Barajas asserted that Firestone had originally designed, manufactured and sold a component part of the wheel in question. The Barajas also alleged that Firestone engaged in a civil conspiracy to conceal and obscure the hidden dangers of trying to mount mismatched tires and wheels.

Firestone answered and moved for summary judgment. Firestone alleged in its motion that its summary judgment evidence showed, as a matter of law, that it did not design, manufacture or sell the wheel in question. [**5] In support of its motion, Firestone relied on its expert witness' deposition. Firestone also relied upon the Barajas' partial motion for summary judgment against Kelsey-Hayes and their summary judgment evidence that showed, as a matter of law, Kelsey-Hayes manufactured the wheel in question. Firestone also argued that it could not be liable based upon its original patent.

The trial court heard both motions at the same time. The trial court granted the Barajas' a partial summary

judgment, holding Kelsey-Hayes manufactured the wheel. The trial court also granted Firestone a summary judgment on all the Barajas' claims and rendered a take nothing judgment for Firestone against the Barajas.

2. ON APPEAL

The Barajas appealed the take nothing judgment. They contended that Firestone did not conclusively negate an essential element of their strict products liability, negligence and civil conspiracy causes of action. Specifically, they claimed that Firestone did not negate their allegations that Firestone designed, manufactured and sold a component part of the wheel in question. They argued that Firestone was liable for faulty design of the tire and wheel that killed Jimmy [**6] Barajas because of Firestone's original patent.

The court of appeals agreed with the Barajas, and held that Firestone's summary judgment proof did not negate all the Barajas' allegations. Specifically, it held that Firestone did not negate:

- (1) the outstanding theory that Firestone manufactured, designed or sold a component part of the wheel that allegedly killed Jimmy Barajas;
- (2) the allegations that Firestone had engaged in the business of introducing the wheel in question, or a component part thereof, into the channels of commerce; and
- (3) the allegations that Firestone had consciously and knowingly combined and conspired with others to engage in an intended course of conduct which resulted in Jimmy's death.

3. APPLICATION FOR WRIT OF ERROR

In its Application for Writ of Error, Firestone argues that the court of appeals erred because it improperly held that Firestone's summary judgment evidence did not negate the Barajas' claims that Firestone manufactured, designed or sold a component part of the wheel that allegedly killed Jimmy Barajas. Firestone also argues that the court of appeals erred in concluding that Firestone's [**7] original design idea could subject Firestone to liability for injury caused by a product that was designed,

927 S.W.2d 608, *; 1996 Tex. LEXIS 79, **;
39 Tex. Sup. J. 848; CCH Prod. Liab. Rep. P14,695

manufactured and sold by a different entity. Firestone argues that the court of appeals' decision creates an expansive new cause of action for original design defects that is not recognized under strict liability tort law in Texas.

The Barajas respond that the court of appeals was correct in reversing Firestone's summary judgment. The Barajas assert that Firestone's summary judgment motion and proof did not meet the Barajas' allegations and proof that: (1) Firestone originally designed, patented, licensed and marketed the tire/rim combination using the 15-degree-bead-taper and low-flange-height features; (2) Firestone was the cause and the primary cause of such design becoming a standard for the tire-wheel industry; (3) Firestone was a producing, proximate and legal cause of the use of that design in the wheel in question; (4) Firestone originally designed, initiated, promoted, marketed and introduced to the tire-wheel and vehicle industries the 16.5-inch nominal diameter [*613] drop-center single piece wheel/rim design such as the wheel in question; and (5) but for [*8] Firestone, this system would not exist today.

The Barajas further argue that Firestone had a duty to warn users including their son, Jimmy, of the hazards associated with the use of its products. The Barajas conclude that because Firestone patented, marketed and licensed the 15-degree-bead-taper design and the low-flange-height feature and the 16.5-inch wheel, Firestone should be held accountable the same as if Firestone had manufactured the particular wheel in question.

We granted Firestone's application for writ of error.

II. APPLICABLE LAW

A. NEGLIGENCE

At common law, a negligence cause of action consists of: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). A prerequisite to tort liability is the existence of a legally cognizable duty. *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex. 1993). Whether a duty exists is a question of law. *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385, 387 (Tex. 1991); *Greater Houston Transp. Co.*, 801 S.W.2d at 525.

B. STRICT PRODUCTS LIABILITY

In Texas, [*9] section 402A of the *RESTATEMENT (SECOND) OF TORTS* governs claims for strict liability in tort. See *RESTATEMENT (SECOND) OF TORTS* § 402A (1965); *Lubbock Mfg. Co. v. Sames*, 598 S.W.2d 234, 236 (Tex. 1980); *Arm-*

strong Rubber Co. v. Urquidez, 570 S.W.2d 374, 375-76 (Tex. 1978). Section 402A defines the cause of action as:

(1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402A (1965); *Lubbock Mfg. Co.*, 598 S.W.2d at 236.

The rule applies to any person engaged in the business of selling products for use or consumption. *Armstrong Rubber Co.*, 570 S.W.2d at 375. To incur liability, a defendant does not have to actually sell the product; introducing the product into channels of commerce is enough. *Armstrong Rubber Co* [*10] ., 570 S.W.2d at 375. However, the product must reach the user or consumer without substantial change in the condition it left the manufacturer's or seller's possession. See *RESTATEMENT (SECOND) OF TORTS* § 402A(1)(b) (1965); *Armstrong Rubber Co.*, 570 S.W.2d at 375.

If the original designer of a system or prototype gives the design to another party, this action alone is not enough to impose liability under a strict products liability theory. See *Piscitello v. Hobart Corp.*, 799 F. Supp. 224, 225-26 (D. Mass. 1992)(applying Massachusetts law and holding that where a defendant did not manufacture, distribute or sell a particular product at issue, but rather only designed the original product after which most of the products had been patterned over the years, does not impose strict liability upon the original designer; *Snyder v. ISC Alloys, LTD.*, 772 F. Supp. 244, 250 n.4 (W.D. Pa. 1991)(applying Pennsylvania law and stating that under § 402A, a seller can be held strictly liable only if the product reaches the injured user unchanged).

Mere preparation of drawings or a prototype, does not constitute designing the eventual product from which liability does lie. See [*11] *Zanzig v. H.P.M. Corp.*,

927 S.W.2d 608, *; 1996 Tex. LEXIS 79, **;
39 Tex. Sup. J. 848; CCH Prod. Liab. Rep. P14,695

134 Ill. App. 3d 617, 480 N.E.2d 1204, 1208, 89 Ill. Dec. 461 (Ill. App. Ct. 1985). See also *Talley v. City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264, 269 (Ga. Ct. App. 1981); *Chemical Design v. American Standard*, 847 S.W.2d 488, 490-91 (Mo. Ct. App. 1993).

In Texas, the existence of a duty to warn of the dangers of an alleged defective product is a question of law. *Joseph E. [*614] Seagram & Sons v. McGuire*, 814 S.W.2d 385, 387 (Tex. 1991). A manufacturer generally does not have a duty to warn or instruct about another manufacturer's products, even though a third party might use those products in connection with the manufacturer's own product. See *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App.--San Antonio 1990, writ denied). Other jurisdictions reach the same conclusion. See *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 591 N.E.2d 222, 225-26, 582 N.Y.S.2d 373 (N.Y. 1992); *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374 at 1374-1376 (Mass. 1985).

Most jurisdictions require more than the mere act of licensing a design to impose strict products liability, and require some purposeful [**12] activity with respect to the design by the licensor as well. See 1A LOUIS R. FRUMER AND MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* § 5.15 (1995); See also 1 M. STUART MADDEN, *PRODUCTS LIABILITY* § 6.17 (1998). A mere licensor is not subject to strict products liability. See, e.g., *Mechanical Rubber and Supply Co., v. Caterpillar Tractor Co.*, 80 Ill. App. 3d 262, 399 N.E.2d 722, 723-24, 35 Ill. Dec. 656 (Ill. App. Ct. 1980); *Harmon v. National Auto. Parts Ass'n*, 720 F. Supp. 79, 81 (N.D. Miss. 1989); *Ogg v. City of Springfield*, 121 Ill. App. 3d 25, 458 N.E.2d 1331, 1336, 76 Ill. Dec. 531 (Ill. App. Ct. 1984); *Harrison v. ITT Corp.*, 198 A.D.2d 50, 603 N.Y.S.2d 826 (N.Y. App. Div. 1993).

Under traditional products liability law, the plaintiff must prove the defendant supplied the product that caused the injury. *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989); *Armstrong Rubber Co.*, 570 S.W.2d at 376. It is not enough that the seller merely introduced products of similar design and manufacture into the stream of commerce. *Armstrong Rubber Co.*, 570 S.W.2d at 376.

C. CIVIL CONSPIRACY

In Texas, a civil conspiracy is a combination by [**13] two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). The "gist of a civil conspiracy" is the injury the conspirators intend to cause. *Triplex Communications*, 900 S.W.2d at 720; *Schlum-*

berger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 856 (Tex. 1968).

Civil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or the wrongful conduct at the beginning of the combination or agreement. See *Triplex Communications*, 900 S.W.2d at 719. One cannot agree, expressly or tacitly, to commit a wrong about which he has no knowledge. See *Schlumberger Well Surveying Corp.*, 435 S.W.2d at 857. Given the specific intent requirement, parties cannot engage in a civil conspiracy to be negligent. *Triplex Communications*, 900 S.W.2d at 720 n.2.

III. THE SUMMARY JUDGMENTS

A.

In the trial court, the Barajas' moved for partial summary judgment against Kelsey-Hayes. The Barajas alleged that their summary judgment [**14] evidence showed, as a matter of law, that Kelsey-Hayes manufactured the wheel that caused Jimmy Barajas' death. Their evidence consisted of photographs of the wheel, the Budd Company's expert witness' deposition, Firestone's in-house expert's deposition, and the Barajas' expert witness' affidavit. All the experts examined the photographs of the wheel.

The Barajas' expert testified that he compared the photographs with wheels he knew Kelsey-Hayes manufactured. He said the wheel in question was a 16.5-inch nominal diameter wheel. The wheel exhibited certain characteristics that assisted in identifying the manufacturer. These characteristics included: (1) the disc was riveted to the rim as opposed to being welded; (2) a single locating pin on the disc the center which was on the same diameter as the centers of the bolt holes; and (3) the location and shape of the hub cap humps. After reviewing the photographs, other Kelsey-Hayes wheels, and Kelsey-Hayes drawings, and taking into account the characteristics of the wheel in [**615] question, the expert concluded Kelsey-Hayes manufactured the wheel.

He further stated that three other wheel manufacturers did not manufacture the wheel. [**15] He stated that a distinctive design feature of the wheel was that the disc was riveted to the rim. Whereas, in the case of the other three manufacturers, the disc was welded to the rim. He did not discuss any wheel Firestone manufactured.

The Barajas offered the Budd Company expert's deposition. He testified that the wheel exhibited characteristics consistent with wheels Kelsey-Hayes manufactured. He identified the characteristics as rivets connecting the disc and rim instead of welds and the location and shape of the hub cap humps. He had not seen this combi-

927 S.W.2d 608, *, 1996 Tex. LEXIS 79, **;
39 Tex. Sup. J. 848; CCH Prod. Liab. Rep. P14,695

nation of characteristics on any wheel manufactured by anyone other than Kelsey-Hayes.

The Firestone expert testified that the Kelsey-Hayes wheel was consistent with the characteristics of the wheel in question. He said he had never seen a wheel with the characteristics of the wheel other than one made by Kelsey-Hayes.

B.

Firestone's principal summary judgment evidence was its expert witness' deposition. This expert was the same expert the Barajas relied on in their partial summary judgment against Kelsey-Hayes. Firestone also relied on the Barajas' summary judgment evidence.

Firestone's expert testified that [**16] Firestone's original design for a 15 degree bead seat taper wheel was for a 22.5-inch wheel suitable for an 18-wheel semi-tractor trailer rig. Later Firestone designed a 15-degree bead seat taper wheel with a 16.5-inch nominal diameter. This design was a dual wheel for use with two tires side by side. This design could be used only with 8- or 9-inch tires, and only for dual wheel application.

Firestone's summary judgment evidence also showed that Kelsey-Hayes modified Firestone's original 15 degree bead seat taper wheel design to design its own wheel. The Kelsey-Hayes design used the 15 degree bead seat taper. However, Kelsey-Hayes made its 16.5-inch nominal diameter wheel narrower so it would fit only 6- or 6.75-inch tires, and made it with a "hump bead." The Kelsey-Hayes wheel would fit only a single wheel by itself. Kelsey-Hayes manufactured its own narrow 16.5-inch hump bead wheel.

IV. THE ISSUE

The summary judgment evidence is virtually undisputed that Kelsey-Hayes manufactured and sold the wheel. The issue is whether Firestone designed all or a component part of the wheel that caused Jimmy Barajas' death.

The summary judgment evidence conclusively shows that the Kelsey-Hayes [**17] wheel is substantially different from Firestone's original patented 15 degree bead seat taper wheel or Firestone's modified 15 degree bead seat taper wheel.

The principal differences are: (1) Firestone's original 15 degree bead seat taper wheel was for a 22-inch tractor-trailer truck wheel -- the Kelsey-Hayes design was for a 16.5-inch small truck wheel; (2) the Firestone modified design was for a 16.5-inch nominal diameter wheel for a 8- or 9-inch tire application -- the Kelsey-Hayes design was for a 16.5-inch wheel for a 6- or 6.75-inch tire application; (3) Firestone welded the disc to the

rim -- Kelsey-Hayes riveted the disc to the rim; (4) Firestone's wheel had no hub cap hump -- Kelsey-Hayes' wheel had a hub cap hump; and (5) Firestone's 16.5-inch wheel was for dual wheel application -- Kelsey-Hayes' 16.5-inch wheel was for single wheel application.

V. THE BARAJASES' CAUSES OF ACTION

A. NEGLIGENCE

Firestone conclusively showed it did not design, manufacture or sell the wheel in question. Accordingly, Firestone owed no duty to the Barajas. Firestone negated an essential element of the Barajas' negligence cause of action. See *Graff*, 858 S.W.2d at 919. [**18] The Barajas and the court of appeals rely on *Alm v. Aluminum Co. of America*, 717 S.W.2d 588 (Tex. 1986), to support [**616] the claim that a designer or manufacturer of a product owes a duty to a consumer. However, *Alm* is easily distinguished on its facts. In *Alm*, Alcoa designed and marketed the bottle closure process. Alcoa designed the bottle cap. Alcoa designed, manufactured, and sold the bottle capping machine. See *Alm*, 717 S.W.2d at 590.

B. STRICT PRODUCTS LIABILITY

Firestone proved that Kelsey-Hayes significantly changed the wheel's design. These design differences are enough to show, as a matter of law, that Firestone did not design all or a component part of the wheel. Firestone's summary judgment evidence showed that the product it originally designed and later modified reached the user with substantial changes in the condition it originally left Firestone's possession. See *RESTATEMENT (SECOND) OF TORTS* § 402A(1)(b) (1965); *Armstrong Rubber Co.*, 570 S.W.2d at 375. Firestone proved it did not introduce the wheel or a component part into the channels of commerce. It is not enough that the original designer merely introduce a product [**19] of similar design into the stream of commerce. See *Armstrong Rubber Co.*, 570 S.W.2d at 376. Firestone proved that it did not supply the product that caused Jimmy Barajas' death. See *Gaulding*, 772 S.W.2d at 68.

The Barajas' theory is that Firestone should be liable in strict liability because it developed a design idea that another manufacturer -- Kelsey-Hayes -- copied, modified, and used. Under this theory, the automobile manufacturer who first developed air bags could be held liable because other manufacturers used the idea, modified the design, and incorporated air bags in their own cars. If there were a successor company of the Wright Brothers, this company could be held liable because other airplane manufacturers borrowed the idea of aerodynamic wings. This is not the law.

927 S.W.2d 608, *; 1996 Tex. LEXIS 79, **;
39 Tex. Sup. J. 848; CCH Prod. Liab. Rep. P14,695

As we have already held, Firestone did not design, manufacture or sell the particular wheel in question. The summary judgment evidence shows only that Firestone originally designed and licensed the 15-degree-bead taper and low-flange-height features of an automobile wheel. For a licensor to be strictly liable, the licensor must be an integral part of the overall marketing process that should [**20] bear the cost of injuries resulting from defective products. Imposition of strict liability demands more than an incidental role in the overall marketing program of the product. Here, the undisputed summary judgment evidence shows only that Firestone was the original designer and that it was not involved in the production, marketing or distribution of the Kelsey-Hayes defective product. Accordingly, the court of appeals erred in reversing summary judgment for Firestone under these circumstances. See *Piscitello*, 799 F. Supp. at 225-26.

We reach the same conclusion about the Barajas' assertion that because Firestone was the original designer of the bead-taper, low-flange wheel that it had a duty to warn their son about the alleged defective nature of the Kelsey-Hayes product. A manufacturer does not have a duty to warn or instruct about another manufacturer's products, though those products might be used in connection with the manufacturer's own products. *Walton*, 796 S.W.2d at 226; see also *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986).

Additionally, Firestone's summary judgment evidence showed that it only introduced a concept, the 15-degree [**21] bead seat taper wheel, to the industry. The concept is an intangible which is not a product within the meaning of the RESTATEMENT (SECOND) OF TORTS. To impose strict products liability upon Firestone for the introduction of a concept, under the facts of this case, is contrary to the very essence of a products liability cause of action under Section 402A of the RESTATEMENT (SECOND) OF TORTS. *Way v. Boy Scouts of America*, 856 S.W.2d 230, 239 (Tex. App.--Dallas 1993, writ denied).

Accordingly, Firestone negated essential elements of the Barajas' strict products liability cause of action. See RESTATEMENT (SECOND) OF TORTS § 402A(1)(a)(b) (1965); *Lubbock Mfg. Co.*, 598 S.W.2d at 236; *Armstrong Rubber Co.*, 570 S.W.2d at 375.

[*617] C. CIVIL CONSPIRACY

Firestone proved it had no duty to the Barajas. Accordingly, Firestone negated the Barajas' civil conspiracy claim as a matter of law. Civil conspiracy is an intentional tort. *Massey*, 652 S.W.2d at 933. For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the agreement. *Triplex Communications*, 900 S.W.2d at 719. Because a

conspiracy [**22] requires intent, parties cannot conspire to be negligent. *Triplex Communications*, 900 S.W.2d at 720. n.2.

The court of appeals relied on *Rogers v. R. J. Reynolds Tobacco Co.*, 761 S.W.2d 788 (Tex. App.--Beaumont 1988, writ denied), to conclude that a course of conduct, agreed upon by conspirators, does not have to involve a separate, distinct intentional tort to impose liability. See *Barajas*, 895 S.W.2d at 794. However, in *Triplex Communications*, this Court expressly disapproved *Rogers* to the extent it held there can be a civil conspiracy to be negligent. See *Triplex Communications*, 900 S.W.2d at 720 n.2.

VI. SUMMARY

Based upon the specific and unique facts of this case, we hold Firestone negated an essential element of each of the Barajas' causes of action. Firestone proved, as a matter of law, that it did not design, manufacture, or sell all or a component part of the wheel that caused Jimmy Barajas' death. We reverse the court of appeals' judgment, and render judgment that the Barajas take nothing from Firestone.

James A. Baker, Justice

OPINION DELIVERED: June 28, 1996

CONCURBY: Craig T. Enoch (In Part)

DISSENTBY: [**23] Craig T. Enoch (In Part)

DISSENT:

The Court misconstrues the Barajas' allegations. There is no dispute between the parties that Firestone did not design, manufacture, or sell the particular wheel that killed Jimmy Barajas. Nor is there any dispute that Firestone did design the 15-degree bead seat taper with low flange height. The fact that Firestone did not design, manufacture, or sell the particular wheel at issue in this case is not dispositive of all the Barajas' claims. The Barajas specifically allege that Firestone's original design for the 15-degree bead seat taper with low flange height is the design feature of the wheel that permits the mismatch between tire and wheel that occurred in this case and that caused the tire to explode. The issue, then, is not whether Firestone designed, manufactured, or sold the particular wheel in this case, but whether Firestone, solely as a designer of a component part of a product that causes injury, can be liable in strict products liability or negligence for its design.

927 S.W.2d 608, *; 1996 Tex. LEXIS 79, **;
39 Tex. Sup. J. 848; CCH Prod. Liab. Rep. P14,695

I agree with the Court that Firestone is not liable in strict products liability. Strict liability rests on the defendant placing into the [**24] stream of commerce a defective product. *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978). Firestone did not place any product into the stream of commerce. Rather, by granting a royalty-free license, Firestone only placed its design in the stream of commerce.

I note that a non-manufacturer may, under certain circumstances, be liable in the same manner as a manufacturer or seller of a defective product. See *RESTATEMENT (SECOND) OF TORTS § 400* (1965) (Selling as Own Product Chattel Made by Another). For example, a trademark licensor may be liable as an apparent manufacturer when the licensor is significantly involved in the manufacturing, marketing, or distribution of the defective product. See *Torres v. Goodyear Tire & Rubber Co.*, 163 Ariz. 88, 786 P.2d 939, 945 (Ariz. 1990) (trademark licensor that significantly participates in the overall process by which the product reaches consumers, and who has the right to control the incidents of manufacture or distribution is liable under section 402A of the Restatement); *Burkert v. Petrol Plus*, 216 Conn. 65, 579 A.2d 26, 35 (Conn. 1990) (trademark licensor, absent any involvement in the production, marketing, [**25] or distribution of defective product, is not liable in strict tort liability or negligence); *Connelly v. Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155, 163, 27 Ill. Dec. 343 (Ill. [**618] 1979) (trademark licensor liable in strict liability as integral part of the marketing enterprise and participation in the profits reaped by placing a defective product in the stream of commerce); *Stanford v. Dairy Queen Prods.*, 623 S.W.2d 797, 805 (Tex. App.--Austin 1981, writ ref'd n.r.e.) (trademark licensor that only authorized use of trade name was not an "actual vendor" of the defective product under section 400 of the Restatement); see also Rockwell, Annotation, *Trademark Licensor's Liability for Injury or Death Allegedly Due to Defect in Licensed Product*, 90 A.L.R. 4th 981 (1990); KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS § 100* (5th ed. 1984) (strict liability may extend to licensor who participates in the construction and sale of products made pursuant to a patent). But a mere designer of a defective product is not liable in strict liability because the apparent manufacturer doctrine does not apply when the party is not involved in the manufacture, sale, [**26] or installation of the product. *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d 153, 155-56 (7th Cir. 1987).

As Firestone is not a manufacturer, seller, or apparent manufacturer of the wheel causing Jimmy Barajas's death, Firestone is not liable in strict products liability for the Barajas's damages. I concur with the Court's

judgment reversing and rendering judgment for Firestone on the Barajas's strict products liability claims.

II

I do not agree, however, with the Court's treatment of the Barajas's negligence claims. Unlike strict products liability, liability in negligence is not premised on placing a defective product into the stream of commerce. The Court in *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 591 (Tex. 1986), held that a designer who was not a manufacturer or seller of the product causing the injury had a duty to exercise ordinary care in its design and a duty to warn users of hazards associated with the use of the designed product.

In *Alm*, the plaintiff sued the Aluminum Company of America (Alcoa) for injuries he sustained when a bottle cap exploded off a soda bottle he had purchased at a grocery store. Alcoa designed the bottle cap but did [**27] not manufacture or sell the bottle cap or the bottle. Alcoa did design, manufacture, and sell a bottle capping machine, and designed and marketed a process for capping bottles. The Court expressly defined the issue in terms of the duty owed by a "designer who is not a manufacturer." *Alm*, 717 S.W.2d at 590. The Court first recognized that a designer who is not also the manufacturer should share the same duty to develop a safe design. *Id.* at 591. It makes little sense to hold liable a manufacturer who purchased or obtained by license someone else's design, but not the party ultimately responsible for the design. A negligent design claim should not fail simply because the design is divorced from the manufacture of the product. Moreover, while a manufacturer may have independent liability for failing to test a product design, it should have a right of indemnity against a designer who licensed or sold a negligent design to the manufacturer.

The Court misconstrues the Barajas's allegations to avoid *Alm*. The Court concludes that because Firestone did not design, manufacture, or sell the wheel in question, Firestone owed no duty. 927 S.W.2d at 613. Contrary to the Court's [**28] framing of the issue, the Barajas's allege that Firestone designed the feature of the Kelsey-Hayes wheel that caused the injury -- the 15-degree bead seat taper with low flange height. The fact that Firestone did not design, manufacture, or sell the particular wheel at issue in this case is irrelevant for a negligent design claim. Firestone designed the feature of the wheel alleged to be defective and alleged to have caused Jimmy Barajas's death. Firestone had a duty to exercise ordinary care in its design of the 15-degree bead seat taper. *Alm*, 717 S.W.2d at 591.

Moreover, the Court's attempt to distinguish *Alm* on its facts is unpersuasive. The sole basis for imposing any design-related duties on Alcoa was as a non-

927 S.W.2d 608, *, 1996 Tex. LEXIS 79, **,
39 Tex. Sup. J. 848; CCH Prod. Liab. Rep. P14,695

manufacturing designer of the bottle capping process that caused the plaintiff's injury. Firestone, as the designer of the feature of the wheel alleged to have caused the tire explosion, is no different than Alcoa. Nothing in *Alm* [*619] suggests that the design-related duties derived from the fact that Alcoa did more than design the bottle capping process.

The fact that Firestone has a duty of ordinary care in its design is not dispositive [**29] of liability. Unlike strict products liability, in which a plaintiff need only prove the design was defective without regard to the designer's negligence, the Barajas must prove Firestone was negligent in developing its design. Further, in this case there is evidence that Firestone's design was modified by Kelsey-Hayes. Accordingly, the Barajas would face difficult burdens of proof on both breach of duty and causation.

But Firestone sought summary judgment asserting only that because it did not design, manufacture, or sell the particular wheel involved in this case, it owed no duty to Jimmy Barajas. *Alm* recognized a duty of non-manufacturing designers to exercise ordinary care in the design of a product. This duty is not dependent on whether Firestone placed the injury-causing product into the stream of commerce, but rather derives from Firestone's actions as designer. The duty should be the same whether the designer designed the entire product or a component part alleged to have been the cause of injury. Because Firestone designed the feature of the wheel alleged to have caused the tire explosion -- the 15-degree bead seat taper with low flange height -- Firestone owed [**30] a duty of ordinary care in its design.

The fact that Firestone's design has become an industry standard does not militate against a duty. Liability should not be more limited the more widely adopted a design is by an industry. To the contrary, a designer who offers up its design for a product through a royalty-free license in the hopes of gaining widespread adoption of the design in the industry militates in favor of a duty.

Alm also recognizes a designer's duty to warn of hazards associated with the design. The Court stated:

There is no reason to distinguish a designer, who has intimate knowledge of a designed product, from a retailer, wholesaler or manufacturer. Alcoa designed the closure system. It is the failure of that system which caused [the plaintiff's] injury. There can be no justification for requiring a user of Alcoa's closure technology to

warn of its hazards while not holding Alcoa to the same duty.

Alm, 717 S.W.2d at 591. The Barajas allege a negligent failure to warn claim. Under *Alm*, as a non-manufacturing designer, Firestone has a duty to warn of the hazards associated with its design of the 15-degree bead seat taper if a reasonably [**31] prudent person in the same position would have warned of the hazards. *Id.* The Court incorrectly resolves the failure to warn issue by concluding that one manufacturer has no duty to warn or instruct about another manufacturer's product. Firestone's role in this case is not as a manufacturer, but as a designer. *Alm* plainly recognizes a designer's duty to warn of hazards of its design.

* * *

In sum, the Court correctly concludes that Firestone is not liable in strict products liability because the summary judgment evidence establishes that Firestone did not design, manufacture, or sell the particular wheel involved in this case. That summary judgment evidence, however, does not entitle Firestone to summary judgment on the Barajas' negligence claims because those claims are not dependent on having placed the particular product at issue in the stream of commerce. A designer's duty of ordinary care and duty to warn derive from the conduct in designing a product; that duty should not vanish simply because the design is developed by someone other than the manufacturer.

Like the designer in *Alm*, Firestone designed the feature of the product alleged to have caused Jimmy [**32] Barajas's death. The Court misconstrues the Barajas' allegations and, in so doing, provides a false basis for distinguishing *Alm*. Firestone owed a designer's duty of ordinary care and duty to warn. It was not entitled to summary judgment on the Barajas' negligence claims. For these reasons, I concur in that part of the Court's judgment reversing the court of appeals' judgment and rendering judgment for Firestone on the Barajas' strict liability claims. I dissent from the Court's judgment [**620] reversing and rendering on the Barajas' negligence claims. I would affirm the reversal of summary judgment on the Barajas' negligence claims and remand those claims to the trial court.

Craig T. Enoch

Opinion delivered: June 28, 1996

LEXSEE 703 A 2D 1315

FORD MOTOR COMPANY v. NOLLIE P. WOOD et al.

No. 280, September Term, 1997

COURT OF SPECIAL APPEALS OF MARYLAND

119 Md. App. 1; 703 A.2d 1315; 1998 Md. App. LEXIS 4; CCH Prod. Liab. Rep. P15,143

January 8, 1998, Filed

PRIOR HISTORY: [***1] APPEAL FROM THE Circuit Court for Baltimore City. Edward J. Angeletti, JUDGE.

DISPOSITION: JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; COSTS TO BE PAID BY APPELLANT.

LexisNexis(R) Headnotes

COUNSEL: ARGUED BY Robert Dale Klein and Michael T. Wharton (Debra S. Block and Wharton, Levin, Ehrmantraut, Klein & Nash, P.A. on the brief, all of Annapolis, MD., Steven R. Williams and McGuire, Woods, Battle & Boothe LLP of Richmond, VA on the brief.), FOR APPELLANT.

ARGUED BY Deborah K. Hines of Washington, [***2] DC (Shepard A. Hoffman, Brian C. Parker and Gebhardt & Smith on the brief for appellee, Wood) both of Baltimore, MD.

Edward J. Lilly (Gary J. Ignatowski, Steve W. Smith, Scott D. Schellenberger and the Law Offices of Peter G. Angelos on the brief for appellee, Grewe) all of Baltimore, MD., FOR APPELLEES.

JUDGES: ARGUED BEFORE SALMON, EYLER, and SONNER, JJ.

OPINIONBY: EYLER

OPINION: [*8]

[**1318] Opinion by Eyler, J.

Filed: January 8, 1998

This appeal involves two wrongful death and survival actions filed by appellees Nancy L. Grewe, individually, Rosanna Wood, individually and as personal representative of the Estate of Nollie P. Wood, and Marjorie Grewe, as personal representative of the Estate of Keith K. Grewe, that were consolidated for trial in the Circuit Court for Baltimore City. The parties agree that appellees' decedents died of mesothelioma, but disagree that the evidence at trial demonstrated that their diseases and resulting deaths were caused by their exposures to the asbestos-containing brake and clutch products of the appellant, Ford Motor Company ("Ford"). n1 Ford raises a number of challenges to the judgments entered in favor of appellees including challenges to the jury selection [***3] process and challenges to certain of the trial court's evidentiary rulings. In addition, Ford maintains that the evidence in [*9] the Wood case was insufficient to support the judgment against Ford. Finally, Ford asserts that the trial court should have applied the non-economic damages cap to the survival/loss of consortium portions of the judgments. For the reasons set forth below, we shall reverse the judgment in favor of Mrs. Wood and affirm the judgment in favor of the Grewe appellees.

n1 These cases were tried with a third case that did not proceed to verdict and in which Ford was not a defendant.

At the time suit was initiated in these cases, Ford was only one of many manufacturers or suppliers of asbestos-containing products named as a defendant in these cases. By virtue of settlements and voluntary dismissals, most of which occurred prior to jury selection, Ford was the only remaining defendant in these cases at the time the jury began its deliberations.

QUESTIONS PRESENTED

Ford inquires on appeal: [***4]

1. Whether the trial court committed reversible error by not striking two jurors for cause.

2. Whether the trial court committed reversible error by denying Ford its right to Maryland Rule 2-512(c) information.

3. Whether the trial court committed reversible error in refusing to ask Ford's voir dire questions.

[**1319] 4. Whether the trial court committed reversible error in overruling Ford's Batson challenges.

5. Whether there was sufficient evidence of Mr. Wood's exposure to Ford's brake and clutch parts to submit to the jury the issue of substantial factor causation in the Wood case.

6. Whether the trial court committed reversible error in refusing to permit Ford to introduce evidence of exposure of Grewe and Wood to other asbestos products to prove alternative causation.

7. Whether the trial court committed reversible error in refusing to apply the noneconomic damages cap to the survival/loss of consortium claims.

In addition to those questions presented by Ford, Mrs. Wood's arguments regarding Ford's question 5 raise the novel question of whether Ford can be held liable for failure to warn of the latent dangers of asbestos-containing brake and clutch products that it neither [***5] manufactured nor placed into the stream of commerce.

[*10] FACTS

Nollie Wood was employed as a garageman at the United States Post Office Preston Street Garage in Baltimore City from 1948 to 1952. Although Mr. Wood did not work on brakes and clutches, there was evidence that Mr. Wood worked "within feet" of mechanics who did work on brakes and clutches at a rate of between three and nine jobs a day. The brake and clutch parts contained asbestos and produced dust when they were replaced. In particular, Ford acknowledged that its brake linings, presumably similar in composition, were 40 to 60 percent chrysotile asbestos by weight. Dust was created during the replacement of brakes in a number of different ways. During normal use of brakes, dust accumulates in the brake drums, and it was a common practice at the Preston Street Garage to use an air hose to blow out the dust from old brakes. The use of the air hose caused asbestos dust to be blown throughout the garage. In addition, during the process of replacing brakes, workers were required to grind the brake shoes so that the brakes prop-

erly fit the vehicles. This grinding process also would create dust. Finally, dust was created [***6] when the garage was swept at the end of each day.

It is undisputed that a majority of the vehicles that were serviced at the Preston Street Garage were Ford vehicles that were manufactured in the late 1920s and early 1930s. It further is undisputed that the vehicles did not contain their original brake and clutch parts by the time Mr. Wood began working at the Preston Street Garage in 1948. The two coworker witnesses who testified on behalf of Mr. Wood could not identify the manufacturers of the replacement brakes and clutches that were used at the Preston Street Garage between 1948 and 1952, and there was no documentary evidence, such as invoices or purchase orders, identifying the manufacturer of the brake and clutch products to which Mr. Wood was exposed.

Mr. Wood was diagnosed with mesothelioma in January, 1990, and he died on May 26, 1990. Experts testifying on [*11] behalf of Mr. Wood offered the opinion that, to a reasonable degree of medical certainty, Mr. Wood's mesothelioma was caused by his exposure to respirable asbestos fibers emanating from brake and clutch work at the Preston Street Garage between 1948 and 1952. Ford contends that expert testimony excluded by the trial [***7] court would have shown that the most likely cause of Wood's mesothelioma was his exposure to amphibole asbestos fibers in ship insulation when he worked as a longshoreman from 1942 until 1947.

The jury awarded \$ 2,000,000 for Mrs. Wood's wrongful death claim, \$ 840,000 for her loss of consortium claim, and \$ 3,467,727 for the survival action, \$ 3,450,000 of which was for noneconomic damages, for a total verdict of \$ 6,307,727. The trial court denied Ford's post-trial motion to apply to the survival action and loss of consortium claim the statutory cap on noneconomic damages set forth in § 11-108 of the *Courts & Judicial Proceedings Article* ("CJ").

Keith Grewe was employed as a mechanic at Foreign Motors in Baltimore City from 1957 through December of 1992, where he regularly worked on brakes and clutches. Mr. Grewe worked with Ford brakes at least [**1320] weekly. Mr. Grewe testified that when he worked on Ford vehicles, he used Ford replacement brake and clutch parts because they fit better than the parts supplied by other companies. Mr. Grewe was exposed to dust containing asbestos during the repair of brakes when the worn parts were removed and compressed air was used to blow the dust [***8] from the drums. Mr. Grewe testified that dust would get all over him and that he could taste the dust and would breathe it. Mr. Grewe also was exposed to dust when installing new brakes since he was required to use a file, hacksaw, and

sandpaper in preparing the asbestos facings for installation.

In October 1992, at age 56, Mr. Grewe sought medical attention for symptoms related to fluid which had accumulated around his lungs. Mr. Grewe was diagnosed with mesothelioma in January 1993, and he died on October 14, 1993. Mr. Grewe's medical experts testified that, to a reasonable degree [*12] of medical certainty, Mr. Grewe's occupational exposures to Ford's asbestos-containing brake and clutch products were a substantial factor in causing his mesothelioma and resulting death. Ford contends that the trial court erred in excluding evidence that would have demonstrated that Mr. Grewe was exposed to asbestos while working as a sheet metal worker in the mid-1950s, and while using asbestos-containing joint compound while remodeling homes in the mid to late 1960's.

The jury awarded \$ 4,000,000 for Mrs. Grewe's wrongful death claim, \$ 1,000,000 for her loss of consortium claim, and \$ 3,069,934 for [***9] the survival action, \$ 3,000,000 of which was for noneconomic damages, for a total verdict of \$ 8,069,934. The trial court denied Ford's post-trial motion to apply to the survival action and loss of consortium claim the statutory cap on noneconomic damages set forth in *CJ* § 11-108.

DISCUSSION

I.

Jury Selection

Jury selection in Maryland is regulated by Title 8, Subtitle 2 of the Courts and Judicial Proceedings Article. *Hunt v. State*, 345 Md. 122, 143, 691 A.2d 1255, cert. denied, U.S. , 117 S. Ct. 2536, 138 L. Ed. 2d 1036 (1997). "Modeled after the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-69 (1994), the selection process set forth in that subtitle necessarily embodies the Sixth Amendment's right to an impartial jury." *Id.* "A fundamental tenet underlying the practice of trial by jury is that each juror, as far as possible, be 'impartial and unbiased.'" *Langley v. State*, 281 Md. 337, 340, 378 A.2d 1338 (1977) (citing *Waters v. State*, 51 Md. 430, 436 (1879)). "The objective of this tenet is to assemble a group of jurors capable of deciding the matter before them based solely upon the facts presented, 'uninfluenced by any extraneous considerations. [***10] . . ." *Id.*

[*13] A. Challenges for Cause

In a civil trial, a "party may challenge an individual juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown." Md. Rule 2-512(e); see also *CJ* § 8-

210(b)(5). "In determining whether a juror should be excused for cause, the general question is whether a person holds a particular belief or prejudice that would affect his ability or disposition to consider the evidence fairly and impartially and reach a just conclusion." *King v. State*, 287 Md. 530, 535, 414 A.2d 909 (1980). "The proper focus is on the venire person's state of mind, and whether there is some bias, prejudice, or preconception." *Davis v. State*, 333 Md. 27, 37, 633 A.2d 867 (1993).

During the course of voir dire, the trial court asked the prospective jurors if there were "any members of this panel or any member of their immediate family who has been involved or had a claim filed for an asbestos-related disease?" Appellant asserts that, in response to this question, seven panel members explained how their relatives "had been involved or had a claim filed for an asbestos-related disease" [***11] as follows:

Juror No. 199 -- His brother worked at Domino Sugar and filed a claim. The trial court struck him without inquiring whether [***1321] this fact would interfere with his ability to be fair to the parties.

Juror No. 155 -- Her father had black lung; her mother receives his pension for it. The trial court explained to the juror that "that is not asbestos." When asked if this fact would interfere with her ability to be fair to the parties, she stated: "I don't know. I don't know. I really don't. I am not sure."

Juror No. 98 -- Her brother-in-law had a claim that has been resolved; he receives residual benefits. When asked if this fact would interfere with her ability to be fair to the parties, she stated: "I don't think so."

Juror No. 109 -- His uncle recently settled a suit with an unknown asbestos company. When asked if this fact would [*14] interfere with his ability to be fair to the parties, he stated: "I am unsure. Yes, I guess."

Juror No. 195 -- His father has a claim for asbestos. The trial court struck him without asking whether this fact would interfere with his ability to be fair to the parties.

Juror No. 187 -- Her father has an asbestos case and was represented by Peter [***12] Angelos (the same law firm that represented Mr. Grewe). The trial court struck her without asking whether this fact would interfere with his ability to be fair to the parties.

Juror No. 200 -- "[His] fiancee is seeking an asbestos claim." The trial court struck him without inquiring whether this fact would interfere with his ability to be fair to the parties.

(Appellant's Brief at 7-8).

119 Md. App. 1, *; 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

The trial court struck all of the foregoing jurors for cause with the exception of Juror No. 98. Although the defendant companies n2 had moved to strike Juror No. 98 for cause as well, the trial court denied that motion without an explanation. Ford contends that the trial court's refusal to strike Juror No. 98, or at least make further inquiry of her, constituted an abuse of discretion. Ford contends that Juror No. 98's response to the trial court's inquiry was just as equivocal as the responses of Jurors Nos. 155 and 109. Further, Ford cites the trial court's failure to question Jurors Nos. 199, 195, 187 and 200 as support for its assertion that the trial court lacked a rationale for refusing to strike Juror No. 98. Ford implies that the trial court's differential treatment of these jurors [***13] was arbitrary and capricious.

n2 In the proceedings below, an objection made by one of the defendants was made on behalf of all of the defendants, and an objection made by one of the plaintiffs was made on behalf of all of the plaintiffs, unless the individual defendant or plaintiff expressly opted out of the objection.

We note first of all that the trial court's reasoning for questioning some of the jurors but not others is apparent from a review of the record. Specifically, each of the jurors that the trial court struck without questioning had a very close [*15] relationship (brother, father, or fiancée) with an individual who had an asbestos-related claim. Further, Jurors Nos. 195 and 200 were related to individuals with pending, as opposed to resolved, claims. Jurors Nos. 98 and 109 had more attenuated relationships with individuals, brother-in-law and uncle respectively, who had resolved asbestos-related claims. Juror No. 155 revealed that her father had black lung disease, not an asbestos-related disease. The [***14] trial court explained to the juror that black lung was not asbestos-related, but nevertheless asked her whether that fact would interfere with her ability to judge the case fairly and impartially.

Similarly, we do not agree with Ford that Juror No. 98's response was just as equivocal as responses supplied by Jurors Nos. 155 and 109. The hesitancy and uncertainty of the responses given by Jurors Nos. 155 and 109 is apparent from the face of the trial transcript. By contrast, the response "I don't think so" may express a degree of hesitancy or no hesitancy at all depending upon its delivery. In quoting Juror No. 98, Ford adds emphasis to the word "think" and informs us that it was preceded by a hesitant pause. That information, however, is not contained in the record. The trial judge had the opportunity to observe Juror No. 98's facial expressions, intona-

tion, and all of the subtle nuances that would render "I don't think so" equivocal or unequivocal. Accordingly, [**1322] we must defer to the trial judge's ability to interpret the response.

Ford also challenges the trial court's denial of the defendant companies' motion to strike Juror No. 123. In response to the trial court's question regarding [***15] hardships, Juror No. 123 revealed that she had an appointment on June 25, 1996, "a follow-up [for] lung cancer." Ford maintains that the fact that the plaintiffs had mesothelioma, a cancer affecting the lungs, and that Juror No. 123 had lung cancer, required the trial court to strike Juror No. 123 for cause or, at the very least, make further inquiry of her regarding whether that fact would affect her ability to be fair and impartial. Ford argues that the trial judge's introductory description of [*16] the cases was insufficient to signal to prospective jurors that the cases were about a type of cancer affecting the lungs. Hence, the trial court's general question regarding bias would not necessarily be sufficient to uncover any bias Juror No. 123 may have had. We disagree with Ford's position.

In *Davis v. State*, 333 Md. 27, 633 A.2d 867 (1993), the defendant requested that the trial judge ask during voir dire whether any member of the venire was employed as a law enforcement officer or had friends or relatives employed in the law enforcement field. The defendant in *Davis* contended that he had a right to know such information because the prosecution's case hinged upon the testimony [***16] of a police officer, and such a person would be more likely to believe a police officer than a criminal defendant. The trial judge refused the defendant's request, and the Court of Appeals affirmed. The Court held that, although the trial court could, in its discretion, have asked such a question, it was not required to ask such a question.

The Court first noted that the scope and form of voir dire rests firmly within the trial judge's discretion, and further, that the purpose of voir dire is "to ascertain the existence of cause for disqualification and for no other purpose." *Id.* at 34 (quoting *McGee v. State*, 219 Md. 53, 58, 146 A.2d 194 (1959) (quoting *Adams v. State*, 200 Md. 133, 140, 88 A.2d 556 (1952) (citations omitted)). Although parties to a jury trial have a right to have questions propounded to prospective jurors concerning a specific cause for disqualification, *id.* (quoting *Casey v. Roman Catholic Archbishop*, 217 Md. 595, 605, 143 A.2d 627 (1958)), the Court determined that the question proposed by *Davis* was not such a question because an affirmative answer would not automatically disqualify the prospective juror. The Court further stated that in general, [***17] the professional, vocational, or social status of a prospective juror is not a dispositive factor establishing cause to disqualify. Rather, the proper focus

119 Md. App. 1, *; 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

is on the venire person's state of mind, and whether there is some bias, prejudice or preconception. Short of those instances where there is a demonstrably strong correlation between [*17] the status in question and a mental state that gives rise to cause for disqualification, mere status or acquaintance is insufficient to establish cause for disqualification of a prospective juror.

333 Md. at 37.

Just as the professional, vocational or social status of a prospective juror does not establish that the juror is biased, neither does a prospective juror's affliction with a particular disease establish that the juror is biased. Just as a police officer would not necessarily be more likely to believe a police officer, a juror suffering from lung cancer is not necessarily more likely to believe plaintiffs who had a similar disease. The fact of Juror No. 123's lung cancer arguably might influence her sympathy for the plaintiffs. As we stated recently, however, a jury is not expected to judge a case without sympathy. See *Fowlkes v. State*, [***18] 117 Md. App. 573, 584, 701 A.2d 862 (1997). ("[A] jury is expected to decide a case without bias or prejudice; it is not expected to do so without sympathy but is expected to follow the court's instruction that it not be unduly swayed by it.") (emphasis in original). Accordingly, the trial court did not err in refusing to strike Juror No. 123.

Similarly, the trial court did not abuse its discretion in refusing to voir dire Juror No. 123 regarding her illness. As we discuss more fully below, when a party requests inquiry regarding a specific area of [**1323] potential bias, the trial court must engage in such inquiry. *Davis*, 333 Md. at 47. In this case, there was no request for voir dire regarding a specific area of potential bias.

n3

n3 Ford's proposed voir dire regarding lung cancer and other lung diseases sought very broad and general information. It was not crafted to elicit specific areas of potential bias. Additionally, as follow-up, the trial court was not requested to elicit the juror's belief whether her illness was related to asbestos exposure. Given that the trial court only questioned the panel regarding asbestos-related claims, and not asbestos-related illnesses, such a question arguably would not have been covered by the trial court's voir dire.

[***19] [*18]

While we do not find reversible error, we note that a better approach in this case would have been to allow more expansive voir dire on issues of lung disease and, in introductory remarks, to explain to the panel that

mesothelioma is a cancer affecting the lungs. See *Fowlkes*, 117 Md. App. at 586. Such an approach would not significantly lengthen voir dire and would decrease the possibility that a prospective juror who should be disqualified for cause will not be identified.

B. Rule 2-512(c) Information

Ford next contends that the trial court committed reversible error by denying Ford's right to receive Rule 2-512(c) information. Rule 2-512(c) provides as follows:

Jury List. -- Before the examination of jurors, each party shall be provided with a list of jurors that includes the name, age, sex, education, occupation, and occupation of spouse of each juror and any other information required by the county jury plan. When the county jury plan requires the address of a juror, the address need not include the house or box number.

Such information is derived from juror qualification forms that are completed by each prospective juror. See Md. Code Ann., CJ,

§ [***20] 8-202 (1995 Repl. Vol., 1997 Suppl.). Relying on the rationale of *Booze v. State*, 347 Md. 51, 68-69, 698 A.2d 1087 (1997), n4 Ford argues that the purpose of providing parties with Rule 2-512(c) information is to enable them to exercise their peremptory challenges intelligently and strategically. Ford further argues that such information is useless to the parties if it is inaccurate.

n4 In *Booze*, the Court of Appeals held that Rule 4-312(g) requires that, to the extent possible, parties should have the full panel of prospective jurors before them before being required to exercise their peremptory challenges. 347 Md. at 69.

Prior to voir dire, one of the defendant companies indicated to the trial court that the voir dire process of a prior trial before the court had revealed certain inaccuracies in the juror [*19] occupational information that had been supplied to the parties. Counsel asked that the trial court avoid a similar situation in this case by verifying the jurors' occupational information during voir [***21] dire. Although the trial judge initially indicated a willingness to accommodate the parties, when he was asked again after voir dire had commenced, he declined to engage in such questioning based upon the holding in *Davis*, *supra*.

In *Davis*, the Court of Appeals expressly declined *Davis*'s invitation to broaden the scope of mandatory voir dire to include inquiry that would aid a party in the exer-

cise of its peremptory challenges. Instead, it reaffirmed the principle that any questioning that seeks information to aid the parties in their exercise of peremptory challenges is wholly discretionary with the trial judge. In particular, the Court held that occupational information generally is the type of information that falls into the category of discretionary, as opposed to mandatory, voir dire. *Davis*, 333 Md. at 37-38. Generally, the trial judge may, but need not, ask questions regarding occupation. Id. Absent some alternative remedy provided by Rule 2-512(c) or the statutory scheme of Title 8, Subtitle 2 of the Courts & Judicial Proceedings Article, the reasoning in *Davis* applies to Ford's 2-512(c) challenge.

Section 8-201 provides that each circuit court [***22] shall maintain a jury selection plan. Section 8-202 provides that each jury selection plan shall specify detailed procedures to be followed by the jury commissioner or clerk in selecting jurors at random from voter registration lists or other sources, *CJ* § 8-202(2), [**1324] and provides for a juror qualification form which asks each potential juror certain information including occupation and occupation of spouse. *CJ* § 8-202(5). Section 8-205 provides that, when directed by the circuit court, the clerk or jury commissioner shall publicly draw at random, from the master jury wheel, the names of as many persons as are required for jury service. Section 8-206 provides for the mailing of juror qualification forms to those persons selected pursuant to § 8-205, with instructions that the form be completed [*20] and returned within ten days. Section 8-206(c) provides that when a person appears for jury service, or is interviewed by the jury judge, clerk or jury commissioner, the person may be required to fill out another juror qualification form in the presence of the jury commissioner or the clerk of the court, and at that time, if it appears warranted, the person may be questioned, but only about [***23] his responses to questions contained on the form and grounds for his excuse or disqualification. The clerk or jury commissioner shall note any additional information thus acquired on the juror qualification form and transmit it to the jury judge.

While § 8-206 gives the trial court the power to seek updated juror qualification information at the time a prospective juror appears for jury service, it does not require that such information be questioned or updated. Rule 2-512(c) merely provides that the information contained on the jury qualification form be transmitted to the parties. It does not require that the parties receive more recent or current information.

Subsection 8-211(b) provides that any party to a civil case may, before voir dire begins, move to stay the proceedings on the ground of substantial failure to comply with the jury selection procedures of Subtitle 2. Subsection 8-211(d) provides that where the trial court finds

that there has been a substantial failure to comply with the selection procedures of Title 8, other than those contained in § 8-103, n5 and that the failure is likely to be prejudicial to the moving party, the court shall stay the proceedings pending [***24] selection of the jury in conformance with Title 8.

n5 Section 8-103 provides that "[a] citizen may not be excluded from service as a grand or petit juror in the courts of the State on account of race, color, religion, sex, national origin, or economic status." Where there has been a violation of this section, the likelihood of prejudice need not be demonstrated, but instead, is presumed. See *CJ* § 8-211(d)(1).

[*21] Title 8 provides a statutory remedy only in those instances in which the moving party has demonstrated (1) a substantial failure to comply with the selection procedures of Title 8, and, (2) when the violation is other than a § 8-103 violation, that the moving party is likely to be prejudiced by the substantial failure. Further, a § 8-211 challenge is timely only if made prior to voir dire. That is true even if the party was unaware of the reasons for the challenge prior to the commencement of voir dire. See *Hunt*, 345 Md. at 143-46 (preventing, under § 8-211(a), the criminal equivalent of § [***25] 8-211(b), defendant in capital murder case from raising challenge post-voir dire).

In this case, the defendants did state their challenge prior to the commencement of voir dire. They did not demonstrate, however, either substantial failure to comply with the jury selection process of Title 8, or a likelihood of prejudice. In order to obtain a stay at this juncture, the defendants would have had to demonstrate (1) substantial noncompliance with the statutes governing the dissemination and completion of juror qualification forms (e.g., due to clerical error, juror qualification forms sent to prospective jurors do not include a question regarding the occupation of the juror's spouse), and (2) that the defendants likely would be prejudiced by such substantial noncompliance.

While it is true that a few inconsistencies in the occupational information were revealed during voir dire, such inconsistencies could have been due to recent changes in occupation, and are not evidence of substantial failure to comply with the procedures governing dissemination and collection of juror qualification forms. Further, given that the discrepancies were uncovered after the commencement of voir dire, Ford, [***26] under the reasoning of *Davis*, was entitled to verification of such information only if it could demonstrate that the

information was linked to [**1325] probable bias. That is a demonstration Ford was unable to make.

We are cognizant of the fact that, as a practical matter, a party often will not learn of inaccuracies in Rule 2-512(c) [*22] information until after the commencement of voir dire. It is at this point that trial judges, under their broad discretion to fashion voir dire, have the ability to rectify such discrepancies.

C. Ford's Proposed Voir Dire

Further, Ford contends that the trial court committed reversible error when it refused to ask the venire panel the voir dire proposed by Ford. Ford submitted proposed voir dire containing forty-four questions. The trial court declined to ask the voir dire submitted by Ford or any of the other parties, and instead, limited voir dire to the following nine questions:

1. Do the jurors know the decedents?
2. Do the jurors have any connection with any named company (defendants)?
3. Do the jurors know Plaintiffs' counsel?
4. Do the jurors know Defendants' counsel?
5. Do the jurors know the potential product identification witnesses? [***27]
6. "Are there any member of this panel or any member of their immediate family who has been involved or had a claim filed for an asbestos-related disease?"
7. Do the jurors know the medical expert witnesses?
8. "If you do think that you have what is an extraordinary reason why you could not stay to a conclusion of this trial, please stand."
9. "Is there any other reason at all that I have not specifically questioned you about, any other reason at all that would interfere with your ability to be fair to the parties in this case if you were selected as a juror?"

Ford emphasizes the fact that, notwithstanding that the trial was expected to last up to four weeks, the trial court's voir dire took only one hour to complete. The expected length of a trial, however, does not dictate the length of voir dire. The scope and form of voir dire is left almost wholly to the discretion of the trial judge with the exception of those limited areas that are mandatory areas of inquiry under Maryland law. These mandatory areas recently were described [*23] by the Court of Appeals in *Boyd v. State*, 341 Md. 431, 671 A.2d 33 (1996):

The mandatory scope of voir dire in Maryland only extends to those [***28] areas of inquiry reasonably likely to reveal cause for disqualification. There are two

areas of inquiry that may uncover cause for disqualification: (1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service . . . ; or (2) "an examination of a juror . . . conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him."

. . . In other words, we have held that the well-settled "right" to examine potential jurors, inherent in the constitutional right to fair trial and an impartial jury, translates into a defendant's right to have certain questions propounded to the jurors where the proposed questions "concern a specific cause for disqualification."

Id. at 435-36 (citations omitted). When a party requests inquiry regarding a specific cause for disqualification, refusal to engage in such inquiry will constitute reversible error. *Davis*, 333 Md. at 47. In particular,

where the parties identify an area of potential bias and properly request voir dire questions designed to ascertain jurors whose bias [***29] could interfere with their ability to fairly and impartially decide the issues, then the trial judge has an obligation to ask those questions of the venire panel. Merely asking questions, such as, "is there any reason why you could not render a fair and impartial verdict," is not an adequate substitute for properly framed questions designed to highlight specific areas where potential jurors may have biases that could hinder their ability to fairly and impartially decide the case.

Id.

Ford argues that a number of its questions "sought to reveal prejudices gained [**1326] through education or training in the medical field or other employment." Our review of such questions, however, reveals that they did not seek information [*24] regarding the panel members' various states of mind. Instead, they sought the type of occupational information that is not mandatory under the holding in *Davis*. *Davis* does not foreclose the possibility that, in some instances, there may be a "demonstrably strong correlation" between a particular occupation and a particular bias (e.g., doctors in a medical malpractice case). No such correlation, however, was demonstrated in the instant case.

A few other questions [***30] were directed to uncover information regarding the panel members' experiences with cancer and other lung problems, and the panel members' experiences with Ford products generally, not Ford friction products in particular. Even assuming that these questions were likely to uncover potential biases, Ford did not identify the areas of potential biases for the trial court and then request that its questions be asked.

119 Md. App. 1, *, 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

Instead, when the trial judge asked the parties whether they had any additional voir dire, Ford simply asked that all of its proposed voir dire be read:

THE COURT: . . . For the defense, any request for additional voir dire?

MR. WILLIAMS: Yes, Your Honor, for the record, Ford would go ahead and request that the voir dire questions that we submitted be read and specifically I can give you a list of those.

THE COURT: Every area that you have asked has been fairly covered by the Court's previous questions.

MR. WILLIAMS: Very good, Your Honor.

In the absence of the identification of a specific question or questions coupled with an explanation that might have caused the trial court or this Court to come to a different conclusion, it appears that Ford's lengthy voir dire was [***31] either fairly covered by the trial court's voir dire or sought general information useful to the parties in the exercise of their peremptory challenges rather than specific causes for disqualification.

D. Ford's *Batson* Challenge

Finally, Ford contends that the trial court committed reversible error by refusing to conduct a *Batson* inquiry prior to [*25] the swearing of the jury. In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), the Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, a criminal defendant who is a member of a cognizable racial group can challenge the prosecution's use of peremptory challenges to exclude jurors of the defendant's race. The Supreme Court has since applied *Batson* in a civil case. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991). In addition, in *Gilchrist v. State*, 340 Md. 606, 620-21, 667 A.2d 876 (1995), the Court of Appeals held that *Batson* applied to peremptory challenges aimed at excluding white prospective jurors from the venire based on their race.

In *Gilchrist*, the Court of Appeals adopted the following [***32] three step process, first set forth by the Supreme Court in *Batson*, to determine whether the exercise of peremptory strikes is discriminatory:

First, the complaining party has the burden of making a prima facie showing that the other party has exercised its peremptory challenges on an impermissible discriminatory basis, such as race or gender. . . .

Gilchrist, 340 Md. at 625. Generally, a prima facie showing of discrimination is satisfied by showing a pat-

tern of strikes against same race jurors. *Batson*, 476 U.S. at 96-97.

Second, once the trial court has determined that the party complaining about the use of the peremptory challenges has established a prima facie case, the burden shifts to the party exercising the peremptory challenges to rebut the prima facie case by offering race neutral explanations for challenging excluded jurors. . . .

Finally, the trial court must "determine whether the opponent of the strike has carried his burden of proving purposeful discrimination."

[**1327] *Gilchrist*, 340 Md. at 625-26 (citations omitted).

In the instant case, Ford made a prima facie showing of discrimination by pointing out to the trial court [*26] that appellees had [***33] used all of their strikes to strike white panel members. The trial court did not proceed to the second step, however. Instead, it ruled that Ford had not made a prima facie showing of discrimination because the racial composition of the jury approximated the racial composition of Baltimore City. A comparison of the racial composition of the jury to the community from which it is drawn, however, is not the test required by *Batson*. When, as in this case, a party demonstrates a pattern of discriminatory strikes, the trial court must inquire whether the challenged party had race-neutral reasons for exercising his or her strikes. Then, the trial court must determine whether the opponent of the strike has met its burden of proving purposeful discrimination.

Ultimately, at a post-trial hearing, the trial court did conduct a full *Batson* hearing. At that time, appellees offered the following reasons for their strikes:

MR. IGNATOWSKI: Number 94 was an auditor, and for that reason she was struck. This obviously -- this case was going to involve economic values, economic figures. That was the reason that that juror was struck by the plaintiffs.

Number 157 was a high school teacher. [***34] There were a number of high school teachers in the venire that were part of the venire that indicated an unwillingness to serve.

Number 157, I don't believe, fell into that category, but we picked this jury in late May, and from the discussions of the whole panel, from the responses of the whole panel, there was some reluctance to serve by some teachers because it was the end of the school year, and we struck that individual who was a high school teacher.

Also, numbers 94 and 157 both had postgraduate training, and that is evident from their juror selection list,

119 Md. App. 1, *; 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

and that was an additional reason that we used in our process to strike those two individuals.

Number 91, Juror Number 91, again, was an administrator. She had 20 years of education, and she was a wife of an attorney whom we believe to be an attorney who was [*27] affiliated or at least affiliated in the past with a defense firm in the Baltimore Metropolitan area.

With respect to Juror Number 99, she also, I believe, was a teacher, had 16 years of education, and that was the reason that we used to strike Number 99.

With respect to Juror Number 202 who is listed as a banker, again, this case was going to involve a number [***35] of economic issues as is evident from the evidence in the case and evident from the analysis of the economist that testified in the case, and that was the reason that we struck Juror Number 202.

MS. HINES: . . . Just briefly, I would concur with everything that Mr. Ignatowski has said, and just to make the record clear, we set forth in our opposition Juror Number 94, who was the auditor, and that was also the reason we struck him as well, and there is excerpts from the transcript in our memo where he basically set forth that he would not be able to support himself if he had to sit on a trial that was a duration that this trial was expected to last, and that was an additional reason for our striking --

THE COURT: Number 157, John Wilcox, also said he couldn't return.

MS. HINES: That was exactly the next point that I was going to make, and our transcript is attached to our opposition with respect to Juror Number 157 who was a high school teacher, and because of the size of his school, he had indicated he would have difficulties.

Likewise, that is why we also struck, although that individual did not set forth any reasons on the record, as an additional reason as [***36] to why Juror Number 99 who is also a teacher was struck for the additional reasons.

The foregoing reasons were race-neutral and were accepted by the trial court. Accordingly, [**1328] we will not question the validity of those reasons on appeal. As we stated in *Ball v. [*28] Martin*, 108 Md. App. 435, 672 A.2d 143, cert. denied, 342 Md. 472, 677 A.2d 565 (1996).

in a practical sense, if, after the party opposing the strike has presented a prima facie showing, the proponent

thereof proffers a facially neutral reason *that is accepted by the trial court*, then an appeal on Batson principles has little, if any, chance of success, given that the credibility of the proponent offering the reasons is, as it is generally, for the trial court -- not an appellate court -- to determine.

Id. at 456 (discussing *Purkett v. Elem*, 514 U.S. 765, 131 L. Ed. 2d 834, 115 S. Ct. 1769, reh. denied, 515 U.S. 1170 (1995), and *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991))(emphasis in original).

Ford argues that the timing of the trial court's Batson inquiry constitutes reversible error. Ford argues that, after a four week trial, the events [***37] surrounding jury selection had to be reconstructed; memories were not as fresh. Further, there was a tremendous disincentive for the trial court to sustain challenges after the trial had already completed. Finally, the lapse in time gave appellees additional time "to fine-tune their reasons," and, as the appellees' reasons originally were submitted in document filings, the trial court did not have an opportunity to evaluate their credibility.

We note first that the trial court did have an opportunity to judge the credibility of appellees' counsel. Although appellees initially submitted the reasons for their strikes in writing, they ultimately gave their reasons to the trial judge on the record in a post-trial hearing. With respect to Ford's other contentions, we agree that ordinarily a Batson inquiry should be conducted at the time the challenge is made. The trial judge in this instance, however, did not purposefully defer the Batson inquiry in this case. Instead, the judge thought that the inquiry was unnecessary based upon his initial determination that Ford had not made out a prima facie case of discrimination. Under these circumstances, we cannot say that the timing of [***38] the Batson inquiry is grounds for reversal.

[*29] Both this Court and the Court of Appeals have remanded cases to trial courts for Batson hearings long after the jury selections and trials in such cases. See *State v. Gorman*, 324 Md. 124, 596 A.2d 629 (1991); *Stanley v. State*, 313 Md. 50, 542 A.2d 1267 (1988); *Chew v. State*, 71 Md. App. 681, 527 A.2d 332 (1987), judgment vacated after remand, 317 Md. 233, 562 A.2d 1270 (1989). Accordingly, a post-trial Batson hearing is not *per se* unreliable. While certainly, there are difficulties inherent in reconstructing events for such a hearing, see *Chew*, 317 Md. at 239, in this case, the trial judge necessarily found that the events were reconstructed to his satisfaction. We have no basis for disagreeing with that determination.

II.

Motion for Judgment in Wood

In deciding whether to grant a motion for judgment, a trial court "assumes the truth of all credible evidence on the issue and of all inferences fairly deducible therefrom, and considers them in the light most favorable to the party against whom the motion is made." *Impala Platinum Ltd. v. Impala Sales, Inc.*, 283 Md. 296, 328, 389 A.2d 887 [***39] (1978). If, when viewed in that light, "there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact at issue, then the trial court would be invading the province of the jury by [granting a motion for judgment]." *General Motors Corp. v. Lahocki*, 286 Md. 714, 733, 410 A.2d 1039 (1980).

Ford contends that the issue of substantial factor causation in the Wood case should not have been submitted to the jury because there was insufficient evidence that Ford's products were a substantial contributing factor of Mr. Wood's mesothelioma. We agree.

Among the questions set forth on the jurors' verdict sheet was the following:

[*30] Do you find by a preponderance of the evidence that Mr. Wood's exposure to asbestos-containing [***1329] products manufactured, supplied, installed and/or distributed by [Ford] was a substantial contributing factor in the development of his mesothelioma?

In order to demonstrate that Mr. Wood was exposed to Ford's asbestos-containing products, Mrs. Wood was required to present evidence tending to show that Mr. Wood inhaled asbestos fibers produced by Ford's products. See *Eagle-Picher Industries, Inc. v. Balbos*, [***40] 326 Md. 179, 211-12, 604 A.2d 445 (1992). Mr. Wood did not do any work with brake or clutch products. Instead, he had bystander exposure to brake and clutch products and the asbestos fibers emanating therefrom. Accordingly, Mrs. Wood was required to demonstrate that Mr. Wood worked in proximity to others using Ford's brake and clutch products with some frequency and regularity. *ACandS v. Asner*, 344 Md. 155, 171, 686 A.2d 250 (1996); *Balbos*, 326 Md. at 210. While Mrs. Wood presented sufficient evidence from which a jury could infer that Mr. Wood's exposure to asbestos-containing brake and clutch products was sufficient to have substantially caused his mesothelioma, she did not present sufficient evidence that Mr. Wood was exposed to Ford's brake and clutch products with the requisite degree of frequency, proximity or regularity.

Mr. Wood worked at the Preston Street Garage between 1948 and 1952. The Ford trucks that were worked on at the garage during that time period were model years 1928 to 1932, and the automobiles were model years 1938 to 1939. While it was undisputed that the

vehicles did not contain their original brake and clutch parts during the relevant [***41] time period, neither of Mr. Wood's two co-worker witnesses could identify the manufacturer or supplier of the replacement brake and clutch parts that were used. Nevertheless, Mrs. Wood contends that there was enough circumstantial evidence to demonstrate that Mr. Wood was exposed to Ford's brake and clutch products.

[*31] Specifically, both Mr. Grewe and Mr. Grossblatt, one of Mr. Grewe's co-worker witnesses, testified that they used Ford replacement brake and clutch products on Ford vehicles at Mr. Grewe's place of employment from 1957 through December, 1992. n6 Further, Mr. Grewe testified that Ford products were used on Ford vehicles because they fit better than products supplied by others. In addition, Mrs. Wood admitted into evidence two Model A instruction books, one that was supplied with 1928 Model A vehicles, and one that was supplied with 1931 Model A vehicles. Each of these books contained the following language:

n6 Although these witnesses testified in the Grewe case, Mrs. Wood adopted their testimony as evidence in her case.

[***42]

When repairs or replacements are necessary, it is important that you get genuine Ford parts.

Finally, Mrs. Wood contends that there was evidence that Ford had contracts to supply replacement brakes to the Postal Service. Mrs. Wood argues that, taken together, this evidence demonstrates that Ford brakes and clutches were applied frequently and regularly to Ford vehicles at the Preston Street garage between 1948 and 1952.

We agree that exposure to a defendant's asbestos-containing products may be demonstrated circumstantially. *Balbos*, 326 Md. at 210. The evidence cited by Mrs. Wood is insufficient, however, to create a jury question on substantial factor causation. First, we note that, contrary to Mrs. Wood's assertion, there is no evidence that Ford had contracts to supply replacement brakes to the Postal Service. The sole support of Mrs. Wood's contention is the following testimony by Mr. Anderson, Ford's corporate designee:

Q. During the time that you were employed by Ford, were you aware of files that involved government contracts supplying -- Ford supplying asbestos-containing brakes or friction products during those years?

A. In a few instances, on friction materials, [***43] yes, I was aware of some special military vehicle operations, SMVO.

[*32] Q. Excuse me, special military --

[**1330] A. Yes, SMVO, special military vehicle operations.

Q. Other than that, were you aware of any other government contracts that Ford had with the U.S. Government to supply brakes?

A. No.

Q. Did Ford have contracts, that you are aware of, to supply brakes to the U.S. Postal Service?

A. I expect they did, but I don't have any direct knowledge of that.

Mr. Anderson simply did not testify that Ford had contracts to supply the Postal Service with replacement brakes. Second, Mr. Grewe's and Mr. Grossblatt's testimony regarding the practices of an entirely different garage during an entirely different time period is not evidence of the practices of the Preston Street garage between 1948 and 1952. See *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 665, 670, 602 A.2d 1182 (1992) ("The mere 'conjecture' that half of Anchor's asbestos products may have come from Raymark over a thirty year period is not sufficient to prove that the plaintiff Zenobia was exposed to Raymark's products during the two year period that he worked at Maryland Shipbuilding and Drydock or that Raymark's products [***44] were a substantial factor in causing the plaintiff Zenobia's injuries."). That leaves Mr. Grewe's statement that Ford brakes and clutches fit Ford vehicles better, and the recommendation contained in the Model A instruction books. These pieces of evidence must be considered in context.

Mr. Anderson, Ford's corporate designee, testified that Ford does not require that its replacement parts be used on its vehicles, and that there is a significant replacement parts industry. Further, Ford occupies only approximately 15% of the replacement parts market. Mr. Anderson testified that it is common for mechanics to use non-Ford replacement parts, including non-Ford brake and clutch parts, on Ford vehicles because other companies make and sell such parts much cheaper than does Ford. Indeed, when Mr. Anderson was a [*33] mechanic in the 1950's, it was his practice to use non-Ford replacement parts because of the cost savings. With respect to the language contained in the manuals, indicating the importance of using Ford replacement parts, Mr. Anderson testified that such language is standard in the automotive industry and is nothing more than a marketing message. Even considering the evidence in a [***45] light most favorable to Mrs. Wood, the evidence simply

was too thin to demonstrate that Mr. Wood frequently and regularly worked in proximity to mechanics applying Ford brake and clutch products.

Alternatively, Mrs. Wood contends that, regardless of who manufactured the replacement parts, there was sufficient evidence from which the jury could infer that Ford had a duty to warn of the dangers involved in replacing the brakes and clutches on its vehicles. We agree with Ford that the case simply was not tried and submitted to the jury on this theory. The jury verdict sheet asked the jury to consider whether Mr. Wood was exposed to Ford's asbestos-containing products. During the course of the trial, the products were identified as brake and clutch linings. Indeed, Mrs. Wood's counsel asked the trial court to revise the jury verdict sheet to allow the jury to consider whether Ford had a duty to warn of the dangers of replacing brakes and clutches regardless of the origin of the brakes and clutches. The trial court declined Mrs. Wood's request on the basis that the case had not been tried on that theory.

We agree with the trial court's determination on that issue. Specifically, counsel [***46] for Mrs. Wood argued in her opening statement that counsel would demonstrate that Mr. Wood was exposed to Ford's asbestos-containing brakes. It was not until after the close of all the evidence, during a discussion of the jury verdict form, that Mrs. Wood articulated for the first time her theory that Ford's duty to warn stemmed from its sales of the vehicles rather than its sales of brakes. Ford had not had the opportunity to defend the case on this new theory, and thus, submission of the case on this theory would have been prejudicial and in error.

[*34] Mrs. Wood seems to read the record differently and apparently believes the case was tried and submitted to the jury on a sale [**1331] of the vehicle theory. Even if that were the case, we would not find liability under that theory as a matter of law. Mrs. Wood's phrasing of the issue, that Ford had a duty to warn of the dangers associated with the foreseeable uses of its vehicles, obscures the fact that she really is attempting to hold Ford liable for unreasonably dangerous replacement component parts that it neither manufactured nor placed into the stream of commerce.

The parties have not favored us with much law on this subject, and our own [***47] research has not uncovered any case on point. As a general matter, however, those courts that have considered the issue have held that a vehicle manufacturer may be held liable in damages for defective component parts manufactured by another only if the vehicle manufacturer incorporated the defective component into its finished product. See, e.g., *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986); *Exxon Shipping Co. v. Pacific Resources, Inc.*,

119 Md. App. 1, *, 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

789 F. Supp. 1521, 1527 (D. Hawaii 1991); *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959). Such liability, often referred to as "assembler's liability," is justified because the assembler derives an economic benefit from the sale of a product that incorporates the component; the assembler has the ability to test and inspect the component when it is within its possession; and, by including the component in its finished product, the assembler represents to the consumer and ultimate user that the component is safe. See *Baughman*, 780 F.2d at 1132-33; *Pacific Resources, Inc.*, 789 F. Supp. at 1527. See also *Phipps v. General Motors Corp.*, 278 Md. 337, 343, 363 A.2d 955 (1976) (discussing [***48] justifications for generally imposing a duty of strict liability upon manufacturers or sellers of defective products).

Courts have noted that such justifications usually are not advanced by making a manufacturer liable for component parts that it did not market or place into the stream of commerce, and thus, have limited liability to those entities in [*35] the defective component's chain of distribution. See *Baughman*, 780 F.2d at 1132-33 (refusing to hold truck manufacturer liable for defective wheel rim that was placed on vehicle after sale and that the manufacturer did not supply); *Pacific Resources*, 789 F. Supp. at 1527 (refusing to hold designer of mooring terminal liable for defective replacement chain); *Spencer v. Ford Motor Co.*, 141 Mich. App. 356, 367 N.W.2d 393, 396 (Mich.App. 1985) (refusing to hold vehicle manufacturer liable for defective wheel rim component added after sale of vehicle). See also *Newman v. General Motors Corp.*, 524 So. 2d 207, 209 (La.App. 4 Cir. 1988) (refusing to hold truck manufacturer liable for defective ratchet assembly it did not incorporate into its product); *Walton v. Harnischfeger*, 796 S.W.2d 225, 227-28 (Tex. App.-San Antonio, [***49] 1990) (crane manufacturer had no duty to warn or instruct about rigging it did not manufacture, incorporate into its crane, or place into the stream of commerce).

As at least one court has noted, limiting liability to those in the chain of distribution is not only equitable, it preserves a bright line in the law of strict liability:

The need to preserve a bright line in the law of strict products liability (that is, a chain of title rule) is evident. For example, if an assembler were strictly liable for an "identical" replacement part purchased from a third party, the court would be forced to conduct an inquiry into whether the original and the replacement parts were manufactured by the same company. . . . If so, whether the original and replacement parts were sufficiently similar? . . . If so, whether the original and replacement parts were manufactured utilizing a similar process and similar materials? If so, at what point in time did endorsement by the assembler of the component manufacturer come to

an end, if ever? Each of these questions would have to be answered in order to support liability under an "endorsement" theory, notwithstanding the other justifications for strict [***50] liability.

[*36] *Pacific Resources*, 789 F. Supp. at 1527-28 (citations omitted). n7

n7 During the proceedings below, Mrs. Wood's counsel asked the trial court not to submit a strict liability count to the jury, but instead, to submit the case only on a negligence theory. Counsel indicated that they may not have met the burden required by strict liability in that they may not have demonstrated that Ford supplied the brakes to which Mr. Wood was exposed. On appeal, Mrs. Wood apparently has abandoned the idea that there is a distinction between negligence and strict liability in this regard. Nevertheless, we note that, regardless of whether Ford's duty to warn sounds in negligence or strict liability, it has a duty to warn only by virtue of its manufacture or sale of unreasonably dangerous products. This is not, for example, a case based on negligent instruction as there is no evidence that anyone relied on instructions supplied by Ford.

[**1332] Indeed, the only context, of which we are aware, in which a court has found [***51] an assembler liable for a replacement component it did not sell is where the replacement component was incorporated into the finished product during the assembler's warranty. See *Morris v. American Motors Corp.*, 142 Vt. 566, 459 A.2d 968, 40 A.L.R.4th 1207 (Vt. 1982). The rationale for finding liability in such a case, however, was that the assembler, a vehicle manufacturer, led the plaintiff to believe that he was dealing with the assembler when he obtained the replacement part. 40 A.L.R.4th at 1215.

Similarly, a finding of liability may be justified if the plaintiff demonstrates that the assembler engaged in a concerted action with others to market, distribute and conceal the dangers of the defective component. See *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 591 N.E.2d 222, 224, 582 N.Y.S.2d 373 (N.Y. 1992); *Cousineau v. Ford Motor Co.*, 140 Mich. App. 19, 363 N.W.2d 721, 729-30 (Mich. App. 1985). We would agree with the Court of Appeals of New York, however, that "parallel activity among companies developing and marketing the same product, without more, . . . is insufficient to establish the agreement element necessary to maintain a concerted action claim." [***52] *Rastelli*, 591 N.E.2d at 224 (quoting *Hymowitz v. Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (N.Y. 1991)).

119 Md. App. 1, *; 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

[*37] Assuming all requirements are met, both the warranty theory set forth in *Morris, supra*, and a concert of action theory will impose liability upon a vehicle manufacturer for a component part that it did not place into the stream of commerce. Both theories, however, require some affirmative conduct or fault on the part of the vehicle manufacturer *linked to the specific product that caused the plaintiff's injuries*. Short of a demonstration of a similar degree of fault linked to the specific components that caused the plaintiff's injuries, we would be unwilling to hold that a vehicle manufacturer has a duty to warn of the dangers of a product that it did not manufacture, market, sell, or otherwise place into the stream of commerce.

The cases that Mrs. Wood cites, for the proposition that a manufacturer has a duty to warn of dangers inherent in maintaining and repairing the manufacturer's products, do not persuade us to the contrary. *Bich v. General Electric Co.*, 27 Wash. App. 25, 614 P.2d 1323 (Wash. App. 1980); *Stewart v. Scott-Kitz* [***53] *Miller Co.*, 626 P.2d 329 (Okla. App. 1981); *Krutsch v. Walter Collin GmBh*, 495 N.W.2d 208 (Minn. App. 1993). In each of these cases, the plaintiff was injured by the manufacturer's product, not by a replacement component part manufactured by another many years later.

In *Bich*, the plaintiff was injured in an explosion that occurred while he was changing a fuse to a potential transformer manufactured by General Electric (GE). 614 P.2d at 1325.

The GE transformer *Bich* checked was housed in a metal cubicle located approximately 14 feet off the plant floor. The cubicle works like a drawer with the transformer and its fuses housed within the metal cabinet. When the drawer is opened, the circuit automatically breaks; when the drawer is closed, the circuit is complete.

Bich replaced the GE fuses with Westinghouse fuses. Both the GE and Westinghouse fuses were labelled 14,400 volts and .5E; they were the same length, 11 1/2 inches. Although the Westinghouse fuses were slightly larger in [*38] diameter, they fit readily into the clips designed to hold the GE fuses. *Bich* closed the drawer and waited approximately 30 to 60 seconds to see if the new fuses would hold. As he reopened the drawer, [***54] electric current [**1333] arced from the opening followed immediately by an explosion and fire. Although the Westinghouse and GE fuses were similar in appearance and labeling, the Westinghouse fuses had a longer time-delay curve than the GE fuses. *Bich* was severely burned in the explosion.

Id. at 1325-26. The court first noted that sufficient evidence existed to support a finding that the transformer

itself was defectively designed. With respect to a duty to warn, the court agreed with GE that it "*had no duty to warn in 1969 of a fuse Westinghouse manufactured in 1973. . . .*" *Id.* at 1328 (emphasis added). Instead, the jury could only have found that GE had a duty to warn of the time-delay characteristics of its own fuses. n8 *Id.* "It would have been a simple and inexpensive matter for GE to have included on its fuses a warning not to substitute fuses or to have given information regarding the time-delay characteristics of its fuses." *Id.*

n8 We note, however, that the court's holding that there was a duty to place a warning on the GE fuses is problematic since it was not the GE fuses that ultimately caused the plaintiff's injuries. A better analysis is that there was a duty to design the transformer and fuses in such a manner that only GE fuses fit or to place a warning on the transformer instructing users to use only GE fuses.

[***55]

In *Stewart*, it was a defectively designed forklift manufactured by the defendant that caused the plaintiff's injuries. While the plaintiff was standing on the lifting platform 16 feet above the ground, the machine's lifting apparatus failed, and the platform and plaintiff fell to the ground. 626 P.2d at 330. During a prior repair, some bolts had been removed and were reinserted backwards causing the ultimate failure of the forklift. *Id.* The plaintiff alleged that the lift was defectively designed because the manufacturer had failed to fashion the guide bolts and their housings in such a way that maintenance personnel could not later insert them backwards. *Id.* Alternatively, [*39] the plaintiff alleged that the manufacturer could have made the forklift safe by placing warnings on the lift advising maintenance personnel and users of the potential danger and of the need to perform a functional check of the equipment after the servicing or repairs to make sure the bolts were correctly inserted. *Id.* The court held that the plaintiff had adequately plead a cause of action based on dangerous design defect and duty to warn. *Id.* at 331.

In *Krutsch*, it was the defendant manufacturer's [***56] lead extruder machine that caused the plaintiff's injuries. The machine in question was a large hydraulic press used to make lead bullets. The plaintiff had been trained by the manufacturer in the use of the machine, but not in the repair of the machine. When the machine broke down, the plaintiff opined that it was not functioning because there was air in the hydraulic cylinder and that he could fix the machine by "bleeding" the cylinder. After consulting a partial copy of the manufacturer's manual, which did not contain any information on bleed-

119 Md. App. 1, *, 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

ing the cylinder, the plaintiff took a wrench and began to turn a pressure release bolt attached to the machine's hydraulic cylinder. The bolt contained a small hole through which fluid could flow from the cylinder. The plaintiff turned the bolt too far, and highly pressurized hydraulic fluid was injected into his thumb causing severe injuries. The court held that the question of whether the manufacturer had a duty to warn of the hazards of bleeding the cylinder was a question of fact.

In both Bich and Krutsch, the plaintiffs were injured during the repair of the defendants' products. They were injured, however, by the defendants' products. [***57] Had the products been designed differently to begin with, the accidents in each case could have been averted. Stewart is even more distinguishable. In that case, the plaintiff was injured during the normal operation of the product after it had been faultily repaired.

For all of the reasons set forth above, we will reverse the judgment of the trial court in Wood.

[*40] III.

Exclusion of Evidence of Exposures to

Other Companies' Asbestos-Containing Products

Pursuant to the trial court's direction, counsel for the Grewes supplied the trial [**1334] court and all parties with a chart indicating all motions in limine previously filed in the case of *Asner v. ACandS, et al.*, Case No. 93149701. The *Asner* case was an asbestos products liability case that had been tried before the same trial judge, the Honorable Edward J. Angeletti, in November 1993. The law firm that represented the Grewes also represented the plaintiffs in *Asner*, and, with the exception of Ford, many of the companies that originally were defendants in the instant case also were defendants in the *Asner* case. The chart supplied by counsel for the Grewes also indicated the disposition of each motion. [***58] In their covering letter, the Grewes informed the trial court that they were adopting all of the motions that the plaintiffs had filed in *Asner*. Counsel for Mrs. Wood filed a similar adoption, and Ford filed oppositions. One of the motions adopted by the appellees was a motion in limine to exclude evidence of exposures to asbestos-containing products of manufacturers other than those who were parties at the time of trial. That motion had been granted by the trial court in *Asner* and was granted again in this case.

Subsequent to the trial court's ruling in this case, the Court of Appeals issued its decision in *Asner, supra*, 344 Md. at 155. In *Asner*, the Court vacated the judgment and remanded the case for a new trial on other grounds. The Court did not resolve the issues presented by the

motion in limine, noting that the record did not make plain the purpose for which the defendants sought to admit such evidence. The Court did, however, discuss the issues in order to provide guidance to the trial court on remand. In particular, it agreed with plaintiffs that evidence of other exposures would be irrelevant if the only purpose of the evidence was to show that a plaintiff's [***59] exposure to the asbestos-containing products of a non-party was greater than the plaintiff's exposure to the [*41] asbestos-containing products of the defendant. *Id.* at 174-75. In that vein, the Court repeated the following admonition it had first stated in *Balbos*:

"No supplier enjoys a causation defense *solely* on the ground that the plaintiff would probably have suffered the same disease from inhaling fibers originating from the products of other -[identified] suppliers."

Asner, 344 Md. at 175 (quoting *Balbos*, 326 Md. at 209) (emphasis supplied by *Asner* Court). It further noted, however, that whether evidence of exposure to the asbestos-containing products of non-parties is relevant is controlled by the purpose for which such evidence is being offered. Such evidence is not *per se* irrelevant. Consequently, it would be a rare case in which a court could impose a blanket ban in advance of trial, inasmuch as the evidentiary setting in which the evidence would be offered ordinarily would be unknown.

344 Md. at 174. The Court then went on to discuss the context in which admission of such evidence would be proper:

A factual defense may be based on the [***60] negligible effect of a claimant's exposure to the defendant's product, or on the negligible effect of the asbestos content of a defendant's product, or both. In such a case the degree of exposure to a non-party's product and the extent of the asbestos content of the non-party's product may be relevant to demonstrating the non-substantial nature of the exposure to, or of the asbestos content of, the defendant's product. [Footnote omitted.] But, a defendant would not ordinarily generate a jury issue on lack of substantial factor causation only by showing the dangerousness of a non-party's product to which the claimant was exposed. Ordinarily a defendant would have to follow up the evidence of exposure to the products of non-parties with evidence tending to prove that the defendant's product was not unreasonably dangerous or was not a substantial causal factor. Under these circumstances [*42] the proposition that the defendant's product is not a substantial cause may be made more probable by evidence tending to prove that the claimant's disease was caused by the products of one or more non-parties. See, e.g., *Becker v. Baron Bros.*, 138 N.J. 145, 649 A.2d 613 (N.J. 1994) (whether [***61] processed

119 Md. App. 1, *, 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

chrysotile in brake products posed a risk of causing mesothelioma in users [**1335] was a sharply disputed issue of fact at trial, so that trial court erred in instructing as a matter of law that the products were defective without a warning).

344 Md. at 176-77.

Ford argues that the type of defense to which Asner refers is exactly the type of defense that Ford attempted to put on in the instant case. In particular, Ford defended itself based upon the opinions of its expert witnesses that processed chrysotile in friction products cannot cause mesothelioma. Ford notes that its defense theory is made much more plausible by identifying for the jury another more likely cause of Mr. Wood's and Mr. Grewe's diseases, i.e., by demonstrating that each was exposed to non-friction asbestos products containing amphibole forms of asbestos (such as amosite and crocidolite).ⁿ⁹ While we agree with Ford's statement of the law, an examination of Ford's proffers reveals that it did not possess sufficient evidence to demonstrate such alternative causation. More particularly, Ford would have had to demonstrate that Mr. Grewe's exposures to amphibole asbestos fibers were sufficient to constitute [***62] a substantial factor in causing his mesothelioma. If such exposures were incapable of causing Mr. Grewe's mesothelioma, they do not make Ford's defense theory any more likely. Given our other [*43] rulings in the Wood case, we need only examine Ford's proffers in Grewe.

ⁿ⁹ The essential principle of Ford's defense theory is that chrysotile fibers, because they are shorter and more easily dissolved by the human body than amphibole fibers (such as crocidolite and amosite), are much less likely to remain intact in the body long enough to do the cellular damage that ultimately may result in mesothelioma. Of course, plaintiffs and their experts do not agree that chrysotile is innocuous or incapable of producing mesothelioma in humans.

Ford proffered certain excerpts of the videotape deposition of Mr. Grewe, and answers to interrogatories, that established that Mr. Grewe had been exposed to asbestos-containing joint compound when he remodeled homes in the mid to late 1960's. The only joint compound that Mr. Grewe [***63] recalled using was a product called "Gold Bond." It was undisputed, however, that Gold Bond contained only chrysotile fibers and not amphibole fibers. Accordingly, this evidence would not have demonstrated Mr. Grewe's exposure to amphibole fibers.

Ford also proffered portions of Mr. Grewe's discovery deposition, and answers to interrogatories, that would have established that he installed hot air furnaces in homes for a year or more prior to 1957. During such work, Mr. Grewe installed sheet metal pipe that was covered with strips of asbestos cloth. There was no evidence that Mr. Grewe ever disturbed the cloth so as to create dust when he was installing the pipe. Further, there was no evidence that the cloth was composed of amphibole fibers. In any event, the jury did receive information regarding Mr. Grewe's installation of furnaces in the late 1950's and his use of joint compound in the 1960's. When Ford's counsel cross-examined Lewis Rubin, M.D., one of plaintiffs' experts, he asked Dr. Rubin to read to the jury a one page summary of Mr. Grewe's asbestos exposure. That summary included the following:

... Mr. Grewe indicated that beginning in the mid to late 1960's he personally [***64] used joint compound while remodeling homes as a side job.

He recalled exposure to asbestos-containing dust when he used, mixed and sanded joint compound. He recalled using asbestos-free joint compounds by the late 1970's.

Mr. Grewe also stated that for about a year in the mid 1950's he performed sheet metal work installing new forced hot air furnaces in residences.

He recalled that strips of asbestos cloth approximately six inches by one-quarter inch in various lengths were incorporated [*44] into the sheet metal pipe work he installed on top of the furnaces. He neither handled nor cut the asbestos cloth.

Ford additionally proffered that, had it been permitted, it would have cross-examined Samuel Hammar, M.D., a pathologist and an expert witness for the plaintiffs, regarding Mr. Grewe's exposures to crocidolite and amosite. Given that there was no evidence of such exposures, such questioning would have been improper.

[**1336] Finally, Ford proffered that John Craighead, M.D., a pathologist, would have testified that it was Mr. Grewe's exposures to amosite and crocidolite, rather than his exposures to brake and clutch products, that caused Mr. Grewe's mesothelioma. An expert's opinion testimony [***65] is admissible only if it is supported by a sufficient factual basis. See Rule 5-702(3). Given that there was no factual basis to support Dr. Craighead's opinion, it was inadmissible.

IV.

Statutory Cap on Noneconomic Damages

119 Md. App. I, *, 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***, CCH Prod. Liab. Rep. P15,143

The jury awarded a total of four million dollars in noneconomic damages, one million of which was for loss of consortium, in the Grewe case. In a post-trial motion Ford requested that the trial court apply to that award the cap on noneconomic damages set forth in *CJ § 11-108*. n10

n10 Ford also requested that the trial court apply the cap to the Wood verdict. Given that we are reversing the Wood judgment, we need not discuss Ford's motion regarding Wood. Ford did not seek application of the cap to the wrongful death awards because both Mr. Wood and Mr. Grewe died prior to October 1, 1994, the effective date of the wrongful death cap. See *CJ § 11-108(b)(2)*.

CJ § 11-108 provides in pertinent part as follows:

(b) *Limitation of \$ 350,000 established.* -- [***66]

(1) In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed \$ 350,000.

[*45] In *Owens-Illinois v. Armstrong*, 326 Md. 107, 604 A.2d 47, cert. denied, 506 U.S. 871, 121 L. Ed. 2d 145, 113 S. Ct. 204 (1992) (hereinafter *Armstrong II*), the Court of Appeals first considered application of this section to an asbestos-related personal injury case. The plaintiff in that case had been diagnosed with asbestosis less than a year after the effective date of the statute, but the medical evidence demonstrated that his disease developed well before the effective date. Accordingly, the defendant argued that a cause of action "arises" when the injury is discovered, i.e., "arises" means the same as "accrues" as that term is used in Maryland's statutes of limitations. The Court disagreed and held, instead, that a cause of action "arises" when all of the elements of the cause of action are present. 326 Md. at 121. In both a negligence action and a strict liability action, the last element to occur is the injury. *Id.* at 121-22. Thus, a cause of action for negligence or strict liability arises [***67] when the injury first occurs. *Id.* at 122. n11

n11 The injury must be one that the law recognizes as compensable. If certain anatomical changes occur in a person as a result of a latent process, in some instances, the appearance of symptoms will make the condition a legally compensable injury. By contrast, a condition such as cancer is a compensable injury when it comes into existence even without symptomatology.

In a conventional personal injury action such as a vehicular tort, it is quite easy to pinpoint the date that the injury occurs. As the Court of Appeals noted, however, "identifying the time at which an asbestos-related injury came into existence is usually not a simple task. Due to the latent nature of asbestos-related disease, experts and courts alike have had difficulty in pinpointing its onset." *Id.* In the case of asbestosis, there are experts willing to testify that asbestosis occurs only when there has been a functional impairment of the lungs and others willing to testify that inhalation [***68] of asbestos fibers causes injury to cells, tissues and/or organs long before a disease is diagnosable. *Id.* at 122-23 (discussing *Lloyd E. Mitchell v. Maryland Cas. Co.*, 324 Md. 44, 64, 66-67, 595 A.2d 469 (1991)).

[*46] Relying upon the testimony of Owens-Illinois's expert, that the usual latency period for the development of asbestosis is twenty years, the Court of Appeals concluded as follows:

Based on Owens-Illinois'[s] expert's testimony, it is reasonable to assume that Armstrong's asbestosis took approximately twenty years to develop. Since his exposure began in the early 1940's, the most reasonable conclusion is that his asbestosis developed at least by the mid-1960's. Even assuming that the initial damage to Armstrong occurred in 1963, the last year [**1337] in which he worked in the shipyards, the disease "ordinarily" would have developed by 1983 and under "unusual" circumstances even earlier. The only reasonable conclusion, even viewed in the light most favorable to Owens-Illinois, is that Armstrong had asbestosis prior to July 1, 1986. Consequently, we affirm the Court of Special Appeals' holding that Armstrong's damage award is not controlled by the cap on noneconomic damages.

[***69] 326 Md. at 124.

Mr. Grewe first began experiencing symptoms in October, 1992, and was diagnosed with mesothelioma in January, 1993. The plaintiffs, however, presented un rebutted expert testimony that mesothelioma generally begins to grow at least ten years prior to the development of symptoms. Despite this evidence, Ford urges us to conclude that Mr. Grewe's cause of action arose in October, 1992, when he first began experiencing symptoms. Ford argues that the cap statute requires the determination of the exact date a cause of action arises, and that such a date can be determined with precision only by examining when the individual plaintiff began experiencing symptoms or when the plaintiff was diagnosed with a disease, whichever occurs first.

In essence, Ford argues a departure from *Armstrong II* as the *Armstrong II* Court did not base its holding upon a determination of when Mr. Armstrong began ex-

119 Md. App. 1, *; 703 A.2d 1315, **;
1998 Md. App. LEXIS 4, ***; CCH Prod. Liab. Rep. P15,143

periencing symptoms of asbestosis. Ford argues, however, that *Armstrong II* is distinguishable because the medical evidence in that case demonstrated that the plaintiff developed asbestosis [*47] at least by the mid-1960's. Given that it was "inconceivable that Armstrong's asbestosis [***70] came into existence between July 1, 1986 and his [diagnosis] in May 1987," *Armstrong II*, 326 Md. at 123 (quoting *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 727, 591 A.2d 544 (1991), *aff'd in part and reversed in part*, by citing case (hereinafter *Armstrong I*)), the Court of Appeals was not required to determine exactly when Mr. Armstrong contracted asbestosis. *Id.* Ford argues that as the date of manifestation of disease approaches the effective date of the statute, it becomes more important to determine exactly when the injury actually occurred.

Recently, we rejected a similar argument in *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 692 A.2d 5, cert. granted sub nom. on other grounds, *Porter Hayden v. Bullinger*, 346 Md. 373, 697 A.2d 112 (1997). In *Grimshaw*, we addressed the application of the cap statute to claims for asbestos-related mesothelioma. Preliminarily, we rejected the plaintiffs' contention that *Armstrong II* held that the cap did not apply to latent injury cases. We noted, instead, that *Armstrong II* held only that the statute was inapplicable under the particular facts of that case where evidence demonstrated that the plaintiff's injuries occurred prior to the effective [***71] date of the statute. Further, we reiterated our holding in *Armstrong I* that to have a cause of action based on claims of product liability or negligence law submitted to the jury, the plaintiff must produce evidence of a legally compensable injury.

87 Md. App. at 734.

We then turned our attention to the question of when a legally compensable injury occurs in an asbestos-related injury case. The defendants had argued that injury or harm does not arise until the symptoms of the disease become apparent. They argued that basing the determination of injury upon symptomatology is a less speculative approach than trying to determine the date the disease began to develop. We chose to rely upon a determination of the date that an injury in fact [*48] came into existence, and rejected defendants' contention that such an approach was too speculative:

We hold, therefore, that an injury occurs in an asbestos-related injury case when the inhalation of asbestos

fibers causes a legally compensable harm. Harm results when the cellular changes develop into an injury or disease, such as asbestosis or cancer. We, therefore, reject appellants' assertion that the injury or harm does not arise until [***72] the symptoms of the disease become apparent.

Grimshaw, 115 Md. App. at 160.

We then proceeded to examine the evidence before us to determine whether there [**1338] was a factual basis for concluding that the plaintiffs had suffered legally compensable injury prior to the July 1, 1986 effective date. All of the plaintiffs were diagnosed in 1993 or 1994. Given the testimony of two medical experts, that mesothelioma typically exists ten years prior to diagnosis, we concluded that there was a factual basis to support a finding that the plaintiffs' injuries occurred prior to the July 1, 1986 effective date of the statute. n12 *Id.* at 165.

n12 We so concluded even though another expert testified that the cancer began, at the earliest, three years prior to diagnosis. In the instant case, there was no such contrary evidence.

Ford does not argue that *Grimshaw* is distinguishable. Rather, Ford urges us to overrule *Grimshaw*. Ford contends that, although the *Grimshaw* analysis "may be easy to apply in 1992 [***73] or 1997, . . . this Court's use of statistics and rough mathematics invites disaster in the near future." Ford then gives the example of the individual who is diagnosed on July 1, 1996. We disagree that Ford's hypothetical invites disaster. Under *Grimshaw*, we will uphold a trial court's determination of when an injury arises as long as that determination is supported by legally sufficient evidence. See *id.*

Mr. Grewe was diagnosed with mesothelioma in January, 1993. Further, there was expert testimony that his cancer likely began to develop at least ten years prior to the date of [*49] diagnosis. Accordingly, there was a sufficient factual basis to support a finding that Mr. Grewe's injury occurred prior to the July 1, 1986 effective date of the statute.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; COSTS TO BE PAID BY APPELLANT.

**DARRYL FRICKE, ET AL v. OWENS-CORNING FIBERGLAS CORP.,
BAUMER FOODS, ET AL CONSOLIDATED WITH JANET FRICKE AND
GEORGE FRICKE, JR. v. OWENS-CORNING FIBERGLAS CORPORATION,
ET AL CONSOLIDATED WITH KEITH DAVILLIER, AS DATIVE CURATOR,
ET AL v. BAUMER FOODS, INC., ET AL CONSOLIDATED WITH KEITH
DAVILLIER, HEATH DAVILLIER, ET AL v. BAUMER FOODS, INC., ET AL**

No. 92-CA-2192 C/W 92-CA-2193 C/W 92-CA-2194 C/W 92-CA-2195

COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

618 So. 2d 473; 1993 La. App. LEXIS 1616

April 28, 1993, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication June 16, 1993.

PRIOR HISTORY: ON APPEAL FROM THE CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS. NOS. 88-8832, C/W 88-8862, 89-3442. DIVISION "C". HONORABLE RICHARD J. GARVEY, JUDGE

DISPOSITION: AFFIRMED

COUNSEL: THEODORE A. MARS, JR., ANDREW BLANCHFIELD, Mars & Blanchfield, New Orleans, La. 70170-3702 AND SIDNEY L. SHUSHAN, WILLIAM J. GUSTE, III, JOSEPH B. LANDRY, Guste, Barnett & Shushan, New Orleans, La. 70113-3125 AND BRUCE C. WALTZER, MICHAEL G. BAGNERIS, New Orleans, La. 70112, FOR PLAINTIFFS/APPELLANTS.

JOSEPH MASELLI, JR., Plauche, Maselli & Landry, New Orleans, La. 70170-4240, FOR DEFENDANTS/APPELLEES.

JUDGES: Court composed of Judge Denis A. Barry, Judge Philip C. Ciaccio and Judge Robert L. Lobrano

OPINIONBY: ROBERT L. LOBRANO

OPINION:

[*474] The issue in this appeal is whether the trial court correctly granted summary judgment dismissing Nabisco, Inc., Nabisco Brands, Inc. and Fleishman Corporation (collectively referred to as Nabisco) from plaintiffs' lawsuit.

The spouse, heirs and legal representatives of George Fricke, III and Melvin Davillier, Sr. filed the instant products liability suit against Nabisco and others alleging that Nabisco failed to give the proper warnings [**2] in connection with its manufacture and sale of vinegar. George Fricke, III was seriously injured when he was overcome by vapors while attempting to rescue co-worker Melvin Davillier, Sr. who had collapsed at the bottom of a mustard vat tank owned by Baumer Foods, Inc. Davillier subsequently died. The allegations against Nabisco are that it manufactured and sold to Baumer the vinegar used in the mustard vat and that it failed to provide proper warnings about the hazards associated with exposure to vinegar.

Nabisco filed a motion for summary judgment predicated on the fact that it sold its Fleischman's vinegar business to Burns, Philip and Company on July 2, 1986. Because the accident occurred on May 8, 1987 Nabisco argues that the vinegar in the vat was not sold or manufactured by it. Therefore, even if the product was defective because of a lack of warning, Nabisco urges it cannot be responsible because it had no duty to warn.

The trial court granted Nabisco's motion and plaintiffs have perfected this appeal. They raise two arguments. First they assert that there is serious issue of material fact regarding the source of the vinegar in the vat at the time of the accident. [**3] They argue that the vinegar which Nabisco manufactured and sold to Baumer before their sale to Burns, Philip may have been mixed together with vinegar subsequently purchased by Baumer. According to plaintiffs, the vinegar storage tank was never completely empty in the period of time [*475] leading up to the accident, and thus a question

remains as to whose vinegar was in the mustard vat at the time of the accident.

Second, plaintiffs argue that, even assuming the vinegar was not Nabisco's, there is still a mixed legal/factual issue remaining about their failure to provide adequate warnings. Plaintiffs assert that Nabisco's Material Safety Data Sheet sent to Baumer before the accident, and relied upon by Baumer at the time of the accident, failed to include proper and well known warnings regarding vinegar/acetic acid. They argue that Nabisco is responsible because the inadequate warning was adopted in its entirety by Burns, Philip and used by them in the subsequent manufacture and sale of vinegar to Baumer Foods.

In its motion for summary judgment Nabisco relies on evidence of the sale of its vinegar operations prior to the accident as well as plaintiffs' discovery responses which refer [**4] to an invoice dated May 7, 1987 as representative of the vinegar source at the time of the accident. Nabisco argues that the linchpin of a defective products case, i.e. that it was the manufacturer of the product, is missing in this case. The manufacturer cannot be responsible for a product it does not produce or sell.

We believe there is no issue of fact with respect to the source of the vinegar in the vat. Nabisco sold its business to Burns, Philip ten months prior to the accident. The plaintiffs identify the May 7, 1987 invoice as the source of the vinegar in question. They have not raised a serious issue of fact in this regard. Their speculation about a mixture of "old" and "new" vinegar is just that, speculation.

Plaintiffs' second argument presents the issue of whether Nabisco owed any duty to the users of the vine-

gar manufactured and sold by Burns, Philip, the purchaser of its vinegar operations. In support of an affirmative answer to this question plaintiffs cite the New York case of *Sage v. Fairchild-Swearingen Corporation*, 517 N.E.2d 1304 (N.Y. App. 1987). In that case the court held that a defective design prepared and used by the [**5] original manufacturer and relied upon by the purchaser (of the product) when it manufactured a replacement part can result in liability on the original manufacturer.

There are several distinguishing aspects to *Sage* which make it inapplicable to the case before us. Most important is the fact that the defective design relied on was supplied by the manufacturer of the product that was replaced by the product's user. That is, there was identification of the defective (by reason of improper design) product and the manufacturer. And, of course, the product was purchased from the defendant-manufacturer.

In the instant case, Nabisco neither sold nor manufactured the vinegar which allegedly caused plaintiffs' damages. The facts are well established that Nabisco had sold its vinegar business ten months earlier. Our review of Louisiana jurisprudence reveals no case dealing with this issue. Under the facts of this case, we are not prepared to hold a manufacturer responsible for alleged inadequate warnings about a product it neither manufactured nor sold. We cannot abandon the general rule of products liability requiring identification of the product with the manufacturer. Nabisco [**6] should not be required to warn about the use of a product it did not produce or sell to Baumer.

For the reasons assigned, the judgment of the trial court is affirmed.

AFFIRMED.

*** JAMES W. GARMAN, Individually and as Administrator, etc., et al., Plaintiffs
and Appellants, v. MAGIC CHEF, INC., Defendant and Respondent**

* Reporter's Note: This case was previously entitled "Garman v. American
Clipper Corporation."

Civ. Nos. 60146, 60174

Court of Appeal of California, Second Appellate District, Division Two

*117 Cal. App. 3d 634; 173 Cal. Rptr. 20; 1981 Cal. App. LEXIS 1583; CCH Prod.
Liab. Rep. P8955*

April 1, 1981

PRIOR HISTORY: [*1]**

Superior Court of Santa Barbara County, Nos. 124488
and 127052, Bruce W. Dodds and Charles S. Stevens,
Jr., Judges.

DISPOSITION:

The judgments are affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Daniel K. Kean for Plaintiffs and Appellants.

Lawler & Ellis, Byron J. Lawler, Margot Davis,
Owen, Melbye & Rohlf and Cameron Miller for Defen-
dants and Respondents.

JUDGES:

Opinion by Beach, J., with Roth, P. J., and Comp-
ton, J., concurring.

OPINIONBY:

BEACH

OPINION:

[*636] [**21] The matters before us are two ap-
peals from summary judgments in favor of defendant-
respondent Magic Chef, Inc., manufacturer of a cooking
stove. n1

n1 Two actions were filed. The first was
filed by plaintiff husband and wife for personal
injuries and damages. Later a second action was
filed for the wrongful death of wife. The issue in
each case is identical and we consolidate the two
appeals and consider them together.

Plaintiffs, appellant and his now deceased wife, pur-
chased a motor home with a propane gas system, includ-
ing all appliances thereto. About a week after purchase,
[***2] appellants took the motor home into a service
agency. There two leaks at joints in the propane gas sys-
tem were discovered and repaired. One leak was located
at the propane gas tank itself and the other at the hot wa-
ter tank connection. At the time of repairs a T-joint was
replaced. A few days later while at a rest stop, appel-
lant's wife lit the stove to make soup. Approximately
five minutes later an explosion and fire occurred causing
damages and personal injury.

[**22] The physical circumstances that resulted in
the explosion are not in dispute. A copper tube extended
from the propane gas tank upwards to a point where it
flared out in two directions. One branch of the tubing
extended to the gas stove and the other extended to the
gas heater. The branch of tubing which extended to the
hot water heater separated at its attachment to the T-joint
permitting propane gas to leak out and form a pool of
flammable vapor. The flame on the stove, when lit by
[*637] appellant's wife, provided a source of ignition for
the leaking gas. Defendant, Magic Chef, respondent
here, manufactured the stove.

Appellants filed the two actions against the manu-
facturer of the motor home, [***3] the retail dealer that

117 Cal. App. 3d 634, *; 173 Cal. Rptr. 20, **;
1981 Cal. App. LEXIS 1583, ***; CCH Prod. Liab. Rep. P8955

sold it, the two agencies that serviced and repaired it, the manufacturer of the heater and the manufacturer of the stove (respondent). After American Clipper Corporation, the manufacturer and assembler of the motor home and its propane gas system settled with appellants, the trial court granted the summary judgments in favor of respondent Magic Chef.

Contentions on Appeal:

Appellants contend that there remained the question of whether or not the respondent's warning and installation instruction accompanying the gas stove manufactured by it were defective. Appellants argue this is a question of fact which could not be resolved by summary judgment. We reject the contentions and we affirm the judgment.

Discussion:

(1a) Respondent's motion for summary judgment was based on the undisputed fact that the proximate cause of the explosion was a defect in the copper tubing and joints between the propane gas tank and the hot water heater which allowed gas to escape. There was no defect in the cook stove itself. In opposing the motion for summary judgment, appellants for the first time raised the contention that the instructions provided by defendant Magic Chef for [***4] the operation of the gas range were inadequate in that they did not warn the stove user to check inside the motor home for gas leaks before lighting the pilot and making use of the stove. Appellants claim that their contention presented a triable issue of fact as to the existence of a defect in the product, the gas range manufactured and sold by respondent. Appellants are in error.

The issue before the court contained no disputed facts. The leaked gas was ignited by the stove's flame. There was no physical defect in the stove. It was working properly. The physical facts thus being not in dispute, the question remaining before the court was whether as a matter of law the stove manufacturer had a duty to warn that a lighted but properly operating stove might ignite gas leaking from some other place. In other words: did the absence of a warning constitute the legally recognized or "proximate" cause of the explosion, so as to affix [*638] liability therefor? The answer is "no." The trial court's ruling on this question was correct.

(2) Causation is a necessary element in strict liability just as it is in negligence liability. Thus the general rules of proximate cause apply. [***5] (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 833, p. 3128.) Proximate cause is a legal relationship. Whether an act or incident is the proximate cause of injury is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be

drawn from those facts. (*Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 Cal.App.3d 630 [135 Cal.Rptr. 555].)

(3) A failure to warn may create liability for harm caused by use of an unreasonably dangerous product. (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338 [157 Cal.Rptr. 142]; *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44 [46 Cal.Rptr. 552].) That rule, however, does not apply to the facts in this case because it was not any unreasonably dangerous condition or feature of respondent's product which caused the injury. To say that the absence of a warning to check for gas leaks in other products makes the stove defective is semantic nonsense.

The product here did not cause or create the risk of harm. (4) A cook stove is not [**23] an "unavoidably dangerous or unsafe product" within the meaning of the strict liability rule applicable to [***6] those engaged in ultrahazardous activities. (See 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 798, p. 3095 et seq.) Nor is it similarly so dangerous or unsafe simply because it is used with natural gas. Even if its use required the use of natural gas, that fact does not require a special warning. Use of natural gas is not an activity the danger of which is not known by a substantial number of people. To the contrary, natural gas has been in use for generations for lighting, cooking, heating, and providing energy. The use of any product can be said to involve some risk because of the circumstances surrounding even its normal use. Nonetheless, the makers of such products are not liable under any theory, for merely failing to warn of injury which may befall a person who uses that product in an unsafe place or in conjunction with another product which because of a defect or improper use is itself unsafe. This is especially so where the risk is commonly known. (A fuller discussion appears in Prosser, Torts (4th ed. 1971) Products Liability, § 96, p. 641, and particularly at p. 646 et seq.)

[*639] (1b) At bench, respondent was under no duty to warn of the possible defect [***7] in the product of another and is not liable for failure to do so. It was the tubing, the product of another, that was defective here. Appellants specifically pleaded that it was the supply tube leading to the hot water heater that was defective and leaked gas. Once the gas leaked and gathered in the motor home, the explosion was bound to occur as soon as someone lit a match for a cigarette, a cigar, a pipe or for any other reason. The fact that the stove was lit to prepare food simply was a fortuitous circumstance. The law does not yet recognize the mere use of either the tobacco products or the stove as the legally proximate cause of the injury so as to impose liability therefor on the supplier or manufacturer of either product.

117 Cal. App. 3d 634, *; 173 Cal. Rptr. 20, **;
1981 Cal. App. LEXIS 1583, ***; CCH Prod. Liab. Rep. P8955

The judgments are affirmed.

**Freddie Hamilton et al., Plaintiffs, and Gail Fox et al., Respondents, v. Beretta
U.S.A. Corp. et al., Appellants, et al., Defendants.**

No. 36

COURT OF APPEALS OF NEW YORK

*96 N.Y.2d 222; 750 N.E.2d 1055; 727 N.Y.S.2d 7; 2001 N.Y. LEXIS 946; CCH
Prod. Liab. Rep. P16,061*

February 8, 2001, Argued

April 26, 2001, Decided

PRIOR HISTORY:

Proceeding, pursuant to *NY Constitution, article VI, § 3 (b) (9)* and Rules of the Court of Appeals (*22 NYCRR*) § 500.17, to review two questions certified to the New York State Court of Appeals by order of the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals pursuant to section 500.17: "Whether the defendants owed plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture?" and "Whether liability in this case may be apportioned on a market share basis, and if so, how?"

DISPOSITION: Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in the negative.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondents, relatives of gunshot victims, sued appellant handgun manufacturers, and the manufacturers appealed from judgments entered against them. The United States Court of Appeals for the Second Circuit certified these questions to the instant court: whether the manufacturers owed the relatives a duty to exercise reasonable care in marketing and dis-

tributing; and whether liability could be apportioned on a market share basis, and if so, how.

OVERVIEW: The relatives of persons killed by handguns sued the manufacturers. Judgment was entered for the relatives on their claims of negligent marketing and distribution; the manufacturers appealed. The federal appellate court certified these questions to the instant court: (1) whether the manufacturers owed the relatives a duty of reasonable care in marketing and distributing the guns, and (2) whether liability could be apportioned on a market share basis. The instant court answered both questions in the negative. The relatives presented no evidence to show to what degree the risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society. The negligent entrustment doctrine was inapplicable, as the relatives did not show that the manufacturers knew or had reason to know their distributors engaged in substantial sales of guns into the gun-trafficking market on a consistent basis. The market share theory was inapt, as guns were not fungible, the manufacturers' marketing techniques were not uniform, and the manufacturers' market share did not necessarily correspond to the degree of risk their conduct created.

OUTCOME: The certified questions were answered in the negative.

LexisNexis(R) Headnotes

Torts > Negligence > Duty > Duty Generally
[HN1] The threshold question in any negligence action is: does defendant owe a legally recognized duty of care

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

to plaintiff? Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.

Torts > Negligence > Duty > Duty Generally

[HN2] Foreseeability, alone, does not define duty -- it merely determines the scope of the duty once it is determined to exist. The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. That is required in order to avoid subjecting an actor to limitless liability to an indeterminate class of persons conceivably injured by any negligence in that act. Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs.

Torts > Negligence > Duty > Duty Generally

[HN3] A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control. This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.

Torts > Negligence > Duty > Control of Third Parties

[HN4] A duty may arise where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others. Examples of these relationships include master and servant, parent and child, and common carriers and their passengers.

Torts > Negligence > Duty > Control of Third Parties

[HN5] The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion. Gun

sales have subjected suppliers to liability under this theory. Of course, without the requisite knowledge, the tort of negligent entrustment does not lie.

Torts > Causation > Cause in Fact

[HN6] Market share liability provides an exception to the general rule that in common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury.

Torts > Negligence > Duty > Duty Generally

[HN7] A manufacturer's share of the national handgun market does not necessarily correspond to the amount of risk created by its alleged tortious conduct. No case has applied the market share theory of liability to such varied conduct and wisely so.

Torts > Negligence > Duty > Duty Generally

[HN8] Inability to locate evidence does not alone justify the extraordinary step of applying market share liability.

Torts > Negligence > Duty > Duty Generally

[HN9] New York and other jurisdictions do not extend the market share theory where products are not fungible and differing degrees of risk are created.

HEADNOTES:

Negligence - Duty - Handgun Manufacturers - Marketing and Distribution of Handguns - Limitless Liability

1. Persons killed or injured by illegally obtained handguns are not owed a duty by handgun manufacturers to exercise reasonable care in the marketing and distribution of their handguns. Imposition of such a duty would potentially expose them to limitless liability. The pool of possible plaintiffs is very large--potentially, any of the thousands of victims of gun violence. Further, the connection between the manufacturers, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that the manufacturers were a direct link in the causal chain that resulted in the plaintiffs' injuries, and that the manufacturers were realistically in a position to prevent the wrongs. Giving plaintiffs' evidence the benefit of every favorable inference, they have not shown that the gun used to harm a permanently disabled plaintiff

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon the manufacturers.

Negligence - Duty - Handgun Manufacturers - Marketing and Distribution of Handguns - Protective Duty

2. Persons killed or injured by illegally obtained handguns are not owed a duty by handgun manufacturers to exercise reasonable care in the marketing and distribution of their handguns. Imposition of such a duty would potentially expose them to limitless liability. A duty may not be predicated merely because it is foreseeable that persons may be killed or injured by defendants' lethal products. Plaintiffs, relatives of people killed with illegal handguns or people so injured, have not shown that a change in marketing techniques would likely have prevented their injuries. A duty may not be imposed on a products liability theory since defendants' products are not defective and plaintiffs have not asserted a defective warnings claim. Actions against handgun manufacturers may not be analogized to cases involving hazardous materials or unsupervised access by children to hazardous substances.

Negligence - Duty - Handgun Manufacturers - Marketing and Distribution of Handguns - Ability to Reduce Risk of Illegal Gun Trafficking by Reforming Distribution Techniques

3. Persons killed or injured by illegally obtained handguns are not owed a duty by handgun manufacturers to exercise reasonable care in the marketing and distribution of their handguns. Imposition of such a duty would potentially expose them to limitless liability. No general duty of care arises out of the manufacturers' alleged ability to reduce the risk of illegal gun trafficking through control of the marketing and distribution of their products. Any prophylactic changes in marketing and distribution would have the unavoidable effect of eliminating a significant number of lawful sales to "responsible" buyers by "responsible" Federal firearms licensees who would be cut out of the distribution chain under the suggested "reforms." Plaintiffs presented no evidence showing any statistically significant relationship between particular classes of dealers and crime guns. To impose a general duty of care upon the makers of firearms because of their purported ability to control marketing and distribution of their products would conflict with the principle that any judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens. Imposing such a general duty of care would create not only an indeterminate class of plaintiffs, but also an indeterminate class of defendants whose liability might have little relationship to the benefits of controlling illegal guns.

Negligence - Duty - Handgun Manufacturers - Marketing and Distribution of Handguns - Negligent Entrustment

4. Persons killed or injured by illegally obtained handguns are not owed a duty by handgun manufacturers to exercise reasonable care in the marketing and distribution of their handguns. Imposition of such a duty would potentially expose them to limitless liability. No duty may arise under the theory of negligent entrustment. Although that doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis, plaintiffs did not present such evidence. Instead, they claimed that manufacturers should not engage in certain broad categories of sales. However, without a showing that specific groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert. Defendants do not have an affirmative duty to investigate and identify corrupt dealers, which is neither feasible nor appropriate for the manufacturers. Federal law already has implemented a statutory and regulatory scheme to ensure seller "responsibility" through licensing requirements and buyer "responsibility" through background checks.

Negligence - Duty - Handgun Manufacturers - Marketing and Distribution of Handguns - Market Share Liability

5. Persons killed or injured by illegally obtained handguns are not owed a duty by handgun manufacturers to exercise reasonable care in the marketing and distribution of their handguns. Imposition of such a duty would potentially expose them to limitless liability. Were liability found to exist, it could not be apportioned on a market share basis since guns are not identical, fungible products and plaintiffs have never asserted that defendants' marketing techniques were uniform. The distribution and sale of every gun is not equally negligent, nor does it involve a defective product. Thus, a manufacturer's share of the national handgun market does not necessarily correspond to the amount of risk created by its alleged tortious conduct. While it may be difficult to prove precisely which manufacturer caused any particular plaintiff's injuries since crime guns are often not recovered, inability to locate evidence does not alone justify the extraordinary step of applying market share liability. Rather, a more compelling policy reason is required for the imposition of market share liability.

COUNSEL: *Gordon, Feinblatt, Rothman, Hoffberger & Hollander, L. L. C.*, Baltimore, Maryland (*Lawrence S. Greenwald, Nancy E. Paige and Catherine A. Bledsoe* of

96 N.Y.2d 222, *, 750 N.E.2d 1055, **,
727 N.Y.S.2d 7, ***, 2001 N.Y. LEXIS 946

counsel), and *Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski*, New York City (*Daniel T. Hughes* and *Erin A. O'Leary* of counsel), for Beretta U.S.A. Corp. and another, appellants. I. Defendants did not owe plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture. (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1; *Di Porzio v Riordan*, 89 NY2d 578; *Lauer v City of New York*, 95 NY2d 95; *Liriano v Hobart Corp.*, 92 NY2d 232; *D'Amico v Christie*, 71 NY2d 76; *Pulka v Edelman*, 40 NY2d 781; *Strauss v Belle Realty Co.*, 65 NY2d 399; *Eiseman v State of New York*, 70 NY2d 175; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507.) II. Liability may not be apportioned in this case on a market share basis. (*Williams v State of New York*, 308 NY 548; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, 493 US 944; *Matter of DES Mkt. Share Litig.*, 79 NY2d 299; *Enright v Eli Lilly & Co.*, 77 NY2d 377, 502 US 868; *Brenner v American Cyanamid Co.*, 263 AD2d 165; *Matter of New York State Silicone Breast Implant Litig.*, 166 Misc 2d 85, 234 AD2d 28; *210 E. 86th St. Corp. v Combustion Eng'g*, 821 F Supp 125; *DaSilva v American Tobacco Co.*, 175 Misc 2d 424; *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596; *Kinnett v Mass Gas & Elec. Supply Co.*, 716 F Supp 695.)

Budd Larner Gross Rosenbaum Greenberg & Sade, P. C. (*Timothy A. Bumann*, of the Georgia Bar, admitted *pro hac vice*, of counsel), and *Budd Larner Gross Rosenbaum Greenberg & Sade, P. C.*, New York City (*Christina Fichera Dente* of counsel), for Taurus International Manufacturing, Inc., appellant. I. The duty asserted by plaintiffs is not and should not be recognized by New York law. (*Murphy v American Home Prods. Corp.*, 58 NY2d 293; *Hall v United Parcel Serv.*, 76 NY2d 27; *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1; *McCarthy v Olin Corp.*, 119 F3d 148; *Pulka v Edelman*, 40 NY2d 781; *Strauss v Belle Realty Co.*, 65 NY2d 399; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579.) II. Liability in this case can neither be imposed nor apportioned on a market share basis. (*Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *Brenner v American Cyanamid Co.*, 263 AD2d 165.)

Schulte Roth & Zabel, L. L. P., New York City (*Marc E. Elovitz, Michael S. Feldberg, Tim O'Neal Lorah* and *Ke-fira R. Wilderman* of counsel), *McHugh & Barnes, P. C.* (*Elisa Barnes* and *Monica Connell* of counsel), and *Weitz & Luxenberg, P. C.* (*Denise M. Dunleavy* of counsel), for respondents. I. New York's common law of negligence requires gun manufacturers to use reasonable care in marketing and distributing their uniquely lethal products. (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579; *Lauer v City of New York*, 95 NY2d 95; *Temuto v Lederle Labs.*, 90 NY2d 606; *Nallan v Helmsley-Spear,*

Inc., 50 NY2d 507; *Stevens v Kirby*, 86 AD2d 391; *Liriano v Hobart Corp.*, 92 NY2d 232; *Dukes v Bethlehem Cent. School Dist.*, 216 AD2d 838; *Splawnik v Di Caprio*, 146 AD2d 333; *Zellers v Devaney*, 155 Misc 2d 534; *Earsing v Nelson*, 212 AD2d 66.) II. Liability of appellants for negligently marketing their uniquely lethal products should be apportioned on a market share basis. (*People v Hobson*, 39 NY2d 479; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, 493 US 944; *Matter of DES Mkt. Share Litig.*, 79 NY2d 299; *Matter of New York County DES Litig.*, 211 AD2d 500; *Brenner v American Cyanamid Co.*, 263 AD2d 165; *Bichler v Eli Lilly & Co.*, 55 NY2d 571; *DaSilva v American Tobacco Co.*, 175 Misc 2d 424; *Matter of New York State Silicone Breast Implant Litig.*, 166 Misc 2d 85, 234 AD2d 28; *In re Related Asbestos Cases*, 543 F Supp 1152; *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596.)

Pepper Hamilton, L. L. P., Philadelphia, Pennsylvania, and New York City (*Nina Gussack* and *James M. Beck* of counsel), and *Hugh F. Young, Jr.*, Reston, Virginia, for Product Liability Advisory Council, Inc., *amicus curiae*. I. The expansive duty to avoid "negligent marketing" of guns created by the court below is not New York law. (*Lauer v City of New York*, 95 NY2d 95; *D'Amico v Christie*, 71 NY2d 76; *Turcotte v Fell*, 68 NY2d 432; *Pulka v Edelman*, 40 NY2d 781; *Waters v New York City Hous. Auth.*, 69 NY2d 225; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579; *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1; *Johnson v Jamaica Hosp.*, 62 NY2d 523; *Strauss v Belle Realty Co.*, 65 NY2d 399; *Lafferty v Manhasset Med. Ctr. Hosp.*, 54 NY2d 277.) II. New York law does not impose market share liability outside the unique situation of DES litigation. (*Hymowitz v Eli Lilly & Co.*, 73 NY2d 487, 493 US 944; *Horn v Homier Distrib.*, 272 AD2d 909; *Matter of DES Mkt. Share Litig.*, 79 NY2d 299; *Enright v Eli Lilly & Co.*, 77 NY2d 377, 502 US 868; *Healey v Firestone Tire & Rubber Co.*, 87 NY2d 596; *New York Tel. Co. v AAER Sprayed Insulations*, 250 AD2d 49; *Gifaldi v Dumont Co.*, 172 AD2d 1025; *Hamilton v Accu-Tek*, 62 F Supp 2d 802; *Matter of New York State Silicone Breast Implant Litig.*, 166 Misc 2d 85, 234 AD2d 28; *DaSilva v American Tobacco Co.*, 175 Misc 2d 424.) III. Whether the theories of liability advanced in this case might be socially desirable is a fundamental policy decision properly made by the Legislature. (*Lauer v City of New York*, 95 NY2d 95; *Pulka v Edelman*, 40 NY2d 781; *Patterson v Rohm Gesellschaft*, 608 F Supp 1206; *Wasylow v Glock, Inc.*, 975 F Supp 370; *Perkins v F.I.E. Corp.*, 762 F2d 1250; *Murphy v American Home Prods. Corp.*, 58 NY2d 293; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *Fleishman v Eli Lilly & Co.*, 62 NY2d 888, 469 US 1192; *McDonald v Cook*, 252 AD2d 302, 93 NY2d 812; *Enright v Eli Lilly & Co.*, 77 NY2d 377.)

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

Crowell & Moring, L. L. P., Washington D.C. (Victor E. Schwartz and Mark A. Behrens of counsel), and *National Chamber Litigation Center, Inc.* (Robin S. Conrad of counsel), for Chamber of Commerce of the United States, *amicus curiae*. I. The extreme new "duty" theory created by the court below is unsound and should be rejected. (*Pulka v Edelman*, 40 NY2d 781; *Waters v New York City Hous. Auth.*, 69 NY2d 225; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579; *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053; *Eiseman v State of New York*, 70 NY2d 175; *D'Amico v Christie*, 71 NY2d 76; *Strauss v Belle Realty Co.*, 65 NY2d 399; *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1; *Lauer v City of New York*, 95 NY2d 95; *Elsroth v Johnson & Johnson*, 700 F Supp 151.) II. The lower court's analogies to existing New York theories of recovery are flawed. (*Hamilton v Accu-Tek*, 62 F Supp 2d 802; *Eiseman v State of New York*, 70 NY2d 175; *Pulka v Edelman*, 40 NY2d 781; *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1; *Codling v Paglia*, 32 NY2d 330; *DeRosa v Remington Arms Co.*, 509 F Supp 762.) III. The lower court's theory would place an unreasonable burden on commerce. (*Elsroth v Johnson & Johnson*, 700 F Supp 151.) IV. Regulation through litigation is unsound. (*Wasylow v Glock, Inc.*, 975 F Supp 370; *BMW of N. Am. v Gore*, 517 US 559.)

Baron & Budd, P. C., Dallas, Texas (Brent M. Rosenthal, Misty A. Farris and Thomas M. Sims of counsel), *Frederick M. Baron*, Washington D.C., and *Jeffrey R. White*, for Association of Trial Lawyers of America, *amicus curiae*. I. The application of market share liability in this case best serves the policies advanced by *Hymowitz v Eli Lilly & Co.* (73 NY2d 487). (*Tidler v Eli Lilly & Co.*, 851 F2d 418; *Hamilton v Accu-Tek*, 62 F Supp 2d 802.) II. The factual considerations here present an even more compelling case for the application of market share liability than existed in *Hymowitz*. (*Wood v Eli Lilly & Co.*, 38 F3d 510; *Bradley v Firestone Tire & Rubber Co.*, 590 F Supp 1177; *Hamilton v Accu-Tek*, 62 F Supp 2d 802; *Doe v Cutter Biological*, 852 F Supp 909; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487.)

Legal Action Project, Washington D.C. (Rachana Bhowmik, Dennis A. Henigan, Jonathan E. Lowy, Brian J. Siebel, Allen Rostron and Leslie Klein of counsel), for Center to Prevent Handgun Violence and others, *amici curiae*. I. There is a relationship between gun violence and the careless distribution of handguns. (*Huddleston v United States*, 415 US 814.) II. Recognizing that gun makers owe potential victims a duty to use reasonable care in distribution is consistent with New York law. (*Hamilton v Accu-Tek*, 62 F Supp 2d 802; *Hall v E. I. Du Pont De Nemours & Co.*, 345 F Supp 353; *Havas v Vic-*

tory Paper Stock Co., 49 NY2d 381; *McGlone v William Angus, Inc.*, 248 NY 197; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339; *MacPherson v Buick Motor Co.*, 217 NY 382; *Thomas v Winchester*, 6 NY 381; *Loop v Litchfield*, 42 NY 351; *Favo v Remington Arms Co.*, 67 App Div 414, 173 NY 600; *Sickles v Montgomery Ward & Co.*, 6 Misc 2d 1000.) III. All relevant policy factors support recognizing a duty here. (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579; *Travell v Bannerman*, 71 App Div 439, 174 NY 47; *Caveny v Raven Arms Co.*, 665 F Supp 530, 849 F2d 608; *Patterson v Rohm Gesellschaft*, 608 F Supp 1206; *Thomas v Winchester*, 6 NY 381.)

Simpson Thacher & Bartlett, New York City (Barry R. Ostrager, Mary Beth Forshaw and Gerald E. Hawxhurst of counsel), and *Fiedelman & McGaw*, Jericho (Andrew Zajac of counsel), for American Meat Institute and others, *amici curiae*. The market share theory invented by the District Court is without legal or factual basis and is unworkable. (*Matter of New York State Silicone Breast Implant Litig.*, 166 Misc 2d 85, 234 AD2d 28; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *Brenner v American Cyanamid Co.*, 263 AD2d 165; *Zuchowicz v United States*, 140 F3d 381; *Starling v Seaboard Coast Line R. R. Co.*, 533 F Supp 183; *Becker v Schwartz*, 46 NY2d 401; *Ray v Cutter Labs.*, 754 F Supp 193; *Morris v Parke, Davis & Co.*, 667 F Supp 1332; *Sanderson v International Flavors & Fragrances*, 950 F Supp 981; *University Sys. v United States Gypsum Co.*, 756 F Supp 640.)

Eliot Spitzer, Attorney General, Albany (Preeta D. Bansal, Michael S. Belohlavek, Daniel Smirlock, Daniel Feldman, Natalie Gomez-Velez, Sachin S. Pandya and Adam L. Aronson of counsel), for State of New York, *amicus curiae*. I. Under the common law of this State, gun manufacturers have a duty to exercise reasonable care in the distribution of their products when they have the knowledge and ability to reduce the availability of their products in the hands of criminals. (*Codling v Paglia*, 32 NY2d 330; *MacPherson v Buick Motor Co.*, 217 NY 382; *Gebo v Black Clawson Co.*, 92 NY2d 387; *Lugo v LJM Toys*, 75 NY2d 850; *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102; *Micallef v Miehle Co.*, 39 NY2d 376; *Bolm v Triumph Corp.*, 33 NY2d 151; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507; *McCarthy v Olin Corp.*, 119 F3d 148; *Forni v Ferguson*, 232 AD2d 176.) II. Liability may be apportioned on a market share basis in appropriate cases. (*Matter of DES Mkt. Share Litig.*, 79 NY2d 299; *Hymowitz v Eli Lilly & Co.*, 73 NY2d 487; *McCormack v Abbott Labs.*, 617 F Supp 1521; *Bichler v Eli Lilly & Co.*, 55 NY2d 571; *Enright v Eli Lilly & Co.*, 77 NY2d 377; *Brenner v American Cyanamid Co.*, 263 AD2d 165; *Rooney v Tyson*, 91 NY2d 685;

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***, 2001 N.Y. LEXIS 946

Erie R. R. Co. v Tompkins, 304 US 64; *Hydro Investors v Trafalgar Power*, 227 F3d 8; *Dawson v Wal-Mart Stores*, 978 F2d 205.)

Michael D. Hess, Corporation Counsel of New York City (*Gail Rubin* and *Eric Proshansky* of counsel), for City of New York, *amicus curiae*. Gun makers owe a duty to the public to exercise reasonable care in the marketing and distribution of handguns. (*Turcotte v Fell*, 68 NY2d 432; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579; *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053; *Micallef v Miehle Co.*, 39 NY2d 376; *Codling v Paglia*, 32 NY2d 330; *Eiseman v State of New York*, 70 NY2d 175; *Tobin v Grossman*, 24 NY2d 609; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 249 NY 511; *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 953; *D'Amico v Christie*, 71 NY2d 76.)

JUDGES: Opinion by Judge Wesley. Chief Judge Kaye and Judges Smith, Levine, Ciparick, Rosenblatt and Graffeo concur.

OPINIONBY: WESLEY

OPINION: [*229] [***10] [**1058]

Wesley, J.

In January 1995 plaintiffs--relatives of people killed by handguns--sued 49 handgun manufacturers in Federal court alleging negligent marketing, design defect, ultra-hazardous activity and fraud. A number of defendants jointly moved for summary judgment. The United States District Court for the Eastern District of New York (Weinstein, J.), dismissed the product liability and fraud causes of action, but retained plaintiffs' negligent marketing claim (see, *Hamilton v Accu-Tek*, 935 F Supp 1307, 1315). Other parties intervened, including plaintiff Stephen Fox, who was shot by a friend and permanently disabled. The gun was never found; the shooter had no recollection of how he obtained it. Other evidence, however, indicated that he had purchased the gun out of the trunk of a car from a seller who said it came from the "south." Eventually, seven plaintiffs went to trial against 25 of the manufacturers.

Plaintiffs asserted that defendants distributed their products negligently so as to create and bolster an illegal, underground market in handguns, one that furnished weapons to minors and criminals involved in the shootings that precipitated this [*230] lawsuit. Because only one of the guns was recovered, plaintiffs were permitted over defense objections to proceed on a [***11] [**1059] market share theory of liability against all the manufacturers, asserting that they were severally liable for failing to implement safe marketing and distribution

procedures, and that this failure sent a high volume of guns into the underground market.

After a four-week trial, the jury returned a special verdict finding 15 of the 25 defendants failed to use reasonable care in the distribution of their guns. Of those 15, nine were found to have proximately caused the deaths of the decedents of two plaintiffs, but no damages were awarded. The jury awarded damages against three defendants--American Arms, Beretta U.S.A. and Taurus International Manufacturing--upon a finding that they proximately caused the injuries suffered by Fox and his mother (in the amounts of \$ 3.95 million and \$ 50,000, respectively). Liability was apportioned among each of the three defendants according to their share of the national handgun market: for American Arms, 0.23% (\$ 9,000); for Beretta, 6.03% (\$ 241,000); and for Taurus, 6.80% (\$ 272,000).

Defendants unsuccessfully moved for judgment as a matter of law pursuant to *Federal Rules of Civil Procedure* rule 50 (b). The District Court articulated several theories for imposing a duty on defendants "to take reasonable steps available at the point of ... sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them" (*Hamilton v Accu-Tek*, 62 F Supp 2d 802, 825). The court noted that defendants, as with all manufacturers, had the unique ability to detect and guard against any foreseeable risks associated with their products, and that ability created a special "protective relationship" between the manufacturers and potential victims of gun violence (*id.*, at 821). It further pointed out that the relationship of handgun manufacturers with their downstream distributors and retailers gave them the authority and ability to control the latter's conduct for the protection of prospective crime victims. Relying on *Hymowitz v Eli Lilly & Co.* (73 NY2d 487, cert denied 493 US 944), the District Court held that apportionment of liability among defendants on a market share basis was appropriate and that plaintiffs need not connect Fox's shooting to the negligence of a particular manufacturer.

On appeal, the Second Circuit certified the following questions to us:

"(1) Whether the defendants owed plaintiffs a duty [*231] to exercise reasonable care in the marketing and distribution of the handguns they manufacture?

"(2) Whether liability in this case may be apportioned on a market share basis, and if so, how?" (see, *Hamilton v Beretta U.S.A. Corp.*, 222 F3d 36, 39).

We accepted certification (95 NY2d 878) and now answer both questions in the negative.

Parties' Arguments

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

Plaintiffs argue that defendant-manufacturers have a duty to exercise reasonable care in the marketing and distribution of their guns based upon four factors: (1) defendants' ability to exercise control over the marketing and distribution of their guns, (2) defendants' general knowledge that large numbers of their guns enter the illegal market and are used in crime, (3) New York's policy of strict regulation of firearms and (4) the uniquely lethal nature of defendants' products.

According to plaintiffs, handguns move into the underground market in New York through several well-known and documented means including straw purchases (a friend, relative or accomplice acts as [***12] [**1060] purchaser of the weapon for another), sales at gun shows, misuse of Federal firearms licenses and sales by non-stocking dealers (i.e., those operating informal businesses without a retail storefront). Plaintiffs further assert that gun manufacturers have oversaturated markets in states with weak gun control laws (primarily in the Southeast), knowing those "excess guns" will make their way into the hands of criminals in states with stricter laws such as New York, thus "profiting" from indiscriminate sales in weak gun states. Plaintiffs contend that defendants control their distributors' conduct with respect to pricing, advertising and display, yet refuse to institute practices such as requiring distribution contracts that limit sales to stocking gun dealers, training salespeople in safe sales practices (including how to recognize straw purchasers), establishing electronic monitoring of their products, limiting the number of distributors, limiting multiple purchases and franchising their retail outlets.

Defendants counter that they do not owe a duty to members of the public to protect them from the criminal acquisition and misuse of their handguns. Defendants assert that such a duty--potentially exposing them to limitless liability--should not be imposed on them for acts and omissions of numerous and [*232] remote third parties over which they have no control. Further, they contend that, in light of the comprehensive statutory and regulatory scheme governing the distribution and sale of firearms, any fundamental changes in the industry should be left to the appropriate legislative and regulatory bodies.

The Duty Equation

[HN1] The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff? Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of

new channels of liability" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 586; see also, *Strauss v Belle Realty Co.*, 65 NY2d 399, 402-403). Thus, in determining whether a duty exists, "courts must be mindful of the precedential, and consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree' " (*Lauer v City of New York*, 95 NY2d 95, 100 [quoting *Tobin v Grossman*, 24 NY2d 609, 619]).

[HN2] Foreseeability, alone, does not define duty--it merely determines the scope of the duty once it is determined to exist (see, *Pulka v Edelman*, 40 NY2d 781, 785, rearg denied 41 NY2d 901; see also, *Eiseman v State of New York*, 70 NY2d 175, 187). The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for "without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer, supra*, at 100). That is required in order to avoid subjecting an actor "to limitless liability to an indeterminate class of persons conceivably injured by any negligence in that act" (*Eiseman, supra*, at 188). Moreover, any extension of the scope of duty must be tailored to reflect accurately [***13] [**1061] the extent that its social benefits outweigh its costs (see, *Waters v New York City Hous. Auth.*, 69 NY2d 225, 230).

The District Court imposed a duty on gun manufacturers "to take reasonable steps available at the point of ... sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them" (*Hamilton v Accu-Tek, supra*, 62 F Supp 2d, at 825). We have been cautious, however, in extending liability to defendants for [*233] their failure to control the conduct of others. " [HN3] A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" (*D'Amico v Christie*, 71 NY2d 76, 88; see also, *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8, rearg denied 72 NY2d 953). This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another.

[HN4] A duty may arise, however, where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others. Examples of these relationships include master and servant, parent and child, and common carriers and their passengers.

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm. In addition, the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship. We have, for instance, recognized that landowners have a duty to protect tenants, patrons or invitees from foreseeable harm caused by the criminal conduct of others while they are on the premises (see, e.g., *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518-519). However, this duty does not extend beyond that limited class of plaintiffs to members of the community at large (see, *Waters v New York City Hous. Auth.*, supra, 69 NY2d, at 228-231). In *Waters*, for example, we held that the owner of a housing project who failed to keep the building's door locks in good repair did not owe a duty to a passerby to protect her from being dragged off the street into the building and assaulted. The Court concluded that imposing such a duty on landowners would do little to minimize crime, and the social benefits to be gained did "not warrant the extension of the landowner's duty to maintain secure premises to the millions of individuals who use the sidewalks of New York City each day and are thereby exposed to the dangers of street crime" (*id.*, at 230).

A similar rationale is relevant here. The pool of possible plaintiffs is very large—potentially, any of the thousands of [*234] victims of gun violence. n1 Further, the [***14] [**1062] connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. n2 Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs. Giving plaintiffs' evidence the benefit of every favorable inference, they have not shown that the gun used to harm plaintiff Fox came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.

n1 According to the U.S. Census Bureau's Statistical Abstract for the U.S., there were 7,402 murders by handguns in 1998 (see, U.S. Census Bureau, Statistical Abstract of the United States: 2000, Table No. 333). This figure does not separately identify legal/illegal handgun deaths. In

1997, there were 39,400 gunshot wounds treated in hospital emergency rooms. For 59% of the victims of nonfatal gunshot wounds, the type of firearm was unknown. Where the firearm was known, 82% were shot by handguns, but additional details about the firearm used are not given (see, Firearms and Crime Statistics, U.S. Department of Justice, Bureau of Justice Statistics <<http://www.courts.state.ny.us/reporter/webdocs/guns.htm>>; see also, Zawitz and Strom, *Firearm Injury and Death From Crime, 1993-1997*, Bureau of Justice Statistics: Selected Findings, at 4 [Oct. 2000] <<http://www.courts.state.ny.us/reporter/webdocs/fidc9397.pdf>>).

n2 One of the original plaintiffs was Katina Johnstone. Her husband was killed with a Smith & Wesson revolver. The gun was recovered and traced to its lawful owner, who had reported it missing after a burglary of his home two weeks before the shooting. Johnstone's case was transferred to Federal court in California (*Hamilton v Accu-Tek*, 47 F Supp 2d 330).

Plaintiffs make two alternative arguments in support of a duty determination here. The first arises from a manufacturer's "special ability to detect and guard against the risks associated with [its] products [and] warrants placing all manufacturers, including these defendants, in a protective relationship with those foreseeably and potentially put in harm's way by their products" (*Hamilton v Accu-Tek*, supra, 62 F Supp 2d, at 821 [emphasis added]). Plaintiffs predicate the existence of this protective duty—particularly when lethal or hazardous products are involved—on foreseeability of harm and our products liability cases such as *MacPherson v Buick Motor Co.* (217 NY 382). [*235]

As we noted earlier, a duty and the corresponding liability it imposes do not rise from mere foreseeability of the harm (see, *Pulka*, supra, 40 NY2d, at 786). Moreover, none of plaintiffs' proof demonstrated that a change in marketing techniques would likely have prevented their injuries. Indeed, plaintiffs did not present any evidence tending to show to what degree their risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society (see generally, Twerski & Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 Conn L Rev 1379).

The cases involving the distribution or handling of hazardous materials, relied upon by plaintiffs, do not support the imposition of a duty of care in marketing handguns. The manufacturer's duty in each case was

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

based either on a products liability theory—that is, the product was defective because of the failure to include a safety feature—or on a failure to warn (see, e.g., *Hunnings v Texaco, Inc.*, 29 F3d 1480 [11th Cir 1994] [defectively packaged hazardous substance accompanied [**1063] [***15] by lack of adequate warnings]; *Blue-flame Gas v Van Hoose*, 679 P2d 579 [Colo 1984] [insufficiently odorized propane gas]; *Flint Explosive Co. v Edwards*, 84 Ga App 376, 66 SE2d 368 [1951] [defective dynamite]). Certainly too, a manufacturer may be held liable for complicity in dangerous or illegal activity (see, e.g., *Suchomajcz v Hummel Chem. Co.*, 524 F2d 19 [3d Cir 1975] [manufacturer sold chemicals to retailer with knowledge that retailer intended to use them in making and selling illegal firecracker assembly kits]). Here, defendants' products are concededly not defective—if anything, the problem is that they work too well. Nor have plaintiffs asserted a defective warnings claim or presented sufficient evidence to demonstrate that defendants could have taken reasonable steps that would have prevented their injuries. Likewise, this case can hardly be analogized to those in which a duty has been imposed upon owners or possessors of hazardous substances to safeguard against unsupervised access by children (see, *Kush v City of Buffalo*, 59 NY2d 26, 31; *Kingsland v Erie County Agric. Socy.*, 298 NY 409, 426).

Plaintiffs also assert that a general duty of care arises out of the gun manufacturers' ability to reduce the risk of illegal gun trafficking through control of the marketing and distribution of their products. The District Court accepted this proposition and posited a series of structural changes in defendants' [*236] marketing and distribution regimes that might "reduce the risk of criminal misuse by ensuring that the first sale was by a responsible merchant to a responsible buyer" (*Hamilton v Accu-Tek*, supra, 62 F Supp 2d, at 820). Those changes, and others proposed by plaintiffs that a jury might reasonably find subsumed in a gun manufacturer's duty of care, n3 would have the unavoidable effect of eliminating a significant number of lawful sales to "responsible" buyers by "responsible" Federal firearms licensees (FFLs) who would be cut out of the distribution chain under the suggested "reforms." Plaintiffs, however, presented no evidence, either through the testimony of experts or the submission of authoritative reports, showing any statistically significant relationship between particular classes of dealers and crime guns. n4 To impose a general duty of care upon the makers of firearms under these circumstances because of their purported ability to control marketing and distribution of their products would conflict with the principle that any judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens (see, *Waters v New York City Hous. Auth.*, 69 NY2d 225, supra). Here, imposing

such a general duty of care would create not only an indeterminate class of plaintiffs but also an indeterminate class of defendants whose liability might have little relationship to the benefits of controlling illegal guns (see, *Waters*, supra, 69 NY2d, at 230).

n3 For example, limiting the volume of sales in states with weak gun controls to insure against circulation of the oversupply to strong gun control states such as New York; restricting distribution entirely to established retail stores carrying stocks of guns; franchising of retail outlets; and barring distribution to dealers who sell at unregulated gun shows (see, *Hamilton v Accu-Tek*, 62 F Supp 2d 802, at 826, 829-832).

n4 See, Lytton, *Tort Claims Against Gun Manufacturers For Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo L Rev 1, 41.

[**1064] [***16] Finally, plaintiffs and the District Court identify an alternative basis for imposing a duty of care here under the negligent entrustment doctrine, arising out of the firearms manufacturers' authority over "downstream distributors and retailers" to whom their products are delivered (see, *Hamilton v Accu-Tek*, supra, 62 F Supp 2d, at 821). The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others (see, *Rios v Smith*, 95 NY2d 647; [*237] *Splawnik v Di Caprio*, 146 AD2d 333, 335; *Restatement [Second] of Torts* § 390). The duty may extend through successive, reasonably anticipated trustees (see, *Rios v Smith*, supra). There are, however, fatal impediments to imposing a general duty of care here under a negligent entrustment theory.

[HN5] The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the trustee's propensity to use the chattel in an improper or dangerous fashion. Gun sales have subjected suppliers to liability under this theory (see, *Splawnik*, supra; see also, *Cullum & Boren-McCain Mall v Peacock*, 267 Ark 479, 592 SW2d 442 [1980]; *Semeniuk v Chentis*, 1 Ill App 2d 508, 117 NE2d 883 [1954]). Of course, without the requisite knowledge, the tort of negligent entrustment does not lie (see, *Earsing v Nelson*, 212 AD2d 66 [dismissing a negligent entrustment claim against the manufacturer of a BB gun because a dealer's knowledge of the individual's ability to use the gun safely could not be imputed to the manufacturer]).

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

The negligent entrustment doctrine might well support the extension of a duty to manufacturers to avoid selling to certain distributors in circumstances where the manufacturer knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis. n5 Here, however, plaintiffs did not present such evidence. Instead, they claimed that manufacturers should not engage in certain broad categories of sales. Once again, plaintiffs' duty calculation comes up short. General statements about an industry are not the stuff by which a common-law court fixes the duty point. Without a showing that specific [*238] groups of dealers play a disproportionate role in supplying the illegal gun market, the sweep of plaintiffs' duty theory is far wider than the danger it seeks to avert. n6

n5 An analysis of Bureau of Alcohol, Tobacco and Firearms (BATF) data for 1998 reveals that a very small number of FFLs do account for a significant portion of guns used in crimes. "Just 1.2 percent of dealers--1,020 of the approximately 83,200 licensed retail dealers and pawnbrokers--accounted for over 57 percent of the crime guns traced to current dealers in 1998" (see, Commerce in Firearms in the United States, BATF Document, at 2 [Feb. 2000] <<http://www.courts.state.ny.us/reporter/webdocs/020400report.pdf>>). However, the data does not reveal whether any given FFL's high incidence of crime gun sales is attributable to irresponsible conduct, or merely reflects a high volume of legal sales or some other activity (such as theft) over which the FFL has no control. BATF has "targeted" those dealers to "determine the reasons for diversion of firearms from this relatively small proportion of dealers" (*id.*). Because of BATF's continued pursuit in identifying how handguns enter the illegal market, it may well be that a core group of corrupt FFLs will emerge at some future time. This might alter the duty equation.

n6 Our decision is in accord with most jurisdictions that have considered this issue (see, e.g., *Armijo v Ex Cam*, 843 F2d 406 [10th Cir 1998], *affg* 656 F Supp 771; *First Commercial Trust Co. v Colt's Mfg. Co.*, 77 F3d 1081 [8th Cir 1996]; *Shipman v Jennings Firearms*, 791 F2d 1532 [11th Cir 1986]; *City of Philadelphia v Beretta U.S.A., Corp.*, 126 F Supp 2d 882 [ED Pa 2000]; *Adkinson v Rossi Arms Co.*, 659 P2d 1236 [Alaska 1983]; *First Commercial Trust Co. v*

Lorcin Eng'g, 321 Ark 210, 900 SW2d 202 [1995]; *Delahanty v Hinckley*, 564 A2d 758 [DC Ct App 1989]; *Trespacios v Valor Corp.*, 486 So 2d 649 [Fla Dist Ct App 1986]; *Riordan v International Armament Corp.*, 132 Ill App 3d 642, 477 NE2d 1293 [1985]; *Linton v Smith & Wesson*, 127 Ill App 3d 676, 469 NE2d 339 [1984]; *Resteiner v Sturm, Ruger & Co.*, 223 Mich App 374, 566 NW2d 53 [1997]; *King v R.G. Indus.*, 182 Mich App 343, 451 NW2d 874 [1990]; *City of Cincinnati v Beretta U.S.A. Corp.*, 2000 WL 1133078 [Ohio Ct App 2000]; *Knott v Liberty Jewelry & Loan*, 50 Wash App 267, 748 P2d 661 [1988]; *cf.*, *City of Boston v Smith & Wesson Corp.*, 2000 WL 1473568, 2000 Mass Super LEXIS 352 [Mass Sup Ct 2000]). There are two notable exceptions, both of which involved different factual contexts and different theories of negligent marketing not relevant here (see, *Halberstam v S. W. Daniel, Inc.*, No. 95-C3323 [ED NY 1998]; *Merrill v Navegar, Inc.*, 75 Cal App 4th 500, 89 Cal Rptr 2d 146 [1999], *superseded by grant of review* 991 P2d 755).

***17] [**1065] At trial, plaintiffs' experts did surmise that since manufacturers receive crime gun trace requests conducted by the Bureau of Alcohol, Tobacco and Firearms, they could analyze those requests to locate retailers who disproportionately served as crime gun sources, and cut off distributors who do business with them. In essence, plaintiffs argue that defendants had an affirmative duty to investigate and identify corrupt dealers. This is neither feasible nor appropriate for the manufacturers.

Plaintiffs' experts explained that a crime gun trace is the means by which the BATF reconstructs the distribution history of a gun used in a crime or recovered by the police. n7 While manufacturers may be generally aware of traces for which they are contacted, they are not told the purpose of the trace, nor [*239] are they informed of the results. n8 The BATF does not disclose any subsequently acquired retailer or purchaser information to the manufacturer. Moreover, manufacturers are not in a position to acquire such information on their own. Indeed, plaintiffs' law enforcement experts agreed that manufacturers should not make any attempt to investigate illegal gun trafficking on their own since such attempts could disrupt pending criminal investigations and endanger the lives of undercover officers.

n7 Tracing involves the process of tracking a recovered crime gun's history from its source through the chain of distribution to its first retail

96 N.Y.2d 222, *, 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

purchaser. If the BATF is unable to trace the gun from its own records, it contacts the manufacturer and asks for the identity of the federally licensed distributor to whom the gun was sold. The BATF then follows up with the named distributor and the subsequently named retailer to determine the identity of the first purchaser (*see*, Commerce in Firearms in the United States, BATF Document, at 19-20 [Feb. 2000] <<http://www.courts.state.ny.us/reporter/webdocs/020400report.pdf>>; *Crime Gun Trace Analysis Reports: The Illegal Youth Firearms Market in 27 Communities*, 1998 Youth Crime Gun Interdiction Initiative, BATF Document, at 5 [Feb. 1999] <<http://www.courts.state.ny.us/reporter/webdocs/termused.pdf>>).

n8 In fact, the "ATF emphasizes that the appearance of [an FFL] or a first unlicensed purchaser of record in association with a crime gun or in association with multiple crime guns in no way suggests that either the FFL or the first purchaser has committed criminal acts. Rather, such information may provide a starting point for further and more detailed investigation" (Youth Crime Gun Interdiction Initiative, *supra*, at 17 <<http://www.courts.state.ny.us/reporter/webdocs/update1.pdf>>).

Federal law already has implemented a statutory and regulatory scheme to ensure seller "responsibility" through licensing requirements and buyer "responsibility" [***18] [**1066] through background checks. n9 While common-law principles can supplement a [*240] manufacturer's statutory duties, we should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy debate (*see*, Lytton, *Tort Claims Against Gun Manufacturers*, *supra*, 65 Mo L Rev, at 52-54 [analyzing courts' capacities and limitations in analyzing complex statistical data]).

n9 Gun manufacturers must be licensed by the Federal government in order to produce, deal and ship firearms in interstate commerce (*see*, 18 USC § 922 [a] [1] [A]; § 923 [a]; 27 CFR 178.41 [a]). Manufacturers may sell only to licensed importers, licensed dealers, or licensed collectors (*see*, 18 USC § 922 [a] [2]). Manufacturers must keep records of each firearm they make and sell, including the firearm's type, model, caliber, serial number, as well as information about the purchaser (*see*, 18 USC § 923 [g]

[1] [A]; 27 CFR 178.123 [a], [b]). Any firearm shipped must bear a unique and permanent serial number and the manufacturer's identity (*see*, 18 USC § 922 [k]; § 923 [i]; 27 CFR 178.34, 178.92 [a] [1]).

Like manufacturers, firearms dealers must also be licensed by the Federal government (*see*, 18 USC § 922 [a] [1] [A]; § 923 [a]; 27 CFR 178.41 [a]). As the "principal agent of federal enforcement" (*Huddleston v United States*, 415 US 814, 824-825), licensed dealers must initiate criminal background checks on purchasers and may sell only to those who have been cleared by the FBI or other appropriate law enforcement agencies (*see*, 18 USC § 922 [c], [s] [1]; [t] [1]). Licensed dealers may not sell firearms to individuals who fall within certain at-risk categories (felons, drug users, individuals previously committed to mental institutions and individuals subject to domestic restraining orders, or convicted of crimes of domestic violence, among others) (*see, id.*, § 922 [d]). Federal law also establishes age limits for gun purchasers and sales cannot be made to juveniles (*see, id.*, § 922 [b] [1]; [x] [1]).

Licensees must keep records of all multiple sales to unlicensed persons (*see*, 18 USC § 923 [g] [3] [A]). Additionally, all licensees must report any theft or loss of a firearm to appropriate authorities within 48 hours (*see, id.*, § 923 [g] [6]). The BATF oversees compliance with Federal requirements and is charged with enforcing this entire regulatory scheme (*see generally*, 27 CFR parts 178 and 179). Dealers face criminal penalties and license revocation for intentional unlawful sales (*see*, 18 USC § § 924, 923 [e]; 27 CFR 178.73 [a]).

In sum, analysis of this State's longstanding precedents demonstrates that defendants—given the evidence presented here—did not owe plaintiffs the duty they claim; we therefore answer the first certified question in the negative.

Market Share Liability

The Second Circuit has asked us also to determine if our market share liability jurisprudence is applicable to this case. Having concluded that these defendant-manufacturers did not owe the claimed duty to these plaintiffs, we arguably need not reach the market share issue. However, because of its particularly significant role in this case, it seems prudent to answer the second question.

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

[HN6] Market share liability provides an exception to the general rule that in common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury. This Court first examined and adopted the market share theory of liability in *Hymowitz v Eli Lilly & Co.* (73 NY2d 487, *supra*). In *Hymowitz*, we held that plaintiffs injured by the drug DES were not required to prove which defendant manufactured the drug that injured them but instead, every manufacturer would be held responsible for every plaintiff's injury based on its share of the DES market. Market share liability was necessary in *Hymowitz* because DES was a fungible product and identification of the actual manufacturer [***19] [**1067] that caused the injury to a particular plaintiff was impossible. The Court carefully noted that the DES situation was unique. Key to our decision were the facts that (1) the manufacturers acted in a parallel manner to produce an identical, generically marketed product; (2) the manifestations of injury were far removed from the time of ingestion of the product; and (3) the Legislature made a clear policy decision to revive these time-barred DES claims (*see, id.*, at 508).

Circumstances here are markedly different. Unlike DES, guns are not identical, fungible products. Significantly, it is often possible to identify the caliber and manufacturer of the [*241] handgun that caused injury to a particular plaintiff. n10 Even more importantly—given the negligent marketing theory on which plaintiffs tried this case—plaintiffs have never asserted that the manufacturers' marketing techniques were uniform. Each manufacturer engaged in different marketing activities that allegedly contributed to the illegal handgun market in different ways and to different extents. Plaintiffs made no attempt to establish the relative fault of each manufacturer, but instead sought to hold them all liable based simply on market share. n11

n10 We note that New York has recently become the second State in the nation to establish a new "fingerprinting" system for identifying guns by the distinctive marks on their shell casings (*see, General Business Law § 396-ff*).

n11 Plaintiffs do not contend that negligent marketing of handguns is the sole source of handguns used in crime. They acknowledge that some injuries from handguns will still occur. Indeed, the District Court, using BATF data, assessed the enhanced risk at 33%, leaving a significant probability that plaintiffs' injuries from unidentified weapons came from guns that had not been negligently marketed (*see, Hamilton v Accu-Tek, su-*

pra, 62 F Supp 2d, at 826 [noting that only one third of all guns used in juvenile crimes come directly from FFLs]). Nonetheless, the District Court assessed damages as if the risk enhancement were 100% (*see, id.*, at 845). It would seem that even if plaintiffs had established a duty here in conjunction with market share liability, they would be limited to damages calculated on the proportion to which defendants enhanced the risk (*see, Twerski & Sebok, Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability, supra, 32 Conn L Rev, at 1398-1404*).

In *Hymowitz*, each manufacturer engaged in tortious conduct parallel to that of all other manufacturers, creating the same risk to the public at large by manufacturing the same defective product. Market share was an accurate reflection of the risk they posed. Here, the distribution and sale of every gun is not equally negligent, nor does it involve a defective product. Defendants engaged in widely-varied conduct creating varied risks. Thus, [HN7] a manufacturer's share of the national handgun market does not necessarily correspond to the amount of risk created by its alleged tortious conduct. No case has applied the market share theory of liability to such varied conduct and wisely so.

We recognize the difficulty in proving precisely which manufacturer caused any particular plaintiff's injuries since crime guns are often not recovered. [HN8] Inability to locate evidence, however, does not alone justify the extraordinary step of applying market share liability (*see, Healey v Firestone Tire & Rubber Co., 87 NY2d 596, 601* [loss of an allegedly defective multi-piece truck tire rim which caused the plaintiff's injuries did not [*242] obviate the requirement that the plaintiff identify its exact manufacturer]; *see also, Matter of New York State Silicone Breast Implant* [**1068] [***20] *Litig., 166 Misc 2d 85, 90* [refusal to apply market share liability to silicone breast implants; "the reality of a plaintiff's plight when product identification cannot be made is like any other plaintiff who claims injury from a product that has been lost or destroyed"], *affd for reasons stated 234 AD2d 28*). Rather, a more compelling policy reason—as was shown in the DES cases—is required for the imposition of market share liability.

Notably, courts in [HN9] New York and other jurisdictions have refused to extend the market share theory where products were not fungible and differing degrees of risk were created (*see, e.g., Brenner v American Cyanamid Co., 263 AD2d 165* [lead pigment used in paint]; *Matter of New York State Silicone Breast Implant Litig., supra* [silicone breast implants]; *DaSilva v American Tobacco Co., 175 Misc 2d 424* [cigarettes]; *see also,*

96 N.Y.2d 222, *; 750 N.E.2d 1055, **;
727 N.Y.S.2d 7, ***; 2001 N.Y. LEXIS 946

Sanderson v International Flavors & Fragrances, 950 F Supp 981 [CD Cal 1996] [perfumes containing different aldehydes]; *Doe v Cutter Biological*, 852 F Supp 909 [D Idaho 1994] [blood clotting agent]; *210 E. 86th St. Corp. v Combustion Eng'g*, 821 F Supp 125 [SD NY 1993] [asbestos]; *Skipworth v Lead Indus. Assn.*, 547 Pa 224, 690 A2d 169 [1997] [lead paint pigments]). Similarly, plaintiffs here have not shown a set of compelling circumstances akin to those in *Hymowitz* justifying a departure from traditional common-law principles of causation.

This case challenges us to rethink traditional notions of duty, liability and causation. Tort law is ever changing; it is a reflection of the complexity and vitality of daily life. Although plaintiffs have presented us with a novel theory--negligent marketing of a potentially lethal yet legal product, based upon the acts not of one manufacturer, but of an industry--we are unconvinced that, on the record before us, the duty plaintiffs wish to impose is

either reasonable or circumscribed. Nor does the market share theory of liability accurately measure defendants' conduct. Whether, in a different case, a duty may arise remains a question for the future.

Accordingly, both certified questions should be answered in the negative.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Rosenblatt and Graffeo concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the [*243] questions by this Court pursuant to section 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in the negative.

Malcolm R. Hayes, Jr., & another n1 v. Ariens Company

n1 Donna R. Hayes.

[NO NUMBER IN ORIGINAL]

Supreme Judicial Court of Massachusetts

391 Mass. 407; 462 N.E.2d 273; 1984 Mass. LEXIS 1431; 41 A.L.R.4th 1; CCH
Prod. Liab. Rep. P10,030; 38 U.C.C. Rep. Serv. (Callaghan) 48

September 14, 1983, Argued

March 14, 1984, Decided

PRIOR HISTORY: [***1]

Middlesex.

Civil action commenced in the Superior Court on April 24, 1978.

The case was tried before *Hamlin, J.*

The Supreme Judicial Court granted a request for direct appellate review.

DISPOSITION:

So ordered.

LexisNexis(R) Headnotes

COUNSEL:

Robert V. Costello for the plaintiffs.

John P. Morgan for the defendant.

JUDGES:

Hennessey, C.J., Wilkins, Nolan, Lynch, & O'Connor, [***2] JJ.

OPINIONBY:

O'CONNOR

OPINION:

[*407] [**274] While clearing snow from the driveway of his home, the plaintiff, Malcolm R. Hayes, Jr., suffered injuries to several fingers of his left hand as he was attempting to remove snow from the discharge chute of a snow blower manufactured by the defendant,

Ariens Company (Ariens). Hayes and his wife, Donna, brought suit in the Superior Court seeking compensation for his injuries and for her loss of consortium. The plaintiffs sued on theories of negligence and breach of warranty of merchantability, [*408] alleging that the snow blower was defective in design and that the defendant failed to warn adequately of the snow blower's dangers. The case was submitted to a jury in the form of special questions pursuant to *Mass. R. Civ. P. 49 (a)*, 365 Mass. 812 (1974). The jury found that both Hayes and Ariens were negligent and that their negligence combined to cause Hayes's injuries. They attributed sixty percent of the negligence to Hayes and forty percent to Ariens. The jury also found that Ariens did not breach its warranty of merchantability. Therefore, pursuant to the trial judge's instructions, they did not reach the question whether [***3] a breach of warranty caused Hayes's injuries. They found for Ariens on Donna Hayes's claim of loss of consortium.

Before the jury were discharged, counsel for the plaintiffs informed the judge that in his opinion the special verdicts were inconsistent, stating that it was "impossible to find the defendant to have been negligent in the manufacture of their product and not to have breached their warranty of merchantability." Counsel requested that the jury be told that their verdicts were inconsistent and that they be instructed to deliberate further. The judge denied the request and discharged the jury. Thereafter, judgments were entered for Ariens from which the plaintiffs appeal. We granted the plaintiffs' application for direct appellate review.

The plaintiffs assert error in four respects: (1) the judge erred in entering judgment for Ariens because the answers to the special questions were inconsistent; (2) the judge erred in refusing to instruct the jury that in a breach of warranty case, when the plaintiff has made a

391 Mass. 407, *; 462 N.E.2d 273, **;
1984 Mass. LEXIS 1431, ***; 41 A.L.R.4th 1

prima facie showing [**275] that his injury was proximately caused by a product's design, the burden of proving that the product is not defective shifts [***4] to the defendant; (3) the judge erred in refusing to instruct the jury that in a products liability case alleging negligence or breach of warranty, when the plaintiff has proved an inadequate warning, the burden of proof on the issue of causation shifts to the defendant; and (4) the judge's instructions improperly took from the jury the issue whether the word "obstructions" on the caution label appearing on the snow blower referred to clogged snow.

We hold that the special verdicts were inconsistent, demonstrating that the jury misunderstood, or at least misapplied, the law. [*409] Because it is impossible for us to determine the jury's reasoning, we reverse the judgments, and we remand the case for a new trial on all issues. We discuss the burden of proof issues since they are likely to arise at retrial. We do not consider it necessary to discuss the plaintiffs' fourth assertion of error.

There was evidence that on February 7, 1978, Hayes was using a motor driven snow blower that had been manufactured by Ariens in 1961 and that he had purchased from a third party in 1974. Hayes operated the machine while walking behind it. A large auger, known as a rake, pulled the snow [***5] into fast moving impeller blades which took the snow and threw it out the discharge chute. The discharge chute was labelled by Ariens with a warning: "Caution: Stop engine before removing obstructions from blower or rake."

On three occasions that day the discharge chute of the snow blower became clogged with wet and heavy snow. Hayes twice successfully batted the snow from the discharge chute with his left hand without stopping the engine. When the chute became clogged a third time, Hayes employed the same technique. This time, however, Hayes suffered injuries to several fingers on his left hand when they came into contact with the snow blower's impeller blades.

The plaintiffs, through an expert, introduced evidence that the defendant's failure to design the snow blower with a "dead man's clutch" or an "M wire," both of which were economically and technologically feasible at the time of manufacture, did not meet design standards accepted by the industry when the machine was manufactured. Furthermore, there was evidence that the design allowed wet and heavy snow to clog the discharge chute and that the machine was difficult to restart after being shut down for several minutes. [***6] From that evidence the jury could have found that it was reasonably foreseeable at the time of manufacture that an operator of the machine would have reason to attempt to remove clogged snow from the machine without turning it off. This, in turn, fairly raised the question whether the warn-

ing label was reasonably adequate to alert the operator to the risk of personal injury in doing so. The jury could have found that the snow blower was not reasonably safe and that a reasonably prudent manufacturer would have designed it differently or would have [*410] affixed a different warning to it, or both, in order to lessen the risk of injury to users of the machine.

The special verdicts that Ariens was negligent and that Ariens did not breach its warranty were inconsistent. The finding that Ariens did not breach its warranty necessarily imported a finding that the product, including the warning label, was reasonably safe, whereas the negligence finding necessarily imported a finding that it was not. A defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. [***7] A defendant cannot be found to have been negligent without having breached the warranty of merchantability. n2

n2 Of course, the defendant might not be liable even though a breach of warranty is established. A failure to give timely notice of breach of warranty, if prejudicial to the defendant, constitutes a defense. *G. L. c. 106, § 2-318* and *2-607 (3) (a)*. Also "[w]hen a user unreasonably proceeds to use a product which he knows to be defective and dangerous, he . . . relinquishes the protection of the law." *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 355 (1983).

[**276] The trial judge correctly charged the jury that in determining whether Ariens was negligent they should consider whether that company exercised reasonable care in the design of the snow blower and in warning potential users of dangers involved in its use. The judge properly charged, in substance, that Ariens was to be held to the standard of care set by an ordinarily prudent manufacturer in the same or similar [***8] circumstances as those of Ariens. See *Back v. Wickes Corp.*, 375 Mass. 633, 643 (1978), and cases cited. The finding of negligence was a statement by the jury about the product and about the manufacturer as well. It signified that the product was unreasonably dangerous because of its design or because of its failure to be accompanied by an adequate warning, or both. It also signified that an ordinarily prudent manufacturer would have recognized the product's shortcomings and would have taken appropriate corrective measures.

In support of its contention that the special verdicts were not inconsistent, Ariens relies on *do Canto v. Ametek, Inc.*, 367 Mass. 776, 785 (1975), and argues: "Having in mind voluminous evidence educed by plaintiff

391 Mass. 407, *; 462 N.E.2d 273, **;
1984 Mass. LEXIS 1431, ***; 41 A.L.R.4th 1

counsel as to subsequent model changes with presumably improved safety features, the jury could well [*411] have accepted this as evidence of some negligence by Ariens, in not issuing warnings *after the sale* of a machine" (emphasis in original). The essence of the defendant's contention is that the special verdicts are reconcilable because the jury could have concluded that although there was neither defective design nor [***9] inadequate warning at the time Ariens sold the machine, and that therefore the warranty was not breached, there was a negligent failure to give an appropriate post-sale warning of dangers that were discovered only after the sale. The argument is not persuasive. The finding of negligence could only have been based on a determination of defective design or inadequate warning at the time of the sale. It could not have been predicated on a failure to warn subsequent to the sale for several reasons. First, the judge's charge relative to negligence made no suggestion that the evidence permitted a finding that even though the caution label was adequate when the machine was sold, Ariens nevertheless breached a duty to give further warning after the sale. Second, even if the evidence would have warranted a finding that after the sale of the snow blower Ariens became aware of a danger that was not reasonably discoverable before the sale, which we do not decide, there was no evidence that Ariens reasonably could have notified Hayes, who purchased the snow blower, not from Ariens, but from a third person. Third, in *do Canto v. Ametek, Inc.*, *supra* at 784-785, we held that when a manufacturer [***10] learns or should have learned of a risk *created by its negligence* (before the sale) "it has a duty to take reasonable [post-sale] steps to warn *at least the purchaser* of the risk" (emphasis added). In a footnote we observed also that "there may be a duty to give reasonable warning of a [properly designed] product's dangers which are discovered after sale." *Id.* at 785 n.9. However, we did not say in *do Canto*, and we have never said, that a manufacturer has a duty to advise purchasers about post-sale safety improvements that have been made to a machine that was reasonably safe at the time of sale. Also, we have never said that a manufacturer has a duty to warn remote purchasers, such as Hayes, of risks in the use of a product that have been discovered or have become discoverable only after the product has entered the stream of commerce. We conclude that the jury's finding of negligence could only have been [*412] based on their determination that the snow blower was unreasonably dangerous when sold. That determination cannot be reconciled with the finding that there was no breach of warranty. As we [**277] shall see, in order to conclude that there was [***11] no breach of warranty, the jury had to find that the machine was designed properly and that the caution label affixed to it gave sufficient warning of whatever risk the snow blower presented.

Liability for breach of warranty is governed by the Uniform Commercial Code, *G. L. c. 106, § § 2-314 - 2-318*, and is "congruent in nearly all respects with the principles expressed in *Restatement (Second) of Torts § 402A* (1965)," which defines the strict liability of a seller for physical harm to a user or consumer of the seller's product. *Back v. Wickes Corp.*, *supra* at 640." *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 353 (1983). *Wolfe v. Ford Motor Co.*, 386 Mass. 95, 98 (1982). n3 The seller warrants that the product is "fit for the ordinary purposes for which such goods are used," *G. L. c. 106, § 2-314 (2)(c)*, inserted by St. 1957, c. 765, § 1, which include the uses [*413] intended by the manufacturer and those which are reasonably foreseeable. *Back v. Wickes Corp.*, *supra* at 640. Even if a product is properly designed, it is unreasonably dangerous and, therefore, it is not fit for the purposes for which such goods are used, if foreseeable [***12] users are not adequately warned of dangers associated with its use. *Casagrande v. F.W. Woolworth Co.*, 340 Mass. 552, 555 (1960). Furthermore, the duty of the seller "is not fulfilled even if the seller takes all reasonable measures to make his product safe. The liability issue focuses on whether the product was defective and unreasonably dangerous and not on the conduct of the . . . seller." *Correia v. Firestone Tire & Rubber Co.*, *supra* at 355. Therefore, the finding that the warranty had not been breached signified that the product had not only been properly designed but also that adequate warning of dangers had been given. As we have stated earlier in this opinion, only a contradictory subsidiary finding would support a finding of negligence.

n3 "§ 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

"(a) the seller is engaged in the business of selling such a product, and

"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

"(a) The seller has exercised all possible care in the preparation and sale of his product, and

391 Mass. 407, *; 462 N.E.2d 273, **;
1984 Mass. LEXIS 1431, ***; 41 A.L.R.4th 1

"(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The "Caveat" follows the recitation of § 402A:

"the Institute expresses no opinion as to whether the rules stated in this Section may not apply

"(1) to harm to persons other than users or consumers;

"(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

"(3) to the seller of a component part of a product to be assembled."

[***13]

We have concluded that the special verdict with respect to the defendant's negligence could not properly have been based on the defendant's failure to give Hayes a post-sale warning. However, even if such a rationale were permissible, the verdicts were inconsistent nonetheless. For strict liability purposes, and therefore for purposes of our warranty law, the adequacy of a warning is measured by the warning that would be given at the time of sale by an ordinarily prudent vendor *who, at that time, is fully aware of the risks presented by the product*. A defendant vendor is held to that standard regardless of the knowledge of risks that he actually had or reasonably should have had when the sale took place. The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant, as is the culpability of the defendant. Goods that, from the consumer's perspective, are unreasonably dangerous due to lack of adequate warning, are not fit for the ordinary purposes for [**278] which such goods are used regardless of the absence of fault on the vendor's part. See *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191,

202-207 [***14] (1982); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 492 (1974). See also Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 834-835 (1973). [*414] Liability is imposed as a matter of social policy. *Back v. Wickes Corp.*, *supra* at 640. See *Correia v. Firestone Tire & Rubber Co.*, *supra* at 354-355. The finding that Ariens did not breach its warranty, therefore, necessarily implied that the warning given was adequate regardless of when the risk to be warned about was discovered or was discoverable.

Since the special verdicts with respect to whether the defendant was negligent and breached its warranty were inconsistent, further deliberations by the jury after appropriate instructions by the judge would have been appropriate. In any event, judgments should not have been entered for the defendant.

We turn to the burden of proof issues raised by the plaintiffs only long enough to say that in this Commonwealth the burden is on the plaintiff in a products liability case to prove his or her allegations of injury as a result of the defendant's negligence or breach of warranty. It is immaterial whether the defendant is charged with improper [***15] design, inadequate warning, or both. We are not persuaded by *Barker v. Lull Eng'r Co.*, 20 *Cal. 3d* 413 (1978), or *Caterpillar Tractor Co. v. Beck*, 593 *P.2d* 871 (Alaska 1979), relied on by the plaintiffs, to change our traditional rule. Furthermore, contrary to the plaintiffs' contentions, we do not read *Wolfe v. Ford Motor Co.*, 6 *Mass. App. Ct.* 346, 352 (1978), *S.C.*, 386 *Mass.* 95 (1982), or Restatement (Second) of Torts 402A comment j (1965), as favoring imposition on a defendant of the burden to prove the absence of a causal relationship between personal injuries and an inadequate warning of risk in the use of a product.

The judgments are reversed and the case is remanded to the Superior Court for a new trial on all issues.

So ordered.

J. A19027/04

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

GERALD S. KORIN AND ELAINE KORIN,
H/W

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

OWENS ILLINOIS, INC., ALLIED CORP.,
UNIROYAL, INC., AW CHESTERTON, INC.,
GREENE TWEED & CO., INC., QUIGLEY
CO., INC., PFIZER, INC., HOPEMAN
BROTHERS, INC., FLINTKOTE CO., FOSTER
WHEELER CORP, INC., PARS
MANUFACTURING CO., JH FRANCE
REFRATORIES CO., AC&S CORP.,
GENERAL MOTORS CORP, BRAND
INSULATIONS, INC., SELAS CORP. OF
AMERICA, BICKLEY FURNACES,
WESTINGHOUSE ELECTRIC CORP., DREVER
FURNACES, KEELER DORR-OLIVER BOILER
CO., CLEAVER BROOKS, BEVCO
INDUSTRIES, CRANE PACKING, BORG-
WARNER CORP., RAPID AMERICAN CORP.,
SQUARE D CO., CHRYSLER CORP.,
CUTLER-HAMMER CO., CLARK
CONTROLLER CO., SHEPARD NILES,
KAISER GYPSUM CO., PLIBRICO SALES &
SERVICE, AO SMITH CORP., AMPCO
PITTSBURGH CORP., PEP BOYS, FORD
MOTOR CO., GEORGIA PACIFIC CORP.,
CERTAIN-TEED CORP., INC., DANA CORP.,
UNION CARBIDE, NORTH AMERICAN
REFRATORIES, BENJAMIN FOSTER CO.,
HB SMITH, WEIL MCCLAIN CO., DURABLA
MANUFACTURING CO., KAISER ALUMINUM
& CHEMICAL CORP., ROCK BESTOS, CO.,
EATON CORP., AND JOHN CRANE, INC.

*Six
Partners*

APPEAL OF JOHN CRANE, INC.

No. 3323 EDA 2003

Appeal from the Judgment entered October 2, 2003
In the Court of Common Pleas of Philadelphia County,
Civil No. 3942 December Term, 2001

FILED AUGUST 2, 2004

J. A19027/04

BEFORE: MUSMANNO, KLEIN, JJ. and McEWEN, P.J.E.

MEMORANDUM:

FILED AUGUST 2, 2004

Gerald Korin (Korin) and his wife Elaine were awarded a total of \$1,500,000 against various asbestos manufacturers including John Crane, Inc. for mesothelioma, which he contracted through exposure to asbestos, and which ultimately killed him. Crane raises two issues on appeal: (1) whether comparing Korin's "death sentence" from mesothelioma to a death penalty murder case going on at the same time was prejudicial, and (2) whether the court erred in ruling there was insufficient evidence to allow the jury to consider cross-claims against General Electric and Pep Boys. We affirm.

The issues are well covered in Judge Paul P. Panepinto's opinion and we rely on that in part and attach it in the event there are further proceedings in this matter.

1. The closing statement in Phase I referring to a "death sentence" was not so highly prejudicial as to mandate a new trial.

Trial counsel must be expected to advance a spirited argument to support his client's cause and promote the interest of justice. As long as no liberties are taken with the evidence or prejudices aroused by exaggerated accusations, a lawyer may appeal to a jury in colorful language with the strongest aspect of his case.

***Easter v. Hancock*, 346 A.2d 323 (Pa. Super. 1975).**

In the closing argument in the medical causation phase of the case, plaintiff mentioned a highly publicized murder case which was proceeding at the time of this trial. Plaintiff's counsel said, "There's a similarity here in terms

J. A19027/04

of the importance. Jerry Korin has been given a death penalty." Counsel went on to say that Korin lived a wonderful life and had a good family and did nothing to bring the "death penalty" on himself.

There is no question that Korin was terminally ill at that time. Mesothelioma is invariably fatal. Such a fate is often, even outside the courtroom, referred to as a "death sentence" or "death penalty." There is no liberty taken with the evidence to refer to inevitable death as a death penalty. The question, therefore, is whether this particular comparison so inflamed the jury so as to render the verdict improper.

In *Harvey v. Hassinger*, 461 A.2d 814, (Pa. Super. 1983), the trial court declined to grant a new trial after the plaintiff stated in closing argument that the defendant had "murdered" the decedent. Even acknowledging that it "was improper for appellant's counsel to refer to Appellee as having "murdered" the decedent we cannot say that in the context of this trial that the remark was so prejudicial as to require a new trial." *Id.* at 818. Our court found that in the context of that particular trial, the reference to "murder" was not in the technical criminal sense, but in the broader sense of outrageous conduct.

We agree with Judge Panepinto that this comment, while "stretching into the grey area of permissible comments, certainly was not so highly prejudicial as to cause a mistrial." Opinion at 4. One might also say that although counsel came close to the line, he did not cross it.

J. A19027/04

As noted by Judge Panepinto, this argument was made in the medical causation and damages phase of the case, not the product identification phase. Counsel did say he was bringing this up only to highlight the importance of this case, because Korin was almost certainly going to die from the disease. There was no reference to any actions on the part of the defendants to analogize them to murders. The verdict for this kind of case was not outside the expected range, so it appears there was no actual prejudice. Although defendants asked for a mistrial, there was no request for a curative instruction which could have solved any problem. The trial judge is in the best position to determine whether such a remark is so prejudicial to cause a mistrial, and we do not believe Judge Panepinto abused his discretion at all in denying the motion for mistrial.

2. There was insufficient evidence to allow the claims against General Electric and Pep Boys to go to the jury.

The evidence against Pep Boys came primarily from Korin's testimony. He said that he did remember one purchase of brakes from Pep Boys, and also that he changed brakes more than once on several vehicles. He said that dust was given off when old brakes were removed, but not when new ones were installed. This is insufficient to show that any of the brakes he *removed* were purchased from Pep Boys.

With respect to General Electric, we first note that any issues involving General Electric are waived, as no appeal was filed regarding G.E. Korin filed a

J. A19027/04

lawsuit against a large number of defendants in December 2001. The lower court term and number for that lawsuit is December Term, 2001, Number 3942 (0112-3942). In February 2002, Korin filed a second lawsuit against General Electric and Garlock Industries. That case was issued a distinct court term and number: February Term, 2002, Number 2036. While the two cases were tried at the same time, there is no indication in the docket for either case that the two were ever formally consolidated. No motion for consolidation appears on the docket for either case. In the official record before us, post-trial motions, necessary to preserve issues before this court, were filed only under the December court term and number. No appeal was ever filed regarding the February case. Because General Electric was a defendant only in the February case and not in the original December case, no appellate issues were ever preserved regarding General Electric.

In an abundance of caution, however, because the trial court may have consolidated the two cases, *sua sponte* and/or orally, without that order ever being formally docketed, we will comment on the issue raised.¹

Korin did testify he worked with General Electric panels and generators and was exposed to asbestos. While the products were insulated with

¹ The fact that we *comment* on the issues is not intended to absolve Crane from failing to either provide us with a record that indicates the two cases had actually been consolidated, or from filing a separate appeal regarding the February case. From what we can tell in the record before us, the proper method of appeal here would have been to file separate appeals under both lower court numbers and then indicate to Our court that the two appeals should be heard together.

J. A19027/04

asbestos, Korin did not know whether or not the asbestos insulation was manufactured by General Electric. Likewise, although there was asbestos insulation on turbines on ships that were made by General Electric, he did not know whether or not General Electric supplied the insulation.

Therefore, there is no evidence that General Electric made any of the asbestos insulation on the General Electric products with which Korin came in contact. General Electric is not liable if it made a product that was later insulated with someone else's asbestos. The insulation here was all on the outside of the General Electric components.

Crane is correct in the assertion that a jury may draw reasonable inferences, without direct proof, of the condition of the product that allegedly caused the injury. *See Cornell Drilling Co. v. Ford Motor Co.*, 359 A.2d 822 (Pa. 1976), *reversed on other grounds*. However, the circumstances where such inferences may be drawn do not exist here.

In *Cornell*, a Ford pick-up truck spontaneously burst into flame. Our Supreme Court held that in that situation, where all other explanations for combustion had been ruled out, the jury would be allowed to infer that the pick-up truck was defective under Restatement of Torts, § 402A. Our Supreme Court went on to say:

Accordingly, a plaintiff may often rely on circumstantial evidence, and the inferences that may be reasonably drawn therefrom, to prove his case. Although the mere happening of an accident does not establish liability, Dean Prosser has observed that "the addition of other facts tending to show that the defect existed before the accident, such as its occurrence within a short time after sale, or

J. A19027/04

proof of the malfunction of a part for which the manufacturer alone could be responsible, may make out a sufficient case.

Id. at 826 (emphasis added).

Here, the "defect" of the G.E. product in question was the existence of asbestos insulation on the outside of the product. Crane, however, produced no evidence that the asbestos insulation was a part for which the manufacturer (G.E.) alone could be responsible. Therefore, we agree with Judge Panepinto that there was insufficient evidence for a jury to conclude that Korin came in contact with General Electric asbestos. Thus, even were we to assume that the issue had been properly preserved and raised before this court, Crane would be entitled to no relief regarding General Electric.

Judgment affirmed.

Judgment Entered.

Prothonotary

Date: _____

NOV 2 2004

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL ACTION - LAW

GERALD S. KORIN and ELAINE KORIN, h/w,	:	APPEAL TO SUPERIOR COURT
Appellees	:	
v.	:	SUPERIOR COURT DOCKET 3323 EDA 2003
OWENS ILLINOIS, INC., et al.	:	PHILADELPHIA CCP NO. DECEMBER TERM, 2001, NO. 3942
Appellants	:	FEBRUARY TERM, 2002, NO. 2036

OPINION

PAUL P. PANEPINTO, JUDGE, JANUARY 14, 2004:

PROCEDURAL HISTORY:

Appellants, John Crane, Inc., (hereinafter referred to as Appellant), filed an appeal from this Court's Order of October 2, 2003, wherein this Court denied Appellant's Motion for Post Trial Relief and entered judgment in favor of Appellees, Gerald S. Korin and Elaine Korin, h/w, (hereinafter referred to as Appellees).

This strict products liability action was brought by Gerald S. Korin and his wife, Elaine Korin, wherein it was alleged that due to Appellee's exposure to asbestos-containing

COPIES SENT
PURSUANT TO Pa. R.C.P. 236(b)

JAN 14 2004

First Judicial District of Pa.
User I.D.: PTD

products, Mr. Korin developed malignant mesothelioma, a type of cancer almost exclusively associated with exposure to asbestos. Appellee brought suit against a number of companies which allegedly manufactured asbestos-containing products that Appellee had been exposed to, including products manufactured by the Appellant, John Crane, Inc.

This case proceeded to trial in June of 2002, and in accordance with standard procedure, Appellee's case was tried in reversed bifurcated fashion. The first phase of the trial addressed the issues of medical causation and damages and the second phase addressed the liability of the various defendant companies. At the conclusion of phase one, the jury found that Appellee was suffering from an asbestos-related malignant mesothelioma and awarded compensatory damages to Appellee, Mr. Korin, in the amount of \$1,200,000.00 and compensatory damages to his wife, for her loss of consortium, in the amount of \$300,000.00. At the conclusion of phase two of the trial, the jury found eight companies liable to the Appellees, including Appellant, John Crane, Inc.

Thereafter, Appellant filed Post-Trial Motions alleging several errors made during trial, all of which were denied. Appellants first contend that remarks made by Appellees' counsel during phase one closing arguments were inflammatory, improper and prejudicial to them and, therefore, warranted a mistrial. Appellants further contend that this Court's failure to include two defendants, namely, General Electric and Pep Boys, on the verdict sheet despite their cross-claims, constitute error and warrant a new trial. Finally, Appellants contend that this Court's refusal to admit OSHA's standards during trial warrant a new trial.

Appellants' timely filed their Statement of Matters Complained Of On Appeal and each will be dealt with individually hereinafter.

ANALYSIS

Appellant's Statement of Matters Complained Of On Appeal consists of the following:

1. John Crane should be granted a new trial because of inflammatory and prejudicial statements by plaintiffs' counsel during Phase I closing arguments. (N.T. 6/6/02 at 48-50.) "It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice are improper and will not be countenanced." Narciso v. Mauch Chunk Township, 369 Pa. 549, 550, 87 A.2d 233, 234 (1952). The Court erred by failing to take steps to cure the harm caused by Plaintiffs' counsel's improper remarks. Siegel v. Stefanyszyn, 718 A.2d 1274, 1277 (Pa. Super. Ct. 1998).

The particular language cited by Appellants which they believe was so highly prejudicial as to warrant a new trial is as follows:

"You know, when you were in jury selection there they are picking a jury right now for criminal trial Lex Street massacre or something. [The] death penalty is being sought and a trial can't get any more important than that when the prosecution is seeking the death penalty. There's a similarity here in terms of the importance. Jerry Korin has been given a death penalty. The difference is that if in fact that criminal defendant did what he did he brought that death penalty on himself and Jerry Korin has been given the death penalty for what? For just living a wonderful simple life, getting a good education, rising up in his career, marrying a woman and sticking with her for 36 years, raising two sons to be who they are today and wanting to start that new chapter in his life of raising that grandchild Brynn Korin." [underlining added for emphasis]

Initially, it should be noted that these particular closing arguments occurred during the medical causation phase of the trial and not during the liability phase of the trial. Therefore, Appellee's counsel remarks were not addressed to the liability of the defendants, including Appellant, but to medical causation and damages. This Court, in deciding not to grant a mistrial, determined that although counsel's remarks certainly stretch into a gray area of permissible comments, counsel did, in fact, state that the similarity between the Lex Street criminal trial and its possible result in a death penalty were only analogous to the instant trial

in terms of importance. Counsel for Appellees stated, midway through the above excerpted argument, that "There is a similarity here in terms of importance." This Court determined that counsel's comments were directed towards the fact that his client, Mr. Korin, was ultimately going to die because of his asbestos-related cancer. Counsel's analogizing his client's ultimate death to a death penalty, although again stretching into the gray area of permissible comments, certainly was not so highly prejudicial as to cause a mistrial. Counsel made it clear in his argument that he was not comparing a death penalty sentence to what was claimed to have occurred to his client as a result of defendant's conduct, but only to its similar importance. This was especially true in light of the fact that these comments were made during phase one of the trial, rather than during phase two, which was the liability portion of the trial.

Certainly, Appellee's counsel was trying to convey the innocence of his client's life, now resulting in a cancer-related death, as compared to a death resulting from a criminally sanctioned death penalty. It was this Court's determination that Appellee's counsel's argument was trying to convey the thought that Appellee would eventually die from malignant mesothelioma as similarly a fate that would involve anyone found guilty of murder and had been given a death sentence. However, at no time during his phase one closing arguments did Appellee's counsel refer to the defendants wrongdoing as having resulted in Mr. Korin's eventual death. Moreover, as previously stated, Appellee's arguments came during the conclusion of phase one, and, therefore, any defendants' particular involvement in this matter had yet to be even discussed with the jury so as to have resulted in any prejudice to Appellant or any other defendant. At the conclusion of phase one, the jury merely made the determination that the Appellee had contracted malignant mesothelioma due to exposure

to asbestos, but not that his exposure to asbestos was caused by the conduct of any of the defendants at trial. Although the jury also awarded damages at the conclusion of phase one, it was this Court's determination, following trial, that the jury's verdict of \$1,500,000.00 dollars was not excessive. There was ample evidence presented, including the Appellee's economic loss, and the physical and mental pain and suffering associated with having terminal cancer to substantiate the jury's monetary verdict. As such, this Court does not believe that Appellee's argument is meritorious.

2. The Court erred by refusing to include General Electric and Pep boys on the verdict sheet. [See N.T. 6/13/02 at 47-52, 63-65; N.T. 6/14/02 at 4-14]. John Crane offered sufficient evidence to establish that Korin was exposed to asbestos from Pep Boys' and General Electric's products. The Court erred when it refused to include those defendants on the verdict sheet. Lonasco v. A-Best Prods. Co., 2000 Pa. Super 203, Section 19, 757 A.2d 367, 375 (2000).

At the conclusion of the phase two liability portion of the trial, the two remaining defendants, Appellee, John Crane and Owens Illinois, sought to include nine co-defendants on the verdict sheet for the jury's consideration on liability. Appellant had filed cross-claims against these nine defendants and argued that they had presented competent evidence during trial that plaintiff had, in fact, inhaled asbestos fibers from the co-defendant's products and that the inhalation of these asbestos fibers was a substantial contributing factor in causing plaintiff's malignant mesothelioma. Appellee agreed to include six of these nine co-defendants on the jury-verdict sheet but argued against three other co-defendants. These three co-defendants were General Electric, Pep Boys and Westinghouse. Following argument, this Court ruled that although Westinghouse would be permitted to be placed on the verdict sheet for the jury's consideration, General Electric and Pep Boys were not to be included on the jury sheet despite Appellee having filed cross-claims against them. This

Court determined that there was insufficient evidence for the jury to consider liability against General Electric and Pep Boys.

This Court will first discuss the issue of Pep Boys being excluded from the jury verdict slip. Appellee, Mr. Korin, testified during trial that on at least one occasion during his life, he purchased brake shoes from Pep Boys. [N.T. 6/13/03 at p.28]. Further, although plaintiff testified that the packaging on the new brakes that he had purchased stated that they contained asbestos, he was unable to say whether or not all of the brakes that he installed contained asbestos or that the brakes that he purchased from Pep Boys stated that they contained asbestos. [N.T. 6/13/03 at p.30]. Appellee further testified that he did not recall the new brakes emitting dust, but that dust was caused by the removal of old brakes, none of which he was able to identify. [N.T. 6/13/03 at p. 51-51].

More importantly, Appellant cites, in his reply letter brief submitted to this Court, deposition testimony provided by Appellee during his February 26, 2002 deposition. During this deposition, Mr. Korin stated that Pep Boys was the only store he could specifically recollect buying brake shoes. Appellee also stated during this particular deposition that it was his understanding that the brakes he purchased from Pep Boys contained asbestos and that he believed he was exposed to asbestos from installing these brakes purchased at Pep Boys. However, upon a review of the record in this case and as pointed out by Appellee in their sur reply brief, Appellee was asked to confirm deposition testimony he gave on February 21, 2002 but not February 26, 2002. The above deposition responses, which Appellant seeks to utilize to support its contention that Appellee acknowledged that brake shoes purchased at Pep Boys emitted asbestos containing dust that he was exposed to and breathed in, were made during Appellee's February 26, 2003 deposition.

During trial, Appellee was asked whether or not the deposition testimony he gave on February 21, 2002 at pp. 233-234 was truthful and accurate, to which he responded, "Yes." [N.T. June 13, 2002 at p. 48]. However, this particular testimony was not as detailed as his deposition testimony on February 26, 2002 where Appellee specifically stated that it was his belief that the brake shoes he purchased at Pep Boys contained asbestos and that he was exposed to asbestos dust from these brake shoes. It was for this reason that this Court did not permit Pep Boys to go on the jury verdict slip during the liability phase of this trial.

The testimony that was brought out during trial regarding Pep Boys was speculative. Although Appellee did testify during trial that he had purchased brake shoes on at least one occasion from Pep Boys, he could not state that he then removed any of these Pep Boys brake shoes thereby emitting asbestos-related dust. Further, Appellee's testimony during trial did not specifically state that the brake shoes he bought at Pep Boys actually contained asbestos. Appellee testified that he certainly purchased brake shoes at Pep Boys, but his testimony was speculative as to whether or not these particular brake shoes contained asbestos and whether or not he was exposed to any asbestos-related dust while working with any of the brake shoes purchased at Pep Boys. Therefore, this Court ruled that despite Appellant's cross-claim against Pep Boys, they would not be permitted to be placed on the jury's verdict sheet for the jury's consideration during the phase two liability portion of the trial.

Appellant also contends that this Court improperly excluded General Electric from the jury verdict slip for the jury's consideration during the liability portion of this trial. It was this Court's determination that there was not sufficient evidence against General Electric to warrant it being placed on the jury verdict slip. It was agreed by Appellee during trial that,

during his career, he worked with General Electric equipment. Further, all parties agreed that this General Electric equipment was insulated on the outside with asbestos. However, Appellee was not able to say whether or not General Electric supplied the asbestos that did, in fact, insulate the outside of their equipment. [N.T. 6/13/03 at pp.54-59].

This Court determined that in order for General Electric to be held liable in this asbestos action, it must be shown that General Electric either manufactured, installed or otherwise supplied the asbestos or asbestos-containing product at issue, namely, that the General Electric equipment or the asbestos-related insulation was manufactured, installed or otherwise supplied by General Electric. Although the evidence was clear that the equipment itself was manufactured by General Electric, there was no testimony from anyone during trial that could link the asbestos-containing insulation on the General Electric equipment with General Electric.

Appellant further argues that at trial a list of products containing asbestos that Appellee worked with or around was offered into evidence. (6/12/02 R. at p. 47). Appellee argues that this list had a sub-caption entitled "turbine and electrical panels" which listed General Electric and Westinghouse (6/12/02 R. at p. 58). Appellee testified that to the best of his knowledge these electrical panels did contain asbestos and that when he worked with these panels dust was created and he breathed in that dust. Appellee therefore contends that this evidence was sufficient for a jury to infer that General Electric was responsible for the asbestos he inhaled from the electrical panels. However, although this Court was mindful of this particular list, Appellee testified that it was his understanding that these turbine and electrical panels were manufactured by General Electric and Westinghouse, but he was not certain that the asbestos insulation was, in fact, manufactured by General Electric and

Westinghouse. It was for this reason that this Court determined that to permit General Electric to go on the jury verdict slip would permit the jury to speculate as to whether or not these turbine electrical panels were, in fact, manufactured, supplied and/or installed by General Electric. There was not sufficient evidence during the trial to support the fact that General Electric manufactured, supplied or otherwise installed or sold this asbestos insulation. Therefore, this Court found that Appellant's request to have General Electric placed on the jury verdict slip was not meritorious.

3. The Court erred by refusing to admit OSHA standards to establish that John Crane's products could not have caused Korin's injuries. (See N.T. 6/12/02 at 74-84). In re: Asbestos Master Docket, No. 861000001, Phila. Comm. Pl., Jan. 7, 1997.

During trial, Appellee sought to introduce evidence of OSHA standards to prove that its products and the absence of warning labels on them could not have caused Appellee's injuries. The regulations Appellee sought to include were adopted to protect workers from occupational exposure to toxic and hazardous materials. Appellant sought to present these OSHA regulations during the testimony of its expert, Dr. Toca.

In strict products liability actions, such as the one that was tried before this Court, evidence of compliance with government regulations or industry standards is inadmissible because compliance with such standards have been held to inject into the case the concept of negligence law. (Sheehan vs. Cincinnati Shaper Company, 555 A.2d 1352 (Pa. Super., 1989); Majdic vs. Cincinnati Machine Company, 537 A.2d 334 (Pa. Super., 1988); Louis vs. Coffing Hoist Division, 515 Pa. 334, 528 A.2d 590 (1987). In Sheehan, our Superior Court specifically addressed the issue of admissibility of OSHA standards in a products liability action and concluded that the rule precluding the introduction of industry standards in a strict liability action should be extended to preclude the introduction of OSHA regulations as well.

The Court reasoned that the reasonableness of a manufacturer's conduct in choosing a particular design is not in issue and the Court concluded that OSHA's regulations proffered would introduce into a strict liability action the reasonableness of the defendant's conduct, an issue which the Court felt was irrelevant to whether or not liability attaches.

Appellant cited during trial an Asbestos Litigation Master Docket Order that provided that although government regulations may not be used in products liability cases to establish or disprove product defect, they may be used to prove or disprove causation. (In re: Asbestos Litigation Master Docket, No. 861000001, Phila. Comm. Pl. January 7, 1997). Given this Order, this Court had to determine whether or not it was going to permit OSHA's standards to be injected into this strict liabilities case. This Court had to at first determine whether or not it was bound by the above Asbestos Litigation Master Docket Order. This Order entered by Judge DiNubile was of the substantive nature, that is, it dealt with the permissibility of evidence, rather than a matter of procedural law, which this Court would be bound to follow.

However, this Court determined that it was bound by precedence to follow the law as announced by our Superior Court in the Sheehan case cited above. Therefore, this Court ruled against the introduction, by Appellants, of OSHA's standards to prove that its products and the absence of warning labels on them could not have caused Appellee's injuries.

Appellant was permitted to put on its defense that its particular products did not give off sufficient asbestos fibers to cause Appellee's malignant mesothelioma. However, this Court felt that permitting Appellant's experts to bolster their opinions by citing OSHA regulations would have improperly injected negligence principles into this strict products liability action. Therefore, this Court determined that Appellant's request to introduce OSHA's standards at trial was without merit.

CONCLUSION

For all the above reasons, the Trial Court's Order of October 2, 2003 denying Appellant's Motion for Post-Trial Relief and ordering judgment in favor of Appellees should be affirmed.

BY THE COURT:

Paul P. Panepinto
PAUL P. PANEPINTO, J.

AUG 4 2004
CLERK OF COURT

ROLF L. LINDSTROM, Plaintiff, WILLARD E. BARTEL and DAVID C. PEEBLES, administrators of the estate of ROLF L. LINDSTROM, deceased, Plaintiffs-Appellants, v. A-C PRODUCT LIABILITY TRUST, et al., Defendants, A.W. CHESTERTON, COFFIN TURBO PUMP, INC., INGERSOLL-RAND COMPANY, WALWORTH COMPANY, THE ANCHOR PACKING COMPANY, COLTEC INDUSTRIES, GARLOCK SEALING TECHNOLOGIES, LLC, GOULDS PUMPS, INC., HENRY VOGT MACHINE CO., and JOHN CRANE, INC., Defendants-Appellees.

No. 04-3751

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

05a0400p.06;

424 F.3d 488; 2005 U.S. App. LEXIS 21010; 2005 FED App. 0400P (6th Cir.); 2005 AMC 2425

June 8, 2005, Argued
September 28, 2005, Decided
September 28, 2005, Filed

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 98-13222. Dan A. Polster, District Judge. *Lindstrom v. AC Prods. Liab. Trust*, 264 F. Supp. 2d 583, 2003 U.S. Dist. LEXIS 12553 (N.D. Ohio, 2003)
Lindstrom v. AC Prods. Liab. Trust, 2003 U.S. Dist. LEXIS 12549 (N.D. Ohio, May 7, 2003)
Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 2004 U.S. Dist. LEXIS 8132 (N.D. Ohio, 2004)

COUNSEL: ARGUED: John C. Cardello, JACQUES ADMIRALTY LAW FIRM, P.C., Detroit, Michigan, for Appellants.

George F. Fitzpatrick, Jr., SWANSON, MARTIN & BELL, Chicago, Illinois, Matthew C. O'Connell, SUTTER, O'CONNELL, MANNION & FARCHIONE, Cleveland, Ohio, Holly N. Olarczuk-Smith, Eric Mann, GALLAGHER, SHARP, FULTON & NORMAN, Cleveland, Ohio, William F. Scully, Jr., WILLIAMS, SENNETT & SCULLY CO., Cleveland, Ohio, Stephen H. Daniels, McMAHON, DeGULIS, HOFFMAN & LOMBARDI, Cleveland, Ohio, for Appellees.

ON BRIEF: John C. Cardello, Donald A. Krispin, JACQUES ADMIRALTY LAW FIRM, P.C., Detroit, Michigan, for Appellants.

George F. Fitzpatrick, Jr., SWANSON, MARTIN & BELL, Chicago, Illinois, Matthew C. O'Connell, SUTTER, O'CONNELL, MANNION & FARCHIONE, Cleveland, Ohio, Holly N. Olarczuk-Smith, Eric Mann, Monica A. Sansalone, GALLAGHER, SHARP, FULTON & NORMAN, Cleveland, Ohio, Stephen H. Daniels, Evan J. Palik, McMAHON, DeGULIS, HOFFMAN & LOMBARDI, Cleveland, Ohio, William F. Scully, Jr., WILLIAMS, SENNETT & SCULLY CO., Cleveland, Ohio, Michael A. **[**2]** Pollard, BAKER & McKENZIE, Chicago, Illinois, Stephanie P. Manson, Walter J. Andrews, Paul E. Janaskie, HUNTON & WILLIAMS, McLean, Virginia, for Appellees.

JUDGES: Before: SILER and GIBBONS, Circuit Judges; LAWSON, District Judge. *

* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: JULIA SMITH GIBBONS

OPINION:

[*491] [*2]** JULIA SMITH GIBBONS, Circuit Judge. Rolf L. Lindstrom, a merchant seaman, brought suit against numerous defendants seeking compensation

424 F.3d 488, *, 2005 U.S. App. LEXIS 21010, **;
2005 FED App. 0400P (6th Cir.), ***; 2005 AMC 2425

for his mesothelioma, a disease he claims was caused by exposure to asbestos released from products manufactured by defendants-appellees. The district court granted summary judgment in favor of defendants-appellees Ingersoll Rand Company, Coffin Turbo Pump, Inc., Garlock Sealing Technologies, LLC, Henry Vogt Machine Company, and Goulds Pumps, Inc., but denied John Crane, Inc.'s summary judgment motion. Following a bench trial, the district court entered a verdict in favor of John Crane, Inc. Willard E. Bartel and David C. Peebles, administrators of Lindstrom's estate, now appeal.

For the following reasons, we affirm the decision of the district court with [**3] respect to all of the defendants.

I. Lindstrom was employed from 1963 until 1994 as a merchant seaman. He worked in the engine department as a licensed engineer aboard numerous vessels during this time. In his work, Lindstrom was allegedly exposed to many pieces of equipment that contained asbestos. Lindstrom was diagnosed with malignant mesothelioma of the peritoneum in October 1999 and died of this disease on June 15, 2003. Willard E. Bartel and David C. Peebles were appointed as administrators of Lindstrom's estate and were substituted as plaintiffs.

Lindstrom filed a complaint in the Northern District of Ohio in January of 2003 against various defendants seeking compensation for the mesothelioma, a condition which he asserts he developed as a result of exposure to asbestos contained in defendants-appellees' products. Lindstrom's complaint listed claims of negligence under the Jones Act, 46 U.S.C. § 688 *et seq.*, unseaworthiness under maritime law, and products liability claims of design and manufacturing defects. Only the products liability claims are at issue in this appeal.

The district court granted summary judgment in favor of Ingersoll Rand [**4] and Coffin Pump in an opinion dated May 2, 2003. The district court granted summary judgment in favor of Garlock Sealing on May 7, 2003. The district court granted summary judgment in favor of Goulds Pumps and Henry Vogt Machine Company, but denied John Crane, Inc.'s motion for summary judgment in an opinion dated May 19, 2003. Lindstrom's claim against John Crane, Inc. proceeded to a bench [**492] trial which took place from February 18 through February 27, 2004. On May 3, 2004, the district court entered a verdict in favor of John Crane, Inc. Bartel and Peebles filed a notice of appeal from the district court's orders with respect to the above six defendants-appellees on May 27, 2004. [***3]

II.

We review a district court's grant of summary judgment *de novo*. *Golden v. City of Columbus*, 404 F.3d

950, 954 (6th Cir. 2005). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)* [**5]. We must review the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

On an appeal from a judgment entered after a bench trial, we review the district court's findings of fact for clear error and its conclusions of law *de novo*. *Pressman v. Franklin Nat'l Bank*, 384 F.3d 182, 185 (6th Cir. 2004). When the factual findings involve credibility determinations, we afford great deference to the district court's factual findings. *Schroyer v. Frankel*, 197 F.3d 1170, 1173 (6th Cir. 1999).

Plaintiffs in products liability cases under maritime law may proceed under both negligence and strict liability theories. Under either theory, a plaintiff must establish causation. *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 375 (6th Cir. 2001). We have required that a plaintiff show, for each defendant, that (1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered. *Id.* In addition, we have permitted evidence [**6] of substantial exposure for a substantial period of time to provide a basis for the inference that the product was a substantial factor in causing the injury. *Id.* at 376. "Minimal exposure" to a defendant's product is insufficient. *Id.* Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient. *Id.* Rather, where a plaintiff relies on proof of exposure to establish that a product was a substantial factor in causing injury, the plaintiff must show "a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural." *Id.* (quoting *Harbour v. Armstrong World Industries, Inc.*, 1991 U.S. App. LEXIS 10867, No. 90-1414, 1991 WL 65201, at * 4 (6th Cir. April 25, 1991)). In other words, proof of substantial exposure is required for a finding that a product was a substantial factor in causing injury.

Plaintiffs-appellants urge this court to reject the *Stark* approach to causation proof. We decline their invitation. The *Stark* reasoning permits a plaintiff, faced with a difficult task of establishing causation, to meet his burden through proof of substantial [**7] exposure and has proved workable in maritime asbestos products liability cases.

The plaintiffs-appellants also argue that the district court erred in its application of *Stark*. Plaintiffs-appellants argue that *Stark* stands for the proposition that in order to "withstand a motion for summary judgment, evidence of substantial asbestos exposure for a substantial period of time is required only if the evidence is entirely circumstantial." Because plaintiffs-appellants submitted an affidavit from [*493] an expert witness, plaintiffs-appellants maintain that their causation proof is not entirely circumstantial and that the above standard does not apply. *See id. at 380* ("Had Stark presented expert testimony . . . , summary judgment might well have been improper . . .").

While plaintiffs-appellants are correct that causation may also be established through direct evidence that a product to which a worker has been exposed is a substantial factor in causing injury, they are incorrect in their assertion that their affidavit enables them to survive summary judgment. The affidavit in question was prepared by Joseph Corson, M.D. With regard to the issue of whether defendants-appellees' products [**8] were a "substantial factor" in Lindstrom's mesothelioma, Corson's affidavit stated: "Each of Mr. Lindstrom's occupational exposures to asbestos aboard ship to a reasonable degree of medical certainty were [sic] a substantial contributing factor to his development of mesothelioma. The medical and scientific community cannot exclude any specific asbestos [***4] exposure as to Mr. Lindstrom's mesothelioma." After reviewing this affidavit in considering the summary judgment motions of Ingersoll Rand and Coffin Turbo Pump, the district court stated:

Dr. Corson does not specifically reference the product of any particular Defendant. Rather, he opines that there is no safe level of asbestos exposure, and that every exposure to asbestos, however slight, was a substantial factor in causing Lindstrom's disease. If an opinion such as Dr. Corson's would be sufficient for plaintiff to meet his burden, the Sixth Circuit's "substantial factor" test would be meaningless. Accordingly, Dr. Corson's opinion is insufficient as a matter of law to get Lindstrom past summary judgment.

The district court correctly found the affidavit, which sought to base causation on any hypothetical exposure, [**9] however slight, to be insufficient to allow plaintiffs-appellants to avoid summary judgment in favor of Ingersoll Rand and Coffin Turbo Pump. n1 The affidavit does not reference any specific defendant or product, but rather states in a conclusory fashion that every exposure to asbestos was a substantial factor in Lind-

strom's illness. The requirement, however, is that the plaintiff make a showing with respect to *each* defendant that the defendant's product was a substantial factor in plaintiff's injury, *see Stark, 21 Fed. Appx. at 375* ("Commonly, [the substantial factor] standard is separately applied to each of the defendants."). As a matter of law, Corson's affidavit does not provide a basis for a causation finding as to any particular defendant. A holding to the contrary would permit imposition of liability on the manufacturer of any product with which a worker had the briefest of encounters on a single occasion.

n1 Because the district court was correct in this ruling, its decision not to consider the affidavit in connection with the other summary judgment motions was not error.

[**10]

Plaintiffs-appellants next argue that the district court erred in granting summary judgment in favor of each of the defendants-appellees involved in this appeal. Plaintiffs-appellants also argue that the district court's ruling in favor of John Crane, Inc. should be reversed. We will examine the district court's decisions with respect to each of these defendants-appellants separately.

A. *Henry Vogt Machine Company*

The district court granted summary judgment in favor of Henry Vogt Machine Company based on a finding that plaintiffs-appellants had failed to produce evidence that Henry Vogt's products had [*494] caused Lindstrom's illness. In Vogt's answers to the interrogatories, Vogt acknowledged that the valves the company manufactured contained encapsulated asbestos packing and the company's gaskets were covered in metal and had chrysotile asbestos encapsulated between each of the metal windings. Vogt also noted that the gaskets contained latex-filled asbestos manufactured by other suppliers.

In Lindstrom's May 3, 2000, deposition, he listed Vogt as one of the companies that manufactured valves aboard the vessels upon which Lindstrom had worked. Lindstrom did not, however, name Vogt [**11] as one of the companies that manufactured replacement valve packing containing asbestos to which Lindstrom was exposed on the ships.

Lindstrom also presented deposition testimony given by Horace George, with whom Lindstrom had served with on one ship, The Almeria Lykes. George stated in his deposition that Lindstrom commenced work aboard the ship four years after the ship was commissioned. George testified that generally, the shipping company, rather than the valve manufacturer, provided the replacement packing and gasket material. George named

five manufacturers who provided packing materials that Lindstrom would have come in contact with during his tenure on the ship, none of which was Henry Vogt. George also testified that asbestos-containing and non-asbestos containing [***5] packings were used aboard the ship, but he could not visually distinguish packing containing asbestos from packing that was asbestos-free. George also testified that the packing generally needed to be replaced a couple of times per year. Based on this statement, coupled with the fact that Lindstrom boarded the ship four years after it was initially commissioned, the district court surmised that it would [**12] have been impossible for Lindstrom to have handled any original packing or gasket material attributable to Henry Vogt.

In his response to Henry Vogt's motion for summary judgment, Lindstrom filed an affidavit in which he stated, "I specifically recall numerous valves manufactured and/or supplied by Henry Vogt Machine Co. on board vessels upon which I served throughout my career" and "I specifically recall replacing the asbestos-containing packing materials and gaskets in working on Henry Vogt Machine Co.'s valves described above, many times throughout my career as a merchant mariner." Additionally, Lindstrom filed an affidavit from George, which stated that he specifically recalled numerous Henry Vogt valves aboard The Almeria Lykes and that he witnessed Lindstrom replacing asbestos-containing packing material and gaskets numerous times on those valves. The district court refused to consider these affidavits based on a finding that it was an inappropriate attempt by Lindstrom to create a factual issue by filing affidavits that contradict the earlier deposition testimony. In their appellate brief, plaintiffs-appellants ignore this ruling by the district court and discuss the information [**13] contained in these affidavits as if they are properly before the court. However, because the plaintiffs-appellants have failed to challenge the district court's ruling on the admissibility of these affidavits, they are precluded from relying on them on appeal. n2

n2 In any event, the district court was correct in ruling that Lindstrom's actions in filing affidavits that contradicted the earlier proffered testimony of Lindstrom and George was improper. See *Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984).

The district court's conclusion that there was insufficient information presented to survive summary judgment with respect to [*495] whether a Henry Vogt product was a substantial factor in Lindstrom's illness was correct, and thus we affirm the district court's grant

of summary judgment in Vogt's favor. Based on the information properly before the district court at the time that the motion for summary judgment was filed, there was insufficient evidence to connect Lindstrom with any [**14] Henry Vogt product or to connect a Henry Vogt product with asbestos that caused Lindstrom's illness. Lindstrom almost certainly could not have handled the original packing or gasket material, and this fact compels the conclusion that any asbestos that he may have been exposed to in connection with a Henry Vogt product would be attributable to some other manufacturer. According to *Stark*, Henry Vogt cannot be held responsible for material "attached or connected" to its product on a claim of a manufacturing defect. See *Stark*, 21 Fed. Appx. at 381; cf. *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir. 1986) ("The component part manufacturer is protected from liability when the defective condition results from the integration of the part into another product and the component part is free from defect."); see also *Stark*, 21 Fed. Appx. at 378 ("An asbestos-containing product, even one with a warning label, is not inherently defective as a matter of law.").

B. *Goulds Pumps, Inc.*

The district court granted summary judgment in favor of Goulds Pumps, Inc. based on a finding that plaintiffs-appellants had failed [**15] to produce evidence that Goulds Pumps' products had caused Lindstrom's illness. When listing the manufacturers of the water pumps on board the various vessels on which he worked, Lindstrom mentioned Goulds, among others. However, when Lindstrom was asked which manufacturers' pumps were most prevalent, he stated, "It depends on what ship you went on. Some of them used Aurora pumps, some of them used Worthington pumps, it all depends." Lindstrom did not mention Goulds Pumps as one of the prevalent types of pumps. Lindstrom testified that the packing material used to repack the pumps contained asbestos. [***6] Lindstrom identified several companies that manufactured the replacement packing used in water pumps, none of which was Goulds Pumps. It does not appear that George ever specifically mentioned Goulds Pumps in his deposition. George testified that Lindstrom spent approximately ten percent of his time working with gaskets and packing. George also testified that the replacement packing material was primarily provided by the shipping company. n3

n3 The affidavits filed by Lindstrom following the motions for summary judgment, discussed *supra*, also contain statements from Lindstrom and George specifically identifying Goulds Pumps as prevalent on the ships. For the reasons

stated above, we do not consider these affidavits in reviewing the district court's ruling.

[**16]

The information before the district court was insufficient to create an issue of material fact regarding whether any Goulds Pumps product was a substantial factor in Lindstrom's illness. The information fails to establish a sufficient link between a Goulds Pumps product and Lindstrom or between the asbestos causing Lindstrom's illness and a Goulds Pumps product. The cursory treatment plaintiffs-appellants' brief affords their argument that the district court erred in granting summary judgment does not contain any viable reason that the district court's decision was incorrect. As a result, we affirm the district court's grant of summary judgment in favor of Goulds Pumps.

[*496] *C. Coffin Turbo Pump, Inc.*

The district court granted summary judgment in favor of Coffin Turbo Pump, Inc. based on a finding that plaintiffs-appellants had failed to produce evidence that Coffin Turbo Pump's products had caused Lindstrom's illness. Lindstrom testified that Coffin manufactured most of the feed pumps on the vessels upon which he worked. Lindstrom testified that new Coffin pumps do not come with any insulation and that Coffin did not send insulation at the time it delivered the pumps. Lindstrom [**17] stated that any insulation put on a Coffin pump was probably provided by the shipyard. Lindstrom also testified that the replacement gaskets were not Coffin products. Lindstrom further testified regarding graphite-coated packing rings on the pumps as well as the packing in the valve. Lindstrom stated that he replaced the original packing rings, which were manufactured by Coffin, "many times" and they usually slid right off and were not dusty. Lindstrom testified that the new rings tended to be dusty when they were being put on but stated that he did not know whether the dust contained asbestos. It is unclear from the record whether the replacement packing rings were manufactured by Coffin.

Lindstrom also testified that he worked on the asbestos packing in Coffin pumps in the valve stem many times. Lindstrom testified that he knew that the packing was asbestos packing because it was hot. Finally, Lindstrom testified that he replaced gaskets on the pump throttles approximately twelve times. Lindstrom testified that the replacement gaskets were not Coffin products. William Kammerzell, an individual with whom Lindstrom had worked aboard The Allison Lykes for various periods between 1989 [**18] and 1991, also testified regarding Lindstrom's exposure to Coffin products. Kammerzell testified that Coffin produced special packing made especially for their pumps. Kammerzell testi-

fied that he had observed Lindstrom repacking Coffin pumps. He testified that "asbestos products are everywhere on U.S. merchant vessels."

The information before the district court at the time of the summary judgment motion does not establish a question of material fact regarding the issue of whether a Coffin Turbo product was a substantial factor in Lindstrom's illness, and therefore, we affirm the district court's grant of summary judgment in Coffin Turbo's favor. The information presented establishes that the only asbestos-containing products, aside from the graphite-coated packing rings, to which Lindstrom was exposed in connection with any Coffin Turbo products were not manufactured by Coffin Turbo, but rather products from another company that were attached to a Coffin product. Coffin Turbo cannot [***7] be held responsible for the asbestos contained in another product. See *Stark*, 21 Fed. Appx. at 381; *Koonce*, 798 F.2d at 715.

With respect to the graphite-coated [**19] packing rings, Lindstrom testified that the original rings on the product were manufactured by Coffin Turbo and that the packing rings contained asbestos. Lindstrom also testified that the rings "slid[] right off" and were not dusty. This court has held that in order to hold a defendant liable in an asbestos case, the plaintiff must show, at a minimum, exposure to asbestos dust. *Anjeski v. Acands, Inc.*, 902 F.2d 32, 1990 WL 58191, at * 5 (6th Cir. 1990). Lindstrom testified that the replacement packing rings were dusty; however, it is not clear that the replacement rings were Coffin Turbo products, and further, Lindstrom did not know whether the dust on the replacement rings contained asbestos. It is therefore not reasonable to infer from Lindstrom's testimony [**497] that he was exposed to asbestos dust from the Coffin Turbo packing rings, and thus, he cannot show that the rings were a substantial factor in his illness.

D. *Ingersoll Rand Company*

The district court granted summary judgment in favor of Ingersoll Rand Company based on a finding that plaintiffs-appellants had failed to produce evidence that Ingersoll Rand's products had caused Lindstrom's illness. [**20] Lindstrom testified that Ingersoll Rand manufactured most of the air compressors on the ships on which Lindstrom worked during his lifetime. Lindstrom testified that sheet packing containing asbestos was used with air compressors. He stated that he personally used sheet packing with water pumps, steam joints, and valves, but it is unclear whether he dealt with sheet packing in connection with an air compressor. Lindstrom did not testify that Ingersoll Rand was a manufacturer of the sheet packing. Lindstrom also testified that Ingersoll Rand provided replacement gaskets in kits and that these gasket kits did not have asbestos in them. George testified

that Ingersoll Rand manufactured pumps, but he was unable to remember whether any Ingersoll Rand product was present upon The Almeria Lykes, the one ship on which he and Lindstrom served together.

The information before the district court at the time of the summary judgment motion was insufficient to create any question of material fact with regard to the question of whether an Ingersoll Rand product was a substantial factor in Lindstrom's illness. Lindstrom failed to identify any link between an Ingersoll Rand product and any product [**21] containing asbestos with which he came in contact. Even if Lindstrom's testimony is sufficient to establish that he came in contact with sheet packing material containing asbestos in connection with an Ingersoll Rand air compressor, Ingersoll Rand cannot be held responsible for asbestos containing material that it was incorporated into its product post-manufacture. See *Stark*, 21 Fed. Appx. at 381; *Koonce*, 798 F.2d at 715. Lindstrom did not allege that any Ingersoll Rand product itself contained asbestos. As a result, plaintiffs-appellants cannot show that an Ingersoll Rand product was a substantial factor in Lindstrom's illness, and we therefore affirm the district court's grant of summary judgment in Ingersoll Rand's favor.

E. *Garlock Sealing Technologies, LLC*

The district court granted summary judgment in favor of Garlock Sealing Technologies, LLC based on a finding that plaintiffs-appellants failed to produce evidence that Garlock Sealing's products had caused Lindstrom's illness. Garlock Sealing conceded that it manufactured asbestos-containing as well as non-asbestos containing products. Lindstrom did not identify Garlock as a manufacturer [**22] of sheet packing material and did not identify any exposure to asbestos in connection with a Garlock Sealing product. George testified in his deposition that he recalled seeing Garlock products on The Almeria Lykes. However, George testified that he was not able to distinguish Garlock products, or any product, for that matter, which contains asbestos from those that do not. Similarly, Kammerzell at first stated that he was "almost certain" that the Garlock sheet packing [***8] contained asbestos, but then admitted that he did not know whether all of the Garlock sheet packing material on The Allison Lykes was asbestos-containing, though he stated that some of it contained asbestos. Kammerzell also stated that he was incapable of visually distinguishing between Garlock [*498] products that contained asbestos and those that did not.

Lindstrom did not create an issue of material fact such that he could properly withstand Garlock Sealing's summary judgment motion. While Kammerzell stated that some of the Garlock sheet packing contained asbestos and Garlock itself admitted production of asbestos-

containing products, this evidence is insufficient to raise an issue of material fact. To withstand [**23] the summary judgment motion, Lindstrom had to produce evidence that this asbestos-containing product was a substantial factor in his illness. Because he did not specifically testify regarding Garlock at all, and his other two deponents admitted that they could not tell whether any sheet packing material handled by Lindstrom contained asbestos, the district court properly granted summary judgment in Garlock's favor. See *Stark*, 21 Fed. Appx. at 376 (mere showing that manufacturer's asbestos-containing product was on the premises of plaintiff's workplace insufficient for liability to attach to defendant); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986) (same); *Roberts v. Owens-Corning Fiberglas Co.*, 726 F. Supp. 172, 174 (W.D. Mich. 1989) (same).

F. *John Crane, Inc.*

With respect to defendant-appellant John Crane, Inc., the district court found, following a bench trial, that plaintiffs-appellants had failed to meet the burden of proving that John Crane's products caused Lindstrom's illness. In so holding, the district court relied on the un rebutted testimony of John Crane's experts. This expert testimony [**24] established that (1) John Crane products do not release more than background levels of asbestos, and (2) release of quantities of asbestos fibers below background levels are not dangerous. Plaintiffs-appellants do not challenge any aspect of the district court's factual findings.

Plaintiffs-appellants first argue that, in applying *Stark*, the district court used the wrong legal standard in determining whether John Crane, Inc. was liable. Plaintiffs-appellants argue that the *Stark* standard, which requires the plaintiff to show a substantial exposure to a particular defendant's product for a substantial period of time, is only appropriate where the plaintiff relies on circumstantial evidence alone. However, plaintiffs-appellants fail to articulate a standard that they claim is more appropriate, saying only that "once the mesothelioma is diagnosed, it is impossible to rule out any of Mr. Lindstrom's exposures as being substantially contributory." Their argument appears to be that a showing of any level of asbestos exposure attributable to John Crane's products was sufficient for the court to have entered a judgment in their favor.

We reject plaintiffs-appellants' argument on [**25] this point. The district court did not use the wrong standard in reviewing plaintiffs-appellants' products liability claim. The *Stark* opinion notes that expert testimony is not required. 21 Fed. Appx. at 376. Plaintiffs-appellants apparently interpret this statement to mean that where expert testimony is offered, a plaintiff is no longer re-

424 F.3d 488, *, 2005 U.S. App. LEXIS 21010, **;
2005 FED App. 0400P (6th Cir.), ***, 2005 AMC 2425

quired to show substantial exposure. The *Stark* opinion and general logic may suggest that, where an expert witness can testify unequivocally that a defendant's product was the source of the illness, a plaintiff does not need to rely on proof of substantial exposure to establish causation. In this case, however, plaintiffs-appellants presented no such expert. In fact, their only expert who tested John Crane's products failed to measure the amount of asbestos fibers released in the air from the products. Thus, plaintiffs-appellants' theory of liability does not fit within any possible exception to *Stark*. [*499] The district court properly applied the *Stark* reasoning.

Plaintiffs-appellants also claim that the district court erred in failing to address their strict liability and failure to test theories. Plaintiffs-appellants' [*26] argument that the district court failed to address their strict liability

claim is simply wrong; the district court considered and rejected this [***9] claim in its opinion. Plaintiffs-appellants cite no law in support of their failure to test theory; rather, they cite cases concerning a failure to warn theory. Indeed, plaintiffs-appellants do not appear to have put forth any argument regarding a "failure to test" theory before the district court. The district court considered and correctly rejected plaintiffs-appellants' failure to warn theory in its opinion as well. Thus, plaintiffs-appellants' arguments regarding the district court's ruling in favor of John Crane, Inc. are unavailing and we therefore affirm the district court's decision.

III.

For the foregoing reasons, we affirm the district court's rulings with respect to all defendants.

Katherine E. Mason, administratrix, n1 & another n2 v. General Motors Corporation & another n3

n1 Of the estates of Robert L. Day, Sr., and Robert L. Day, Jr.
n2 Marguerite M. Day.
n3 Donahue Chevrolet, Inc.

No. M-3865

Supreme Judicial Court of Massachusetts

397 Mass. 183; 490 N.E.2d 437; 1986 Mass. LEXIS 1223; CCH Prod. Liab. Rep. P10,987; 42 U.C.C. Rep. Serv. (Callaghan) 1553

October 7, 1985, Argued
March 28, 1986, Decided

PRIOR HISTORY: [*1]**

Middlesex.

Civil action commenced in the Superior Court on August 31, 1976.

A motion for partial summary judgment was heard by *Andrew G. Meyer, J.*, and the case was tried before *George N. Hurd, Jr., J.*

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION:

Judgments affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Richard K. Donahue (Jerry E. Benezra with him) for the plaintiffs.

Patrick F. Brady (Andrew D. Kaizer with him) for General Motors Corporation. [***3]

Joseph B. Bertrand for Donahue Chevrolet, Inc.

JUDGES:

Hennessey, C.J., Wilkins, Liacos, Lynch, & O'Connor, JJ. Liacos, J., dissenting.

OPINIONBY:

O'CONNOR

OPINION:

[*184] [**438] This is a motor vehicle tort case arising out of a fatal accident involving a 1976 Chevrolet Corvette automobile manufactured by General Motors Corporation (General Motors) and owned by Donahue Chevrolet, Inc. (Donahue Chevrolet). In the complaint, Katherine E. Mason, as administratrix of the estates of Robert L. Day, Sr., and Robert L. Day, Jr., and as representative of the decedents' next of kin, made claims for conscious suffering and wrongful death against General Motors and Donahue Chevrolet due to negligence and breach of warranty. On the same grounds, Mason, as the temporary conservator of the estate of Marguerite M. Day, and [**439] thereafter, Marguerite M. Day on her own behalf sought consequential damages and damages for loss of consortium. The complaint was subsequently amended to add claims for negligent infliction of emotional distress against the defendants. Prior to trial, Donahue Chevrolet moved for summary judgment on the breach of warranty counts against it on the ground that [***4] there was "no allegation that the vehicle in question was sold or leased by the defendant to any of the plaintiffs or their decedents." The motion was granted. After a lengthy trial, the jury returned verdicts for the defendants on all the remaining counts. The plaintiffs appeal from the allowance of Donahue Chevrolet's motion for summary judgment and from the judgment entered for General Motors. We transferred this case from the Appeals Court on our own motion. There was no error.

397 Mass. 183, *; 490 N.E.2d 437, **;
1986 Mass. LEXIS 1223, ***; CCH Prod. Liab. Rep. P10,987

[*185] For introductory purposes only, we summarize the facts the jury could have found based on the evidence introduced at trial. On the morning of April 21, 1976, Robert L. Day, Sr., and his son, Robert L. Day, Jr., were killed when the automobile they were driving, a 1976 Chevrolet Corvette Stingray, struck a cable guardrail on Route 111 in Groton. Prior to the accident, Donahue Chevrolet had used the accident vehicle for demonstration purposes, and the vehicle had been driven to and from the dealership by the general manager of Donahue Chevrolet. On the morning of the accident, the Days went to Donahue Chevrolet to inquire about service for a vehicle which the elder Day had recently purchased [***5] from the dealership. During a conversation with the general manager, the elder Day mentioned that his son had never had a ride in a Corvette and asked permission to take the accident vehicle for a drive. The general manager responded affirmatively to his request and gave him the keys to the vehicle. Approximately fifteen minutes later, the Days were fatally injured.

Although no one observed the accident, the evidence indicated that the elder Day lost control of the vehicle and the vehicle skidded off the road and collided with a two-cable guardrail. There was expert testimony that the vehicle was travelling between seventy and eighty miles an hour at the time of the accident. At the point of impact, it could have been found that the upper cable rode over the hood of the car, cut through the "A pillars" on either side of the windshield, and virtually decapitated the Days.

1. Summary Judgment.

Donahue Chevrolet argues that, even if the breach of warranty claims against the dealership were improperly dismissed, the plaintiffs are estopped from litigating those claims on remand because of the jury verdicts for General Motors on the breach of warranty claims asserted against [***6] it. If we were to agree with Donahue Chevrolet's estoppel argument, it would be unnecessary for us to consider whether the judge was correct in allowing the summary judgment motion.

We agree that the plaintiffs should be estopped from relitigating claims that the vehicle was defectively designed. But the [*186] record before us does not permit us to conclude that the plaintiffs' breach of warranty claims against Donahue Chevrolet are limited to design defects. The amended complaint is not so confining, and we have been furnished with no affidavits or other materials which would justify the conclusion that the plaintiffs' claims do not include defects arising after delivery of the vehicle to Donahue Chevrolet. If the plaintiffs' breach of warranty claims against Donahue Chevrolet were otherwise sufficient to withstand a motion to dismiss, which we hold they were not, the plaintiffs would

not be precluded from presenting claims they never have had the opportunity to present. Surely the plaintiffs' failure to present evidence of post-delivery defects at trial, after Donahue Chevrolet's motion to dismiss the breach of warranty claims against it had been allowed, would not bar [***7] the plaintiffs from litigating those claims for the first time on remand.

Having concluded that the plaintiffs would not be estopped from litigating their [***440] breach of warranty claims against Donahue Chevrolet we come to the question whether summary judgment was correctly granted. As we have noted, the record appendix does not show what documents were presented to the judge in connection with Donahue Chevrolet's summary judgment motion. In their brief in this court, however, the plaintiffs rely on Donahue Chevrolet's answers to interrogatories as establishing, for the purpose of dealing with the summary judgment motion, that the accident happened while the elder Day, as a potential customer and with Donahue Chevrolet's permission, was testdriving the vehicle. We consider the motion on that basis. The parties agree that the issue is whether, as Donahue Chevrolet contends, a sale, or a contract to sell, or a lease is necessary in order for a warranty of merchantability to be implied under Massachusetts law. If Donahue Chevrolet's contention is correct, as we hold it is, the judge properly allowed the motion for summary judgment.

General Laws c. 106, § 2-318 (1984 ed.), [***8] provides in pertinent part that "[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages [*187] for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods." The plaintiffs argue that, although there was no privity between the Days and Donahue Chevrolet, the Days were potential customers trying out the accident vehicle and therefore they were persons "whom the . . . supplier [Donahue Chevrolet] might reasonably have expected to use, consume or be affected by" the vehicle. The plaintiffs conclude that, if the vehicle was defective when the Days took possession of it, and their injuries and death were caused by the defect, they are entitled to damages from Donahue Chevrolet on a breach of warranty theory.

It is true, of course, that under *G. L. c. 106, § 2-318*, lack of privity between a plaintiff and a defendant is not a defense to a [***9] claim for breach of an implied warranty of merchantability. But, the fact that lack of privity is not a defense to a breach of warranty claim sheds no light on the logically prior question whether a warranty has indeed been made. Despite the motion's

imperfect statement of grounds for the grant of summary judgment, the principal question raised by the motion is whether Donahue Chevrolet warranted the vehicle to anyone -- not whether the Days or the plaintiffs may claim the benefit of any warranty that may have been made.

The Uniform Commercial Code was enacted in this Commonwealth in 1957, effective October 1, 1958. St. 1957, c. 765. *General Laws c. 106, § 2-314*, as appearing in St. 1957, c. 765, § 1, provides in material part that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." That section creates and defines an implied warranty of merchantability, and it also prescribes the type of transaction in which a warranty of merchantability is implied, namely a contract for the sale of goods. In turn, *G. L. c. 106, § 2-106*, as appearing in St. 1957, c. 765, § 1, defines a contract [***10] for the sale of goods as including both a present sale of goods and a contract to sell goods at a future time. Section 2-106 also [***188] provides that a "'sale' consists in the passing of title from the seller to the buyer for a price." Read together, §§ 2-314 and 2-106 provide that a warranty of merchantability is implied in two situations: (1) when title to goods passes for a price, and (2) when a contract is made for the future passing of title to goods for a price.

The function of *G. L. c. 106, § 2-318*, as appearing in St. 1957, c. 765, § 1, was not to create or define a warranty, or to determine the type of transaction in which a warranty would be implied, but rather was to describe the class of persons who would benefit from warranties recognized elsewhere in the statute. Originally, that class [***441] of persons was limited to members of the family or household of the buyer and to the buyer's guests, but the class was subsequently enlarged by St. 1971, c. 670. That statute amended *G. L. c. 106, § 2-318*, to extend the statutorily recognized warranties to all persons "whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be [***11] affected by the goods." Then, St. 1973, c. 750, struck *G. L. c. 106, § 2-318*, and inserted a new § 2-318 in its place.

As appearing in St. 1973, c. 750, § 1, § 2-318 provided, in pertinent part, as follows: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. The manufacturer, seller, lessor or supplier may not exclude or limit the

operation of this section." (Emphasis added.) Statute 1973, c. 750, further provided that the new § 2-318 "shall apply to leases which are made and to injuries which occur after the effective date of [the] act." St. 1973, c. 750, § 2. n4 As we have explained, the fact that lack of privity is not a [***189] defense to a breach of warranty claim against a lessor or anyone else does not establish the existence of warranties in connection [***12] with particular transactions. Nevertheless, although § 2-314 has never been amended to include leases as transactions in which a warranty of merchantability is implied, it is clear that in enacting St. 1973, c. 750, the Legislature viewed leases as transactions in which the law implies a warranty. Recognizing that fact, we said in *Back v. Wickes Corp.*, 375 Mass. 633, 639 (1978), that "[t]he Legislature has sanctioned the judicial extension of warranty liability, in a proper case, to non-sales transactions such as commercial leases. St. 1973, c. 750, further amending *G. L. c. 106, § 2-318*."

n4 The last amendment to *G. L. c. 106, § 2-318*, provides: "Section 2-318 of chapter 106 of the General Laws, as most recently amended by section 1 of chapter 750 of the acts of 1973, is hereby further amended by striking out the last sentence and inserting in place thereof the following sentence: -- All actions under this section shall be commenced within three years next after the date the injury and damage occurs." St. 1974, c. 153.

[***13]

Thus, in Massachusetts, under *G. L. c. 106, § 2-314*, a warranty of merchantability is implied in present sales of goods and in contracts for the future sale of goods, and, as a result of judicial extension of warranty liability sanctioned by the Legislature, § 2-318, a warranty of merchantability is implied in leases of goods. See *Back v. Wickes Corp.*, *supra* at 639. There is no statutory language, however, that reasonably may be construed as either creating or sanctioning the judicial creation of a warranty in connection with a bailment of the kind that occurred in this case. It is true, as the plaintiffs have been careful to remind us, that we have said that "[a]mendments to the Massachusetts version of the Uniform Commercial Code make clear that the Legislature has transformed warranty liability into a remedy intended to be fully as comprehensive as the strict liability theory of recovery that has been adopted by a great many other jurisdictions," *id.*, and that we have said that warranty liability in Massachusetts is "as comprehensive as that provided by § 402A of the Restatement [(Second) of Torts (1965)]." *Swartz v. General Motors Corp.*, 375 Mass. [***14] 628, 630 (1978). We also said in *Back v.*

397 Mass. 183, *; 490 N.E.2d 437, **;
1986 Mass. LEXIS 1223, ***; CCH Prod. Liab. Rep. P10,987

Wickes Corp., *supra* at 640, that "[t]he Legislature has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in *Restatement (Second) of Torts* § 402A (1965)." [*190] *Hayes v. Ariens Co.*, 391 Mass. 408, 412 (1984). *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 353 (1983). See *Wolfe v. Ford Motor Co.*, 386 Mass. 95, 97-98 (1982). Our statements were made in [**442] cases in which sales had in fact taken place. Once a transaction has occurred in which a warranty is implied by our statute, as in the cases cited above, the nature of the warranty and the parties benefited by it are the same as, or at least very similar to, the warranties and beneficiaries recognized in § 402A of the Restatement, and the remedies are congruent. However, unlike our warranty law, under § 402A an injured plaintiff may recover damages resulting from a defective product regardless of whether title to the product passed or there was a contract to pass title to the product or the product was leased. We did not intend our statements to encompass transactions other than [***15] contracts of sale and leases. In any event, our statements did not insert in the statute words that the Legislature had not put there.

Our conclusion that our statute reasonably cannot be construed to provide the plaintiff with a remedy against Donahue Chevrolet finds support elsewhere. Numerous courts have declined to extend § 2-314 warranties to transactions other than sales. See, e.g., *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364, 367-368 (S.D. Tex. 1974); *Zanzig v. H.P.M. Corp.*, 134 Ill. App. 3d 617, 626-627 (1985); *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144, 1147 (Me. 1983); *Garfield v. Furniture Fair-Hanover*, 113 N.J. Super. 509, 511-512 (1971); *Baker v. Promark Prods. West, Inc.*, 692 S.W.2d 844, 847 (Tenn. 1985). Furthermore, the plaintiffs have not cited, nor has our research revealed, any case, in any of the forty-nine States that have adopted some version of article 2 of the Uniform Commercial Code, in which a court has implied a warranty of merchantability with respect to a bailment like the one involved in this case.

Understandably, in view of our previous declarations, the plaintiffs have not urged us either [***16] to create common law warranty remedies in addition to those mandated or sanctioned by the Legislature, or to hold that in this Commonwealth there is strict tort liability apart from liability for breach of warranty [*191] under the Uniform Commercial Code, *G. L. c. 106, § 2-314 - 2-318*. Nevertheless, we discuss that subject briefly. Whether liability for products that are defective without fault should be imposed in this Commonwealth, and, if so, what types of transactions should give rise to liability, are matters of social policy to which the Legislature has given its attention. In *Back v. Wickes Corp.*, *supra* at 639-640, and *Swartz v. General Motors Corp.*,

supra at 630-631, we decided to defer to the Legislature's judgment in those matters, and, we believe, rightly so. We are unwilling, therefore, to hold today that, apart from liability for breach of warranty under our statute, there may be liability without fault for defective products. The Legislature is free to change the law in that regard if it chooses to do so. We hold, therefore, that the judge correctly granted Donahue Chevrolet's motion for partial summary judgment.

2. The Trial.

The plaintiffs [***17] assign as reversible error two aspects of the trial. First, the plaintiffs argue that the judge improperly restricted their closing argument to the jury. There was evidence at trial that General Motors had not performed crash tests involving Corvette automobiles and cable guardrails. At trial, during the redirect examination of one of its witnesses, General Motors asked "why" this particular type of crash test had not been performed. The plaintiffs objected and the objection was sustained. General Motors then made several attempts to rephrase the question and on each occasion the plaintiffs objected and the objections were sustained. No explanation for the non-performance of the tests was introduced in evidence. Prior to closing arguments, General Motors moved to preclude the plaintiffs from commenting on the fact that General Motors had not conducted such tests. The judge granted the motion. The judge reasoned that it would not be fair to allow the plaintiffs to argue this fact to the jury when General Motors [**443] had been prevented from explaining to the jury its reasons for not conducting crash tests of Corvette automobiles and cable guardrails. While it can be [***18] argued that the judge's reasoning is not entirely correct, the ruling itself was proper nonetheless.

[*192] The plaintiffs argue that they should have been allowed to comment on General Motors' failure to conduct this particular type of crash test because this failure was a fact in evidence in the case. According to the plaintiffs, a party is entitled to comment during closing argument on facts in evidence. The plaintiffs, however, overstate the scope of proper closing argument. The scope of proper closing argument is limited to comments on facts in evidence that are relevant to the issues and the fair inferences which can be drawn from those relevant facts. The burden of establishing the relevance of a fact is on the party seeking to argue that fact to the jury.

In the present case, the plaintiffs did not demonstrate to the trial judge and do not demonstrate now how the fact that General Motors did not crash-test Corvettes into cable guardrails is relevant to their claims of negligence and breach of warranty against General Motors. For example, the plaintiffs have pointed to no evidence in the record indicating that, if such a test could have been per-

formed, useful engineering [***19] information would have been derived from the test, or that any such information would have enabled a prudent automobile manufacturer to have prevented the consequences of this particular accident. Furthermore, the plaintiffs have not shown that the performance of this particular type of crash test would have resulted in information not already known to General Motors. If General Motors already knew that the force generated from a collision between a Corvette travelling seventy miles an hour and a cable guardrail would sever the A-pillars of the vehicle, then General Motors' nonperformance of such a test would not constitute negligence. Standing alone, General Motors' failure to perform this particular type of crash test was simply not relevant and, therefore, the judge properly exercised his discretion in ordering the preclusion of comment on the subject.

Furthermore, the plaintiffs commented on this evidence despite the judge's ruling. Specifically, the plaintiffs stated in their closing, "The nose [of a Corvette] is such . . . that the last and only defense were the A-pillars. . . . Now, what did they give us, what did they give us? An untested pillar, a pillar that they [***20] can't tell you what it will resist." The plaintiffs cannot [*193] properly claim now that the judge's order, even if it was erroneous, was harmful and therefore reversible error.

Finally, the plaintiffs assert that reversal is required because the judge erroneously precluded them from reading to the jury as rebuttal evidence certain portions of the deposition of Dr. Shyne, an independent expert retained before trial by General Motors. Dr. Shyne was "noticed" by General Motors as a potential witness but was not called to testify at trial. Dr. Shyne had testified at his deposition, *inter alia*, that it was possible to design a pressure test of A-pillars with three-quarter inch steel cable and that it would have been possible to construct stronger A-pillars out of low alloy steel. The plaintiffs argue that because General Motors had noticed Dr. Shyne as a witness but then did not call him to testify at trial, it was unfair for the trial judge to preclude the plaintiffs from presenting portions of Dr. Shyne's deposition testimony as rebuttal evidence.

A trial judge has substantial discretion in determining whether to allow the presentation of rebuttal evidence. *Drake v. [***21] Goodman*, 386 Mass. 88, 92 (1982). "There is no right to present rebuttal evidence that only supports a party's affirmative case." *Id.* In their brief, the plaintiffs admit that the proffered testimony would have demonstrated "various critical elements of the plaintiffs' case." As such, the plaintiffs were not entitled as a matter of right to [**444] present portions of Dr. Shyne's deposition in rebuttal. In addition to any potential problems under *Mass. R. Civ. P. 32*, as amended, 392 Mass. 1105 (1984), regarding the intro-

duction of deposition testimony, the judge was well within his discretion in precluding the presentation of such evidence in rebuttal even if it was relevant.

Judgments affirmed.

DISSENTBY:

LIACOS

DISSENT:

Liacos, J. (dissenting).

I do not agree that the judge properly allowed the motion for summary judgment. Consequently, I dissent from the result reached by the court. I believe that the court's action today too firmly closes the door of implied warranty against those injured consumers whose commercial relationships [*194] with merchants do not satisfy the formalities of a completed lease or sale.

In Massachusetts, we have not formally adopted §§ [***22] 402A of the *Restatement (Second) of Torts* (1965). Instead, we have taken the view that the Legislature has made the law of warranty "a remedy intended to be fully as comprehensive as the strict liability theory of recovery that has been adopted by a great many other jurisdictions." *Back v. Wickes Corp.*, 375 Mass. 633, 639 (1978). Our "warranty" cause of action encompasses aspects of social policy normally associated with tort law and "jettison[s] many of the doctrinal encumbrances of the law of sales." *Id.* at 640. The court today unfortunately retrieves one of those encumbrances in its strict limitation of implied warranties. In my view, the court moves in the wrong direction. We should seek to join those jurisdictions that follow the enlightened views expressed in *Restatement (Second) of Torts § 402A, supra*. Indeed, until today, I had thought the court committed to that course. See, e.g., *Swartz v. General Motors Corp.*, 375 Mass. 628, 630 (1978).

Even if the court adhered solely to the policies of the Uniform Commercial Code, it gives too narrow a construction to the relevant provisions of the Code. *General Laws c. 106, § 2-314* (1984 ed.), provides [***23] in part: "(1) Unless excluded or modified by section 2-316, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." n1 Subsection (1) states that a warranty is implied not in the sale of goods, but in the "contract for their sale." As we pointed out in *Back v. Wickes Corp., supra*, the warranty applies equally to leases. [*195] See *ante* at 189. "'Contract for sale [or lease]' includes both a present sale [or lease] of goods and a contract to sell [or lease] goods at a future time." *G. L. c. 106, § 2-106 (1)* (1984 ed.). This definition is intended to limit the application of Article 2 of the

397 Mass. 183, *; 490 N.E.2d 437, **;
1986 Mass. LEXIS 1223, ***; CCH Prod. Liab. Rep. P10,987

Uniform Commercial Code to contracts for transactions in goods. It is not intended to limit its application to situations in which a sale or lease has already occurred. See Comment I to § 2-106 of the Uniform Commercial Code, 1 U. L. A. (Master ed. 1976). "'Contract' means the total legal obligation which results from the parties' agreement . . ." *G. L. c. 106, § 1-201 (1)* (1984 ed.). "'Agreement' means the bargain of the parties in fact as found in their language or [***24] by implication from other circumstances including course of dealing or usage of trade or course of performance . . ." *G. L. c. 106, § 1-201 (3)* (1984 ed.). This broad language demonstrates that the provisions of *G. L. c. 106* are to be construed liberally to achieve the intent of the parties. See *G. L. c. 106, § 1-102* (1984 ed.).

n1 Subsection (3) of *G. L. c. 106, § 2-314* provides: "Unless excluded or modified by section 2-316, other implied warranties may arise from course of dealing or usage of trade." I address primarily the application of subsection (1), the implied warranty of merchantability. It may be that the Legislature, through subsection (3), has provided a remedy for some plaintiffs otherwise foreclosed under subsection (1).

Although we have said that warranty in Massachusetts is as comprehensive as strict liability theory in other jurisdictions, cases like this one provide a demonstration that this may not be true. For an otherwise-foreclosed plaintiff in the future, an action based on the strict liability theory of § 402A of the *Restatement (Second) of Torts* might be appropriate.

[***25]

[**445] It is proper, therefore, in considering whether an implied warranty was made, to examine the entire bargain of the parties, as shown by the evidence or -- on a motion for summary judgment -- as revealed in the pleadings, depositions, answers to interrogatories, admissions and affidavits. *Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974)*. The record contains the answers of the defendant Donahue Chevrolet to the plaintiffs' interrogatories. Donahue Chevrolet admits that the elder Day was a potential customer given permission in accordance with Donahue's test-drive policy to drive the motor vehicle involved in the accident. In my view, the plaintiff should have been permitted to proceed.

The test drive was a bailment for mutual benefit. n2 The plaintiffs may have been able to demonstrate that the over-all transaction [*196] of an automobile sale or lease might include a bailment, which, standing alone,

would otherwise seem to have been gratuitous, n3 but, as one part of the entire transaction, would come within the statute. Cf. *Cheshire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355 (N.Y. Sup. Ct. 1967)* (transaction in its entirety a service contract, but plaintiff [***26] may be able to prove a sale; motion to dismiss denied); *Skelton v. Druid City Hosp. Bd., 459 So. 2d 818, 821 (Ala. 1984)* (use of suturing needle in surgery was "transaction in goods" raising implied warranty under UCC). It is conceivable that in the usage of the automobile trade, the loan of an automobile, or even the furnishing of chauffeured transportation, to a customer or potential customer might be considered part of the inducement, or consideration, for the sale or lease of an automobile. Cf. *Miller v. Hand Ford Sales, Inc., 216 Or. 567, 575 (1959)* (automobile loaned to service customer would create bailment for mutual benefit if bailor held out offer to public that in return for consideration of business to be transacted he would create this benefit for bailee). If such an integration of the relationship between the dealer and the customer were proved to be part of the parties' agreement, I would hold that from that transaction implied warranties arise. Because the contract may be for a future sale or lease, the automobile sold or leased need not yet have changed hands for the contract to exist.

n2. A bailment for mutual benefit is a contract in which the bailment was made and accepted for the purpose of deriving benefit or profit. A test drive of an automobile is a bailment for mutual benefit. See *Wilcox v. Glover Motors, Inc., 269 N.C. 473, 481 (1967)*. See also cases collected in *8 Am. Jur. 2d Bailments § 21* (1980). I find no difficulty in the concept that at least some bailments for mutual benefit come within the definition of leases as contemplated by the Legislature when it enacted St. 1973, c. 750.

[***27]

n3 "A distinction should be made between 'pure' gifts having no sales overtones, and those that are part of an advertising arrangement with the ultimate aim of making a sale. The former should be beyond the reach of the implied warranty of merchantability, whereas the latter can be considered so closely allied to selling as to become a sale for purposes of section 2-314." 2 W. Hawkland, *Uniform Commercial Code Series § 2-314:03*, at 323 (1984).

LEXSEE 487 N.E.2D 1374

Edward M. Mitchell, Jr., administrator, n1 v. Sky Climber, Inc. n2

n1 Of the estate of Edward M. Mitchell.

n2 Other defendants named in the plaintiff's complaint, as now amended, are not involved in this appeal.

No. N-3842

Supreme Judicial Court of Massachusetts

396 Mass. 629; 487 N.E.2d 1374; 1986 Mass. LEXIS 1141; CCH Prod. Liab.
Rep. P10,885

November 4, 1985, Argued

January 28, 1986, Decided

PRIOR HISTORY: [***1]

Norfolk.

Civil action commenced in the Superior Court Department on August 16, 1979.

The case was heard by *Richard S. Kelley, J.*, on a motion for summary judgment.

The Supreme Judicial Court transferred the case from the Appeals Court on its own initiative.

DISPOSITION:

Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff administrator appealed from the judgment of a Massachusetts appeals court, which granted defendant distributor summary judgment on the administrator's claims for negligence resulting from the accidental death of the administrator's decedent.

OVERVIEW: The administrator's claim was not that the distributor violated a duty to give instructions concerning the safe and proper rigging and use of the scaffolding on which the decedent was injured, but that by distribution of a instructional manual, the distributor owed an affirmative duty to warn of the defects that caused the death. The court affirmed and found that nothing in the manual showed that, although the distributor had no duty to warn, it voluntarily but negligently made representations in its manual upon which the decedent or his

employer relied in selecting the parts and assembling the scaffolding equipment. The manual did not speak to any of the conditions that resulted in the decedent's injury. Although the distributor had no duty to warn and made no voluntary but negligent statements in its manual, the question remained whether once it issued a manual, the distributor had a duty to warn against risks that caused the decedent's death. The administrator cited no case imposing on the manufacturer or supplier of a component part a duty, arising from the distribution of a manual or other information, to warn of risks that might be created solely by others.

OUTCOME: The summary judgment was affirmed.

LexisNexis(R) Headnotes

Torts > Products Liability > Duty to Warn

[HN1] A manufacturer of a product has a duty to warn foreseeable users of dangers in the use of that product of which he knows or should know. A manufacturer who advises prospective users concerning the use of its own product must provide complete and accurate warnings concerning dangers inherent in that product. A manufacturer is not held liable, however, for failure to warn of risks created solely in the use or misuse of the product of another manufacturer. The prevailing view is that a supplier of a component part containing no latent defect has no duty to warn the subsequent assembler or its customers of any danger that may arise after the components are assembled.

396 Mass. 629, *; 487 N.E.2d 1374, **;
1986 Mass. LEXIS 1141, ***; CCH Prod. Liab. Rep. P10,885

Torts > Products Liability > Duty to Warn

[HN2] A manufacturer's duty extends to remote users as well as to purchasers. The courts recognize, however, no duty on a manufacturer to set forth in customers' manuals a warning of a possible risk created solely by an act of another that would not be associated with a foreseeable use or misuse of the manufacturer's own product.

COUNSEL:

Andrea H. Loew for the plaintiff.

Andre A. Sansoucy (Philander Ratzkoff with him)
for the defendant.

JUDGES:

Hennessey, C.J., Wilkins, Abrams, Nolan, & Lynch,
JJ.

OPINIONBY:

WILKINS

OPINION: [***2]

[*629] [**1375] The plaintiff's decedent (Mitchell) died on July 28, 1979, as a result of a strong and sustained electric shock he received while working from movable scaffolding equipment attached to a building on Winter Street in Boston. The complaint, as now amended, alleges negligence against the [*630] defendant Sky Climber, Inc. (Sky Climber), which sold lift motors to the defendant Marr Scaffolding Company (Marr) which, in turn, sold or leased the lift motors and other scaffolding equipment to Mitchell's employer, Brisk Waterproofing Co., Inc.

A Superior Court judge heard the case on Sky Climber's motion for summary judgment, allowed the motion, and entered judgment for Sky Climber pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974). On our own we transferred the plaintiff's appeal here. We affirm the judgment.

The plaintiff makes no claim that the electrically powered lift motors sold by Sky Climber to Marr were defective in any respect. Sky Climber provided no other part of the scaffolding equipment. The claim is that Sky Climber violated a duty to give instructions concerning the safe and proper rigging and use of the scaffolding. The plaintiff's [***3] summary judgment material indicates that the scaffolding equipment lost power while Mitchell and another employee were attempting to move to another floor of the building on which they were working. Mitchell undertook to correct what appeared to be a loose connection between the main power cords leading to the two motors. In fact, improper rigging had strained the main power supply line, cutting the insula-

tion of a wire so that the live wire came in contact with an ungrounded metal junction box. Mitchell touched the junction box and was subjected to 220 volts of electricity for approximately five minutes. He died a few days later.

Sky Climber distributed manuals to its customers containing safety, rigging, operating, [**1376] and maintenance information. Mitchell's employer received those manuals frequently, and they were available to workers for review. Sky Climber distributed a manual with each lift motor it sold and also made manuals available for purchase by customers. In advising foremen as to their tasks, the field superintendent for Mitchell's employer took into consideration information in Sky Climber's manuals.

We may assume that there is a jury question whether [***4] the negligent assembly of the scaffolding equipment ultimately [*631] caused the short circuit and a jury question whether failure to ground the junction box was negligent. Sky Climber did not assemble or design the scaffolding. The plaintiff does not claim that Sky Climber's manual contained any error that led to the improper rigging of the scaffolding or to the use of defective equipment. Nor does he show that anyone was misled by any omission of a warning from the manual. Rather, the claim appears to be that because it distributed a manual, Sky Climber owed an affirmative duty to warn of the defects that caused Mitchell's injuries and death.

[HN1] A manufacturer of a product has a duty to warn foreseeable users of dangers in the use of that product of which he knows or should have known. *H.P. Hood & Sons v. Ford Motor Co.*, 370 Mass. 69, 75 (1976). A manufacturer who advises prospective users concerning the use of its own product must provide complete and accurate warnings concerning dangers inherent in that product. See *Fiorentino v. A.E. Staley Mfg. Co.*, 11 Mass. App. Ct. 428, 436 (1981). We have never held a manufacturer liable, however, for failure to warn [***5] of risks created solely in the use or misuse of the product of another manufacturer. See *Carrier v. Riddell, Inc.*, 721 F.2d 867, 869-870 (1st Cir. 1983), discussing Massachusetts law. The prevailing view is that a supplier of a component part containing no latent defect has no duty to warn the subsequent assembler or its customers of any danger that may arise after the components are assembled. See, e.g., *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 376 A.2d 88, 90 (Del. 1977); *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 324-325 (1977); *Frazier v. Materials Transp. Co.*, 609 F. Supp. 933, 935 (W.D. Pa. 1985); *Lockett v. General Elec. Co.*, 376 F. Supp. 1201, 1211 (E.D. Pa. 1974), aff'd, 511 F.2d 1394 (3d Cir. 1975).

396 Mass. 629, *, 487 N.E.2d 1374, **;
1986 Mass. LEXIS 1141, ***; CCH Prod. Liab. Rep. P10,885

The plaintiff's basic argument does not rest on a duty to warn that would have existed had Sky Climber not distributed the manual. We see nothing in the manual to show that, although Sky Climber had no duty to warn, it voluntarily but negligently made representations in its manual on which Mitchell or his employer (or others) relied in selecting the parts and assembling the scaffolding equipment. The manual did not say [*632] [***6] that junction boxes should (or should not) be grounded. Nor did it state how a scaffold should be rigged to avoid the risk of cutting the insulation of electric wires and thereby causing a short circuit.

Although Sky Climber had no duty to warn and made no voluntary but negligent statements in its manual, the question remains whether once it issued a manual, Sky Climber had a duty to warn against risks that caused Mitchell's death. The plaintiff cites no case imposing on the manufacturer or supplier of a component

part a duty, arising from the distribution of a manual or other information, to warn of risks that might be created solely by others. We recognize that [HN2] a manufacturer's duty extends to remote users as well as to purchasers. See *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 135 (1985); *Carter v. Yardley & Co.*, 319 Mass. 92, 96-97, 104 (1946). We recognize, however, no duty on a manufacturer to set forth in customers' manuals a warning of a possible risk created solely by an act of another that would not be associated with a foreseeable use or misuse of the manufacturer's own product. Compare *Schaeffer v. General Motors Corp.*, 372 Mass. [***7] 171, 174 (1977) (automobile manual should have warned of a foreseeable risk in [**1377] the use of a component part manufactured by the defendant).

Judgment affirmed.

CLARA NIEMANN, Administrator of the Estate of Vincent M. Niemann, Deceased,
Plaintiff, v. McDONNELL DOUGLAS CORPORATION, ET AL., Defendants

No. 85 5528

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
ILLINOIS

721 F. Supp. 1019; 1989 U.S. Dist. LEXIS 13118

June 22, 1989, Decided

June 22, 1989, Filed

LexisNexis(R) Headnotes

JUDGES:

[**1] William L. Beatty, United States District Judge.

OPINIONBY:

BEATTY

OPINION:

[*1020] ORDER

WILLIAM L. BEATTY, UNITED STATES DISTRICT JUDGE

This matter is before the court on General Dynamics Corporation's (General Dynamics) motion for summary judgment based upon the "government contractor's defense"; McDonnell Douglas Corporation's (McDonnell Douglas) motion for summary judgment based upon the "government contractor's defense"; and McDonnell Douglas' motion for summary judgment based upon the theory that certain asbestos strips which were originally on aircraft produced by McDonnell Douglas [*1021] had been replaced prior to the plaintiff's decedent having worked on the aircraft.

FACTS AND BACKGROUND

Plaintiff herein, Clara Niemann, Administratrix of the Estate of Vincent M. Niemann, Deceased, originally filed this action in state court on August 9, 1985. Initially, the state court action was against eight defendant corporations, six of which were subsequently dismissed from this case, leaving McDonnell Douglas and General Dynamics as defendants. The plaintiff seeks recovery for

the wrongful death of her husband, alleging that he died from asbestosis and lung cancer.

The complaint was originally brought in two counts, alleging that the defendants are liable as [**2] a result of the design and sale of aircraft containing asbestos chafing and rub strips on pieces of the engine cowling (covering). Count I was a strict liability claim and Count II seeks recovery for negligence based upon design defects and inadequate warnings. On November 2, 1988, this court granted summary judgment in favor of both defendants with respect to Count I, based upon the *Illinois Statute of Repose. Ill. Rev. Stat. 1985 Ch. 110, para. 13-213*. The remaining count is based upon the plaintiff's allegations that General Dynamics and McDonnell Douglas were negligent in designing certain aircraft and in failing to warn of potential health hazards with respect to certain portions of the inside of the aircraft engine cowling.

Plaintiff's decedent, Vincent M. Niemann, worked at the Scott Air Force Base Sheet Metal Shop from approximately 1963 to 1980. His position entailed performing repair work on aircraft manufactured by General Dynamics and McDonnell Douglas. The aircraft in question are: General Dynamics' T-29 and C-131 n1 and McDonnell Douglas' C-54 and C-118. Mr. Niemann's work also consisted of cleaning and repairing engine cowlings which included replacement of chafing [**3] or rub strips. Plaintiff alleges that during the period Mr. Niemann worked at Scott Air Force Base in the sheet metal shop, he was exposed to asbestos allegedly contained in these aircraft.

n1 The plaintiff erroneously designated the aircraft manufactured by General Dynamics as the C-118 and C-131. Apparently, none of the

parties dispute that the actual aircraft in question are the T-29 and C-131.

Mr. Niemann retired from this position on November, 1980, at age 63. In January of 1984 he was diagnosed as having lung cancer and on June 4, 1984, Mr. Niemann died, at age 68.

General Dynamics manufactured the T-29 and C-131 aircraft from the mid 1940's through the late 1950's pursuant to contracts with the United States Air Force. The last of these aircraft was sold and delivered to the U.S. Air Force in approximately 1956.

McDonnell Douglas originally manufactured the C-54 and delivered it to the Army Air Forces (predecessor of the United States Air Force) during World War II. The last C-54 aircraft manufactured by McDonnell Douglas was sold and delivered to the United States Air Force on January 22, 1946. The C-118 was manufactured and delivered to the Air Force and the Navy from [**4] 1949 to 1956. The last C-118 aircraft was manufactured by McDonnell Douglas and delivered to the Air Force on January 21, 1956.

Two of the pending motions for summary judgment are based upon the "government contractor defense," as adopted by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

APPLICABILITY OF GOVERNMENT CONTRACTOR DEFENSE

In *Boyle*, the Supreme Court recognized and set forth the scope, purpose and requirements of the Government Contract Defense.

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers [*1022] in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated - i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. [**5] The third condition is necessary because, in its absence, the displacement

of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision. *Boyle*, 108 S. Ct. at 2518.

In formulating the Government Contractor Defense, the *Boyle* Court analyzed whether the selection of the appropriate design for military equipment was a discretionary function within the meaning of the exception to the Federal Tort Claims Act (FTCA), which shields the government from liability in certain circumstances. n2 Arriving at the conclusion that the selection of appropriate design for military equipment is within the discretionary function of the government, the Court held that this selection

often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater [**6] combat effectiveness. And we are further of the view that permitting 'second-guessing' of these judgments, See *United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 2765, 81 L. Ed. 2d 660 (1984), through state tort suits against contractors would produce the same effect thought to be avoided by the FTCA exemption. *Boyle*, 108 S. Ct. at 2517-2518.

Thus, the court extended the exemption regarding discretionary functions of the government which is provided by the FTCA to military equipment contractors themselves. The Court's reasoning in so holding was based upon the potential passing of the financial burden of judgments against contractors to the United States itself.

It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that

state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with the federal policy and must be displaced.

Id. at 2518. (Footnote [**7] omitted).

n2 28 U.S.C. § 2680(a) exempts "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved is abused."

The plaintiff contends that the government contractor defense is inapplicable for several reasons. Initially, plaintiff argues that the defense does not apply with respect to these particular aircraft because of the "stock product" exception to the defense. In support of this position, the plaintiff cites the *Boyle* Court's example of a federal procurement officer ordering a quantity of stock helicopters, by model number, which happened to be equipped with the escape hatches opening outward, i.e., the defect which caused the injury in *Boyle*. Under this situation, the *Boyle* Court found that it would be impossible to say that the government had a significant interest in the particular feature, i.e., the escape hatches. *Boyle*, 108 S. Ct. at 2516.

The plaintiff urges that the specifications provided to the defendants were actually the government's way of quoting a "stock number". In support of this position, [**8] the plaintiff attaches the deposition of Thayne Flandars Taylor of McDonnell Douglas Corporation, which was taken in a separate [*1023] cause of action against McDonnell Douglas. In the deposition, he states that the asbestos used in the aircraft at issue in that case was purchased commercially from Johns-Manville. (See Exhibit 1 to Plaintiff's Memorandum Opposing Motions for Summary Judgment). Further, Mr. Taylor, referring to the thickness and width of the asbestos rub strip, states that the military "doesn't even have this as a requirement of how it should be. There is no military specs for it so we buy commercial." *Id.* From this statement, the plaintiff argues that there was no military specification for the asbestos containing component part on the aircraft at issue. Thus, according to the plaintiff, the government "virtually bought the asbestos -- containing aircraft parts 'off the shelf' or 'out of stock'." From this, the plaintiff concludes that the government contractor defense does not apply.

Although the court is cognizant of the "stock product" exception to the government contractor defense, the court is unpersuaded by the plaintiff's analogy. The products at issue before the [**9] court are the aircraft themselves, and not each individual component part, nor is this a situation wherein the government merely ordered a quantity of a product. The defendants have presented to the court various declarations and affidavits of persons with actual knowledge of procurement of the aircraft. A review of the supporting documentation to the defendants' memoranda reveals that the government provided the defendants with detail specifications for the design and manufacture of the aircraft. (See Declaration of General Gabriel Disosway, Exhibit 1 to Defendant General Dynamics' Factual Memorandum in Support of its Motion for Summary Judgment; Affidavit of Donald W. Douglas, Jr., Exhibit A to Defendant McDonnell Douglas' Motion for Summary Judgment; Declaration of Mort Rosenbaum, Exhibit 3 to General Dynamics' Memorandum; Exhibit 14 and 15 to General Dynamics' Memorandum; Exhibits 1 through 22 to Exhibit A, Affidavit of Donald W. Douglas, Jr., attached to Defendant McDonnell Douglas' Memorandum in Support of its Motion for Summary Judgment; Exhibit B, Affidavit of Larry L. Fogg, and the attached Exhibits 1 through 4, to McDonnell Douglas' Memorandum in Support of its Motion for [**10] Summary Judgment.) It is clear that the procurement of the aircraft at issue involved a great deal more than merely a procurement officer contacting General Dynamics and McDonnell Douglas to order a quantity of these aircraft, and that the aircraft in question were indeed "military equipment" and not, as plaintiff suggests, merely "stock products."

The plaintiff further urges that the government contractor defense is inapplicable in that the asbestos containing product was of such a commercial nature that there can be no federal interest, and thus no conflict exists between federal and state law. The plaintiff argues that the government must have a significant interest in the particular feature it ordered the contractor to make. (See Plaintiff's Memorandum in Opposition to Motions for Summary Judgment at Page 11). As previously stated, the particular products at issue in the instant case are the aircraft themselves and not, as plaintiff urges the court to find, the pieces of asbestos that was a component of the aircraft. A conflict therefore exists between federal and state law. Through requiring the military equipment to contain asbestos the government exercised a discretionary function. [**11] State law would hold a government contractor liable for utilizing asbestos as required by the government contract, thereby placing the contractor in a paradoxical position in relation to these diametrically opposed theories.

It is clear that the selection of the appropriate design for military equipment to be used by the Air Force is governed by federal common law, and the state law must be displaced. *Boyle*, 108 S. Ct. at 2517.

As this court has previously stated, the decision to use asbestos tape in the aircraft is clearly a discretionary decision of the government. (See *Fairchild Republic Company v. United States and the Department of the Air Force*, 712 F. Supp. 711 (S.D.Ill. 1988). Thus, under the *Boyle* decision, the use of asbestos strips in these [*1024] particular aircraft falls within the government contractor defense, in that this decision by the Air Force to use the asbestos was a discretionary function. n3

n3 It is clear from the record that the decision to use asbestos was made by the government previous to the manufacture of the aircraft in issue. (See Exhibit 1 to post hearing supplemental filing to General Dynamics Corporation's Motion for Summary Judgment; Exhibit 3 to Exhibit A of Factual Exhibits to Memorandum in Support of Defendant McDonnell Douglas Corporation for Summary Judgment Based Upon the Government Contract Defense).

[**12]

The plaintiff further contends that the government contractor defense would not be applicable in the event that the contracts contained a third party liability insurance clause. In support of this contention, the plaintiff states that "it is elementary that before a party can assert the government defense, it *ought* to produce the contract." (Plaintiff's Memorandum in Opposition at Page 9). (Emphasis added). Plaintiff refers the court to a different case involving General Dynamics wherein the contract indeed contained a general liability clause. The plaintiff has failed to present to the court any evidence that such a clause was contained in the contracts involved in the procurement of the T-29, C-131, C-54 or C-118; further, plaintiff fails to cite any authority for this position. Thus, having nothing before the court with respect to such a clause, the court need not consider what effect, if any, a third party liability clause in the contracts would have on the government contractor defense. n4

n4 Although it was not necessary, defendant General Dynamics has presented to the court a declaration of W.J. Bullocks, Chief of Aircraft Logistics Support at General Dynamics Conair Division, which states that he has reviewed all the contracts and can testify that they do not contain the insurance liability to third persons clause as

the plaintiff suggests would be in the General Dynamics' contracts, based upon the other suit filed against General Dynamics in *Hutchinson v. General Dynamics*.

[**13]

Finally, the plaintiff argues that the government contractor defense is inapplicable in "failure to warn" cases. In support of this position, the plaintiff argues that under the third prong of the *Boyle* test, the defendants must demonstrate that any warning about the possible hazards associated with a proposed design must be given to the government prior to the approval of the design specifications, reasoning that "otherwise the underlying rationale for the test would be frustrated." (See Plaintiff's Memorandum Opposing Motions for Summary Judgment at Page 14). Although the issue of whether the government contractor defense should apply in failure to warn cases was not specifically addressed by the court in *Boyle*, this court is of the opinion that the test, as articulated in *Boyle*, includes allegations of a defendant's failure to warn. In order to utilize the government contractor defense, the contractor must prove government approval of reasonably precise classifications, that the equipment conforms to the specifications, and that the supplier warned the government about dangers known to the supplier but not to the government. *Boyle*, 108 S. Ct. at 2518.

The policy behind the government [*14] contractor defense, as previously noted, supports the interpretation that the government contractor defense applies in failure to warn cases.

We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision [28 U.S.C. § 2680(a).] It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting 'second-guessing' of these judgments, See *United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 2765, 81 L. Ed. 2d 660 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would

ultimately be passed through, substantially if not totally, to the United States itself, [*1025] since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the government-ordered designs. [**15] *Boyle*, 108 S. Ct. at 2517-18.

Further, the court stated that "it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." *Id.* at 2518.

The liability for failure to warn as asserted herein, i.e., that the contractors failed to warn the government about the hazards of asbestos in military equipment, "would have the same negative effect on military procurement as outlined in *Boyle*, 108 S. Ct. at 2515. Further, the government's decision on the contents of [the aircraft in question] involves the same balancing of technical, military and even social considerations protected in *Boyle*. *Id.* 108 S. Ct. at 2517." *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988).

Based upon the foregoing, it is clear to the court that the defendants are afforded the opportunity to utilize the government contractor defense. Accordingly, the court must determine whether the defendants have satisfied the three elements of the government contractor defense, as set forth in *Boyle*, in order to avail themselves of its protection.

APPROVAL OF [**16] REASONABLY
PRECISE SPECIFICATIONS.

DEFENDANT GENERAL DYNAMICS

As defendant General Dynamics' Memorandum points out, in the late 1940's and early 1950's the Air Force had already established detailed generic standards and specifications which controlled the manufacture of asbestos-containing parts for use in military aircraft. (See Attachment No. 1 to General Dynamics' Post-Hearing Supplemental Filing to General Dynamics Corporation's Motion for Summary Judgment, MILITARY SPECIFICATIONS Mil-C-7637 entitled "Cloth, Coated, Asbestos" dated March 30, 1953.)

It is clear from the Memorandum, Declarations and documents attached thereto that the Air Force was specifically involved in the preparation and approval of the proposed specifications and drawings for the T-29 and C-131 aircraft. The concept of the aircraft originated with the Air Force, and the Air Force was closely involved in the preparation of the design specifications.

(Declaration of William C. Keller, Exhibit 2 to General Dynamics' Memorandum; Declaration of General Gabriel Disosway, Exhibit 1 to General Dynamics' Memorandum.) n5 A formal Air Force review by the Air Force Mock-Up Board of the proto-type T-29 and C-131 aircraft [**17] and their specifications was performed. Exhibits 1, 2 and 3 of General Dynamics' Memorandum. The purpose of this mock-up board was to review the design specification package and the prototype, direct changes to the design and ultimately approve the design package. *Id.*

n5 The declarations of Mort Rosenbaum and Irving Eggert demonstrate that there was a continual, back and forth discussion and exchange of technical and engineering information and expertise between the defendant and the Air Force. (See Exhibits 3 and 4 of General Dynamics' Memorandum.)

As demonstrated by Exhibit 16, a drawing used for the T-29 and C-131 aircraft, the drawing specifically references the use of asbestos and it further shows that certain aircraft components were made from "fabric 1-16 Neopren impregnated asbestos without wire 40 and wide 95 Johns-Manville." That material explicitly references the Air Force specification entitled Mil-C-7637, Attachment 1 to defendants' supplemental memorandum.

The plaintiff has presented nothing to controvert the declarations and documents referred to in the declarations to demonstrate an issue of material fact with respect to this element of the *Boyle* test. The [**18] declarations and documents overwhelmingly prove that there existed reasonably precise specifications for the aircraft and that the Air Force approved these specifications. *Ramey v. Martin-Baker Aircraft Corp.*, 874 F.2d 946, 1989 U.S. App. LEXIS 6390, 13 (4th Cir. 1989); *Smith v. Xerox*, 866 F.2d 135, 138 (5th [*1026] Cir. 1989); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989). n6 *Tillett v. J.I. Case Company*, 756 F.2d 591, 599 (7th Cir. 1985); *Nicholson*, 697 F. Supp. at 604; *Zinck v. ITT Corp.*, 690 F. Supp. 1331, 1336 (S.D. N.Y. 1988).

n6 Although General Dynamics suggest that the approval might even be no more than a rubber stamp from a federal procurement officer, this court agrees with the *Ramey* and *Trevino* Courts in that approval under the *Boyle* defense requires more than a rubber stamp. This distinction however is not particularly relevant vis-a-vis this cause of action and General Dynamics in that

there is abundant evidence demonstrating the Air Force's involvement in the design, development and production of the T-29 and C-131.

DEFENDANT MCDONNELL DOUGLAS

With respect to the first element of the government contractor defense, McDonnell [**19] Douglas points out that the use of asbestos in military aircraft designs was commonly approved by the United States Government. Federal specification SS-C-466, approved in 1949, is a government specification for asbestos sheet and tape. Affidavit of Donald W. Douglas, Jr. and Exhibit 5 attached thereto, to McDonnell Douglas' Memorandum. Exhibit 6 to the Douglas affidavit reveals that this specification was in effect until 1955 when it was superseded by SS-C-466a, which governed the quality requirements for asbestos cloth, thread and cloth procured by the federal government. Furthermore, Exhibit 3 to the Douglas affidavit, the handbook of instructions for airplane designers, reveals that asbestos was considered an extremely valuable heat resistant material, particularly in engine and cowling areas. As such, many different military aircraft, including the C-54 and the C-118, repeatedly used asbestos as a heat resistant material, in accordance with Government Specification Mil-G-7021. Douglas Affidavit, Exhibit 9 and 10 thereto.

The use of specific components of the aircraft, i.e., the use of asbestos chafing strips on the C-54 and C-118 aircraft, is called for on drawings for the aircraft. [**20] Government review and approval of all the design drawings was required before the contractor could commence production of military aircraft. Details of chafing strip design and materials were among the drawings which were required to be submitted for approval. Douglas Affidavit at Paragraph 10 and Exhibit 14 thereto.

The government's express approval of the asbestos parts in the design of the cowling assembly is evidenced by the signatures of the Army Air Forces and Navy Procurement officials in the Army and Navy approval blocks of engineering drawing No. 5074617. Douglas Affidavit and Exhibit 17 thereto; Exhibit B, Affidavit of Larry L. Fogg and Exhibits 3 and 4 thereto.

The government reviewed and approved the aircraft design at several stages prior to acceptance. The Army Air Forces, and, subsequently, the U.S. Air Force, maintained at the Douglas Plant a resident representative office, including a staff of engineers and procurement specialists. This group was directly responsible for the day to day supervision of the design and manufacture of the C-54 and C-118 aircraft and served as the liaison between government aircraft engineers at Wright Field and Douglas engineers and manufacturing [**21] managers. Douglas Affidavit at Paragraph 17. Furthermore, gov-

ernment engineers and inspectors frequently would visit the facilities throughout the manufacturing process. Douglas Affidavit at Paragraph 16. The aircraft in issue, underwent a final review at Wright Field before the purchase by the government. Douglas Affidavit at Paragraph 15. This review and approval of the C-54 and the C-118 encompassed a review and approval of the engine cowling assemblies, including the asbestos chafing strips. *Id.*

Plaintiff has failed to present the court with controverting affidavits, or other documentation, as prescribed by *Rule 56 of the Federal Rules of Civil Procedure* to create a genuine issue of material fact with respect to the government approval of the C-54 and C-118 aircraft. McDonnell Douglas has demonstrated that the Air Force developed, participated and approved [**1027] these aircraft throughout the course of the procurement, design and purchase of them. Such activity on the part of the Air Force with respect to these aircraft establishes that the Air Force approval of reasonably precise specifications, and thus the first element of the *Boyle* test has been satisfied by McDonnell Douglas. [**22] *Ramey v. Martin-Baker Aircraft Corporation*, 874 F.2d 946 (4th Cir. 1989); *Smith v. Xerox*, 866 F.2d at 138; *Trevino*, 865 F.2d at 1479-81; *Tillett*, 756 F.2d at 598; *Nicholson*, 697 F. Supp. at 604; *Zinck*, 690 F. Supp. at 1336.

Plaintiff argues that, in spite of the affidavits, declarations and documentary evidence, the defendants have failed to produce evidence demonstrating the exercise of discretionary judgment in the use of the asbestos-containing components. This allegation is neither supported by controverting evidence, nor is it an accurate assessment of the first prong of the *Boyle* test. The discretionary judgment involved in reaching the *Boyle* defense is the procurement of military equipment. Both defendants have demonstrated that the government exercised this discretion in the negotiations for the aircraft. The first prong of the *Boyle* test, therefore, requires that the government approve the reasonably precise specifications for the aircraft, and not, as plaintiff argues, for each individual component of the aircraft. *Boyle*, 108 S. Ct. at 2517-18; See Exhibits to Defendants' Memorandum in Support of Motions for Summary Judgment. [**23]

The evidence before the court clearly demonstrates that there is no genuine issue as to material fact that the defendants have satisfied the first requirement of the *Boyle* test, i.e., that United States, vis-a-vis the U.S. Air Force, or its predecessors, approved reasonably precise specifications for the T-29, C-131, C-54, and C-118 aircraft designs.

CONFORMING EQUIPMENT

Turning next to the second prong of the tripartite *Boyle* test, the defendants must show that the equipment conformed to the reasonably precise specifications which

were approved by the United States. Although the plaintiff argues that "prong 2 of the *Boyle* test disallows the defense where it is determined the product does not conform to the specification previously approved by the government," the plaintiff has failed to produce any evidence to controvert the undisputed evidence that the government was involved in and oversaw the production of these aircraft. In addition to approving the specifications, the government accepted the aircraft as produced. Nothing in the record indicates that the aircraft did not conform to the specifications as approved by the government. See Affidavit of General Gabriel Disosway, [**24] Exhibit 1, Declaration of William Keller, Exhibit 2, Declaration of Mort Rosenbaum, Exhibit 3, Declaration of Irving Eggert, Exhibit 4, Declaration of Stan Berling, Exhibit 5, Declaration of William Fox, Exhibit 6, all of which are exhibits to General Dynamics' Memorandum in Support of its Motion for Summary Judgment; Affidavit of Donald Douglas, Exhibit A, and its attachments thereto, Affidavit of Larry Fogg, Exhibit B, and the attachments thereto found in Factual Exhibits to McDonnell Douglas' Memorandum in Support of Summary Judgment. Thus, the plaintiff has failed to produce evidence that a genuine issue of material fact exists as to the second element of the *Boyle* test.

DEFENDANTS' DUTY TO WARN OF DANGERS KNOWN TO DEFENDANTS, AND NOT TO THE GOVERNMENT.

The third condition of the *Boyle* test requires that the supplier warn the government of known dangers in the use of the equipment of which the government was unaware. With respect to this element, both defendants have submitted to the court numerous declarations and affidavits which reveal that neither General Dynamics nor McDonnell Douglas was aware of the dangers and risks associated with the use of asbestos in military [**25] aircraft at the time the aircraft in question were constructed. Declaration of William Keller, Declaration of Mort Rosenbaum, Declaration of Irving Eggert, Declaration of Stan [*1028] Berling, Declaration of Dr. John McCann, Declaration of Manual C. Val Dez, Declaration of Dillman Dimmitt, all attached to General Dynamics' Memorandum in Support of Motion for Summary Judgment. n7 Affidavit of Donald W. Douglas, Jr., Exhibit A to McDonnell Douglas' Memorandum in support of summary judgment.

n7 Plaintiff contends that because General Dynamics held an ownership interest in Asbestos Corporation Limited, the defendant should have imputed knowledge of the dangers of asbestos. As Declaration of John McGuire demonstrates, General Dynamics' interest in said corporation

commenced in 1969, after the construction of the T-29 and C-131 aircraft, and therefore the dangers of asbestos cannot be imputed to General Dynamics based upon this ownership.

Furthermore, at the time of the construction of these aircraft, the government was aware of the risks of the use of asbestos, and chose to continue to use asbestos in spite of this knowledge. Deposition of Alvin F. Meyer, Jr. and deposition of Walter Melvin, [**26] both of which are attached to the defendants' Memoranda in Support of Summary Judgment.

The plaintiff has presented no evidence which controverts the undisputed fact that the government had knowledge of the dangers of asbestos and that the defendants had no such knowledge. As the wording of the third element of the *Boyle* test reveals, the supplier must have had superior knowledge to the government. "The supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle*, 108 S. Ct. at 2518. This element is necessary because, as the *Boyle* Court pointed out, in its absence,

the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract that withholding would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision. *Id.*

The fact that the defendants had no actual knowledge of the risks of asbestos, while the government was already fully aware of the risks, satisfies [**27] the third element of the government contractor defense. *Ramey*, 1989 U.S. App. LEXIS 6390 at 16, *Tillett* at 599, *Nicholson*, 697 F. Supp. at 205; *Zinck*, 690 F. Supp. at 1338. n8

n8 The *Ramey* Court determined that a showing that the government had knowledge of the dangers is sufficient to establish the third element of the *Boyle* test, without having to address whether the defendants knew of any risks. "Because we conclude the Navy was already aware of the risk at issue, we need not consider whether Martin-Baker would otherwise have been required to warn the Navy directly of the risk in order to assert successfully a military contractor de-

fense." *Ramey* 1989 U.S. App. LEXIS 6390, at 17. Although the defendants have demonstrated that they had no prior knowledge of the risks, according to the *Ramey* Court, the defendants could have successfully asserted the government contractor defense in the event that they did have knowledge.

Under the standard set forth in *Rule 56 of the Federal Rules of Civil Procedure* and the Supreme Court decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), the defendants have presented evidence showing [**28] that there is no genuine issue of material fact with respect to each of the *Boyle* elements, and the plaintiff has failed to controvert, through affidavits or other documentation, the defendants' evidence in order to demonstrate genuine issues of material fact exist. Accordingly, the defendants' Motions for Summary Judgment based upon the government contractor defense, must be and the same hereby are, granted.

MCDONNELL DOUGLAS' MOTION FOR SUMMARY JUDGMENT BASED UPON REPLACEMENT STRIPS.

Although the court has granted summary judgment to the defendants based upon the government contractor defense, prior to these motions, defendant McDonnell Douglas filed a motion for summary judgment based upon the fact that the plaintiff's decedent was not exposed to asbestos from products manufactured or [**1029] sold by McDonnell Douglas. n9 McDonnell Douglas contends that since the asbestos chafing strips were routinely replaced, the plaintiff is unable to prove a nexus between McDonnell Douglas and Mr. Niemann's death.

n9 General Dynamics Corporation did not file such a motion, however, General Dynamics did raise the point that the original asbestos strips placed in the aircraft were not present at the time Mr. Niemann began working at Scott Air Force Base. Thus, the court assumes that this discussion applies to General Dynamics as well as McDonnell Douglas. See General Dynamics' Memorandum in Support of its Motion for Summary Judgment, Page 10, n. 4.

[**29]

In support of this contention, McDonnell Douglas has filed excerpts from the depositions of Mr. Niemann's co-workers Coffman, Hewitt, Pinkstaff, Rabenau, and Schrage. Exhibit E to McDonnell's Memorandum in

Support of Motion for Summary Judgment. These excerpts reveal that all of the chafing and rub strips were routinely replaced during scheduled aircraft maintenance, at least once every six months.

Mr. Niemann began working at the Air Force base in approximately 1963. The last C-54 aircraft manufactured by McDonnell Douglas was sold and delivered to the United States Air Force on January 22, 1946. The last C-118 aircraft manufactured by McDonnell Douglas was sold and delivered to the United States Air Force on January 21, 1956. Affidavit of Sam Hovsepian, Exhibit C to McDonnell Douglas' Memorandum. The plaintiff has failed to controvert these depositions and affidavit to demonstrate an issue with respect to the time of McDonnell Douglas' delivery and the replacement of the chafing strips. Thus, the record is clear that Mr. Niemann did not work on aircraft which contained the original chafing strips supplied by McDonnell Douglas.

The Seventh Circuit has discussed the standard to be [**30] used in a strict liability claim under Illinois Law.

The Illinois Supreme Court adopted the theory of strict products liability in *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada*, the court adopted the position taken in Section 402A of the American Law Institute's Revised Restatement of the Law of Torts. Quoting from the Restatement, the court stated:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(A) the seller has exercised all possible care in the preparation and sale of his product and

(B) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Suvada v. White Motor Company, 32 Ill. 2d 612, 210 N.E.2d 182 (1965), quoting *Restatement (2nd) of Torts*, § 402(A)(1964).

[**31] Thus, under Illinois Law, 'to recover in strict liability, the injury must result from a condition of the product, the condition must be unreasonably dangerous and the condition must have existed at the time the product left the manufacturer's control.'

First National Bank of Dwight v. Regent's Sports Corp., 803 F.2d 1431, 1435-36 (7th Cir. 1986) (quoting *Hunt v. Blasius*, 74 Ill. 2d 203, 210, 23 Ill. Dec. 574, 384 N.E.2d 368 (1978)).

The uncontroverted affidavit and deposition excerpts reveal that the defendant was not exposed to any asbestos product manufactured by McDonnell Douglas. Although McDonnell Douglas does not dispute that it originally installed asbestos rub strips, the plaintiff fails to show that the rub strips supplied by McDonnell Douglas in fact caused the injury, pursuant to the standard of § 402(A) of the *Restatement of the Law of Torts*, as set forth in *Suvada*. The [*1030] product supplied by McDonnell

Douglas was not in the same form as it was when Mr. Niemann began working on the product. Thus, under the Illinois standard, the product did not reach Mr. Niemann without substantial change in the condition in which it is sold. *Id.*

In opposition to this position, [**32] the plaintiff argues that the standard announced in *Sage v. Fairchild-Swearingen Corp.*, 70 N.Y.2d 579, 517 N.E.2d 1304, 523 N.Y.S.2d 418 (1987) should be applied. The court is of the opinion that this reliance is misplaced. McDonnell Douglas neither designed the asbestos strips which were originally used, nor did it design the replacement strips. Hovsepian Affidavit at para. 2-3. Thus, under the standard enunciated in *First National Bank of Dwight*, there is uncontroverted documentation and evidence that the unreasonably dangerous condition must have existed at the time the product left the manufacturer's control. *First National Bank of Dwight*, 803 F.2d at 1436.

McDonnell Douglas has sufficiently established that the asbestos which allegedly caused Mr. Niemann's death was not the asbestos which was placed in the aircraft by McDonnell Douglas, and therefore, under the standard of *Rule 56 of the Federal Rules of Civil Procedure* and the Supreme Court's decision in *Celotex*, McDonnell Douglas would be entitled to summary judgment with respect to this aspect of the instant cause of action.

CONCLUSION

The totality of the record clearly indicates that the government contractor defense is appropriate [**33] with respect to this pending cause of action. The defendants' declarations, affidavits and other documents prove each of the three elements delineated in *Boyle* to establish the defense. The plaintiff has been unable to come forward with evidence to controvert the establishment of these elements. Accordingly, the defendants' Motions for Summary Judgment are well taken, and accordingly, judgment is hereby entered on behalf of General Dynamics Corporation and McDonnell Douglas Corporation and against plaintiff.

IT IS SO ORDERED.

DATED: This 22 day of June, 1989.

Helen Palsgraf, Respondent, v. The Long Island Railroad Company, Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

248 N.Y. 339; 162 N.E. 99; 1928 N.Y. LEXIS 1269; 59 A.L.R. 1253

February 24, 1928, Argued

May 29, 1928, Decided

PRIOR HISTORY: [***1]

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 16, 1927, affirming a judgment in favor of plaintiff entered upon a verdict.

Palsgraf v. Long Island R. R. Co., 222 App. Div. 166, reversed.

DISPOSITION:

Judgment reversed, etc.

HEADNOTES:

Negligence -- railroads -- passengers -- package carried by passenger, dislodged while guards were helping him board train, and which falling to track exploded -- plaintiff, an intending passenger standing on platform many feet away, injured as result of explosion -- complaint in action against railroad to recover for injuries dismissed.

SYLLABUS:

A man carrying a package jumped aboard a car of a moving train and, seeming unsteady as if about to fall, a guard on the car reached forward to help him in and another guard on the platform pushed him from behind, during which the package was dislodged and falling upon the rails exploded, causing injuries to plaintiff, an intending passenger, who stood on the platform many feet away. There was nothing in the appearance of the package to give notice that it contained explosives. In an action by the intending passenger against the [***2] railroad company to recover for such injuries, the complaint should be dismissed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right, and the conduct of the

defendant's guards, if a wrong in relation to the holder of the package, was not a wrong in its relation to the plaintiff standing many feet away.

COUNSEL:

William McNamara and *Joseph F. Keany* for appellant. Plaintiff failed to establish that her injuries were caused by negligence of the defendant and it was error for the court to deny the defendant's motion to dismiss the complaint. (*Paul v. Cons. Fireworks Co.*, 212 N. Y. 117; *Hall v. N. Y. Tel. Co.*, 214 N. Y. 49; *Perry v. Rochester Lime Co.*, 219 N. Y. 60; *Pyne v. Cazenovia Caning Co.*, 220 N. Y. 126; *Adams v. Bullock*, 227 N. Y. 208; *McKinney v. N. Y. Cons. R. R. Co.*, 230 N. Y. 194; *Palsey v. Waldorf Astoria, Inc.*, 220 App. Div. 613; *Parrott v. Wells Fargo & Co.*, 15 Wall. 524; *A. T. & S. Fe Ry. Co. v. Calhoun*, 213 U.S. 1; *Prudential Society, Inc., v. Ray*, 207 App. Div. 496; 239 N. Y. 600.)

Matthew W. Wood for respondent. [***3] The judgment of affirmance was amply sustained by the law and the facts. (*Saugerties Bank v. Delaware & Hudson Co.*, 236 N. Y. 425; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *Insurance Co. v. Tweed*, 7 Wall. 44; *Trapp v. McClellan*, 68 App. Div. 362; *Ring v. City of Cohoes*, 77 N. Y. 83; *McKenzie v. Waddell Coal Co.*, 89 App. Div. 415; *Slater v. Barnes*, 241 N. Y. 284; *King v. Interborough R. T. Co.*, 233 N. Y. 330.)

JUDGES:

Cardozo, Ch. J. Pound, Lehman and Kellogg, JJ., concur with Cardozo, Ch. J.; Andrews, J., dissents in opinion in which Crane and O'Brien, JJ., concur.

OPINIONBY:

CARDOZO

OPINION:

[*340] [**99] Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached [***4] forward to help [*341] him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do" (Pollock, Torts [11th ed.], p. 455; *Martin v. Herzog*, 228 N. Y. 164, 170; cf. Salmond, Torts [6th ed.], p. [***5] 24). "Negligence is the absence of care, according to the circumstances" (Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679, 688; 1 Beven, Negligence [4th ed.], 7; *Paul v. Consol. Fireworks Co.*, 212 N. Y. 117; *Adams v. Bullock*, 227 N. Y. 208, 211; *Parrott v. Wells-Fargo Co.*, 15 Wall. [U.S.] 524). The plaintiff as she stood upon the platform of the station might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor (*Sullivan v. Dunham*, 161 N. Y. 290). [*342] If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently [***6] not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated

of a given act, back of the act must be sought and found a duty to the individual complaining, [**100] the observance of which would have averted or avoided the injury" (McSherry, C. J., in *W. Va. Central R. Co. v. State*, 96 Md. 652, 666; cf. *Norfolk & Western Ry. Co. v. Wood*, 99 Va. 156, 158, 159; *Hughes v. Boston & Maine R. R. Co.*, 71 N. H. 279, 284; *U. S. Express Co. v. Everest*, 72 Kan. 517; *Emry v. Roanoke Nav. Co.*, 111 N. C. 94, 95; *Vaughan v. Transit Dev. Co.*, 222 N. Y. 79; *Losee v. Clute*, 51 N. Y. 494; *DiCaprio v. N. Y. C. R. R. Co.*, 231 N. Y. 94; 1 Shearman & Redfield on Negligence, § 8, and cases cited; Cooley on Torts [3d ed.], p. 1411; Jaggard on Torts, vol. 2, p. 826; Wharton, Negligence, § 24; Bohlen, Studies in the Law of Torts, p. 601). "The ideas of negligence and duty are strictly correlative" (Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694). The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary [***7] of a breach of duty to another.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise [*343] which a truckman or a porter has left upon the walk? The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed. In this case, the rights that are said to have been violated, the interests said to have been invaded, are not even of the same order. The man was not injured in his person nor even put in danger. The [***8] purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package. Out of this wrong to property, which threatened injury to nothing else, there has passed, we are told, to the plaintiff by derivation or succession a right of action for the invasion of an interest of another order, the right to bodily security. The diversity of interests emphasizes the futility of the effort to build the plaintiff's right upon the basis of a wrong to some one else. The gain is one of emphasis, for a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of

others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted [***9] as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must [*344] show is "a wrong" to herself, *i. e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct "wrongful" because unsocial, but not "a wrong" to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension (Seavey, *Negligence, Subjective or Objective*, 41 H. L. Rv. 6; *Boronkay v. Robinson & Carpenter*, 247 N. Y. 365). This [***10] does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye" (*Munsey v. Webb*, 231 U.S. 150, 156; *Condran v. Park & Tilford*, 213 N. Y. 341, 345; *Robert v. U. S. E. F. Corp.*, 240 N. Y. 474, 477). Some acts, such as shooting, are so imminently dangerous to any one who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts [**101] sometimes at one's peril (Jeremiah Smith, *Tort and Absolute Liability*, 30 H. L. Rv. 328; Street, *Foundations of Legal Liability*, vol. 1, pp. 77, 78). Under this head, it may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure in injury to B (*Talmage v. Smith*, 101 Mich. 370, 374) [*345] These cases aside, wrong [***11] is defined in terms of the natural or probable, at least when unintentional (*Parrot v. Wells-Fargo Co. [The Nitro-Glycerine Case]*, 15 Wall. [U.S.] 524). The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by conces-

sion, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all (Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694). Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this [***12] case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong. Confirmation of this view will be found in the history and development of the action on the case. Negligence as a basis of civil liability was unknown to mediaeval law (8 Holdsworth, *History of English Law*, p. 449; Street, *Foundations of Legal Liability*, vol. 1, [*346] pp. 189, 190). For damage to the person, the sole remedy was trespass, and trespass did not lie in the absence of aggression, and that direct and personal (Holdsworth, *op. cit.* p. 453; Street, *op. cit.* vol. 3, pp. 258, 260, vol. 1, pp. 71, 74.) Liability for other damage, as where a servant without orders from the master [***13] does or omits something to the damage of another, is a plant of later growth (Holdsworth, *op. cit.* 450, 457; Wigmore, *Responsibility for Tortious Acts*, vol. 3, *Essays in Anglo-American Legal History*, 520, 523, 526, 533). When it emerged out of the legal soil, it was thought of as a variant of trespass, an offshoot of the parent stock. This appears in the form of action, which was known as trespass on the case (Holdsworth, *op. cit.* p. 449; cf. *Scott v. Shepard*, 2 Wm. Black. 892; Green, *Rationale of Proximate Cause*, p. 19). The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime (Holland, *Jurisprudence* [12th ed.], p. 328). He sues for breach of a duty owing to himself.

The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We [***14] may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary (*Bird v. St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, 54; *Ehrgott v. Mayor, etc., of N. Y.*, 96 N. Y. 264; *Smith v. London & S. W. Ry. Co.*, L. R. 6 C. P. 14; 1 Beven, *Negligence*, 106; Street, op. cit. vol. 1, p. 90; Green, *Rationale of Proximate Cause*, pp. 88, 118; cf. *Matter of Polemis, L. R. 1921, 3 K. B. 560*; 44 *Law Quarterly Review*, 142). There is room for [*347] argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e. g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

DISSENTBY: [*15]**

ANDREWS

DISSENT:

Andrews, J. (dissenting). Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. A violent explosion followed. The concussion broke some scales [**102] standing a considerable distance away. In falling they injured the plaintiff, an intending passenger.

Upon these facts may she recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept -- the breach of some duty owing to a particular person or to particular persons? Or where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? This is not a mere dispute as to words. We might not believe that to the average mind the dropping of the bundle would seem to in-

volve the probability of harm to the plaintiff standing many feet away whatever might be the case as to [***16] the owner or to one so near as to be likely to be struck by its fall. If, however, we adopt the second hypothesis [*348] we have to inquire only as to the relation between cause and effect. We deal in terms of proximate cause, not of negligence.

Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect oneself from the dangers resulting from such acts. Here I confine myself to the first branch of the definition. Nor do I comment on the word "unreasonable." For present purposes it sufficiently describes that average of conduct that society requires of its members.

There must be both the act or the omission, and the right. It is the act itself, not the intent of the actor, that is important. (*Hover v. Barkhoof*, 44 N. Y. 113; *Mertz v. Connecticut Co.*, 217 N. Y. 475.) In criminal law both the intent and the result are to be considered. Intent again is material in tort actions, where punitive damages are sought, dependent on actual malice -- not on merely reckless conduct. But here neither insanity nor infancy lessens responsibility. (*Williams v. Hays* [***17], 143 N. Y. 442.)

As has been said, except in cases of contributory negligence, there must be rights which are or may be affected. Often though injury has occurred, no rights of him who suffers have been touched. A licensee or trespasser upon my land has no claim to affirmative care on my part that the land be made safe. (*Meiers v. Koch Brewery*, 229 N. Y. 10.) Where a railroad is required to fence its tracks against cattle, no man's rights are injured should he wander upon the road because such fence is absent. (*Di Caprio v. N. Y. C. R. R.*, 231 N. Y. 94.) An unborn child may not demand immunity from personal harm. (*Drobner v. Peters*, 232 N. Y. 220.)

But we are told that "there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff [*349] himself and not merely to others." (*Salmond Torts* [6th ed.], 24.) This, I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether [***18] we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there -- a wrong to the public at large. Such is the language of the street. Such the language of the courts when speaking of contributory negligence. Such again and again their lan-

guage in speaking of the duty of some defendant and discussing proximate cause in cases where such a discussion is wholly irrelevant on any other theory. (*Perry v. Rochester Line Co.*, 219 N. Y. 60.) As was said by Mr. Justice Holmes many years ago, "the measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." (*Spade v. Lynn & Boston R. R. Co.*, 172 Mass. 488.) Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone.

It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not exist. It does involve a relationship between [***19] man and his fellows. But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one, it harms him a mile away as surely as it does those on the scene. We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for [*350] the loss of his wife's services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory. An insurance company paying a fire loss recovers [**103] its payment of the negligent incendiary. We speak of subrogation -- of suing in the right of the insured. Behind the cloud of words is the fact they hide, that the act, wrongful as to the insured, has also injured the company. Even if it be true that the fault of father, wife or insured will prevent recovery, it is because we consider the original negligence not the proximate cause of the injury. (Pollock, Torts [12th ed.], 463.)

In the well-known *Polemis Case* [***20] (1921, 3 K. B. 560), Scrutton, L. J., said that the dropping of a plank was negligent for it might injure "workman or cargo or ship." Because of either possibility the owner of the vessel was to be made good for his loss. The act being wrongful the doer was liable for its proximate results. Criticized and explained as this statement may have been, I think it states the law as it should be and as it is. (*Smith v. London & Southwestern Ry. Co.*, [1870-71] 6 C. P. 14; *Anthony v. Slaid*, 52 Mass. 290; *Wood v. Penn. R. R. Co.*, 177 Penn. St. 306; *Trashansky v. Hershkovitz*, 239 N. Y. 452.)

The proposition is this. Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally

be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, [***21] but all those in fact injured may complain. We have never, I think, held otherwise. Indeed in the *Di Caprio* case we said that a breach of a [*351] general ordinance defining the degree of care to be exercised in one's calling is evidence of negligence as to every one. We did not limit this statement to those who might be expected to be exposed to danger. Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself -- not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But when injuries do result from our unlawful act we are liable for the [***22] consequences. It does not matter that they are unusual, unexpected, unforeseen and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will be forever the resultant of all causes combined. Each one will have an influence. How great only omniscience can say. You may speak of a chain, or if you please, a net. An analogy is of little aid. [*352] Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy [***23] be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No

man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last, inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series [***24] of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire [**104] my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were [*353] simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

Take the illustration given in an unpublished manuscript by a distinguished and helpful writer on the law of torts. A chauffeur negligently collides with another car which is filled with dynamite, although he could not know it. An explosion follows. A, walking on the sidewalk nearby, is killed. B, sitting in a window of a building opposite, is cut by flying glass. C, likewise sitting in a window a block away, is similarly injured. And a further illustration. A [***25] nursemaid, ten blocks away, startled by the noise, involuntarily drops a baby from her arms to the walk. We are told that C may not recover while A may. As to B it is a question for court or jury. We will all agree that the baby might not. Because, we are again told, the chauffeur had no reason to believe his conduct involved any risk of injuring either C or the baby. As to them he was not negligent.

But the chauffeur, being negligent in risking the collision, his belief that the scope of the harm he might do would be limited is immaterial. His act unreasonably jeopardized the safety of any one who might be affected by it. C's injury and that of the baby were directly trace-

able to the collision. Without that, the injury would not have happened. C had the right to sit in his office, secure from such dangers. The baby was entitled to use the sidewalk with reasonable safety.

The true theory is, it seems to me, that the injury to C, if in truth he is to be denied recovery, and the injury to the baby is that their several injuries were not the proximate result of the negligence. And here not what the chauffeur had reason to believe would be the result of his conduct, but what [***26] the prudent would foresee, may have a bearing. May have some bearing, for the problem [*354] of proximate cause is not to be solved by any one consideration.

It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account. We have in a somewhat different connection spoken of "the stream of events." We have asked whether that stream was deflected -- whether it was forced into new and unexpected channels. (*Donnelly v. Piercy Contracting Co.*, 222 N. Y. 210). This is rather rhetoric than law. There is in truth little to guide us other than common sense.

There are some hints that may help us. The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce [***27] the result? Or by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space. (*Bird v. St. Paul F. & M. Ins. Co.*, 224 N. Y. 47, where we passed upon the construction of a contract -- but something was also said on this subject.) Clearly we must so consider, for the greater the distance either in time or space, the more surely do other causes intervene to affect the result. When a lantern is overturned the firing of a shed is a fairly direct consequence. Many things contribute to the spread of the conflagration -- the force of the wind, the direction and width of streets, the character of intervening structures, other factors. We draw an uncertain and wavering line, but draw it we must as best we can.

Once again, it is all a question of fair judgment, always [*355], keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

Here another question must be answered. In the case supposed it is said, and said correctly, that the

248 N.Y. 339, *; 162 N.E. 99, **;
1928 N.Y. LEXIS 1269, ***; 59 A.L.R. 1253

chauffeur is liable for the direct effect of the explosion [***28] although he had no reason to suppose it would follow a collision. "The fact that the injury occurred in a different manner than that which might have been expected does not prevent the chauffeur's negligence from being in law the cause of the injury." But the natural results of a negligent act -- the results which a prudent man would or should foresee -- do have a bearing upon the decision as to proximate cause. We have said so repeatedly. What should be foreseen? No human foresight would suggest that a collision itself might injure one a block away. On the contrary, given an explosion, such a possibility might be reasonably expected. I think the direct connection, the foresight of which the courts [**105] speak, assumes prevision of the explosion, for the immediate results of which, at least, the chauffeur is responsible.

It may be said this is unjust. Why? In fairness he should make good every injury flowing from his negligence. Not because of tenderness toward him we say he need not answer for all that follows his wrong. We look back to the catastrophe, the fire kindled by the spark, or the explosion. We trace the consequences -- not indefinitely, but to a certain [***29] point. And to aid us in fixing that point we ask what might ordinarily be expected to follow the fire or the explosion.

This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its

contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him. If it exploded [*356] and injured one in the immediate vicinity, to him also as to A in the illustration. Mrs. Palsgraf was standing some distance away. How far cannot be told from the record -- apparently twenty-five or thirty feet. Perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief "it cannot be denied that the explosion was the direct cause of the plaintiff's injuries." So it was a substantial factor in producing the result -- there was here a natural and continuous sequence -- direct connection. The only intervening cause was that instead of blowing her to the ground the concussion smashed the weighing machine which in [***30] turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

The judgment appealed from should be affirmed, with costs.

FLOYD PHILLIPS and KATHRYN G. PHILLIPS, his wife, Appellants v. A-BEST PRODUCTS COMPANY, in its own right and as successor-in-interest to Asbestos Products Company; A.P. GREEN REFRACTORIES COMPANY, ALLEGHENY SAND, INC., ALLIED GLOVE CORPORATION; ARMSTRONG WORLD INDUSTRIES, INC., in its own right and as successor-in-interest to Armstrong Cork Company and Armstrong Contracting and Supply Co.; THE BOC GROUP, INC. in its own right and as successor-in-interest to Airco Welding Products Co.; CAREY-CANADA, INC., in its own right and as successor-in-interest to Carey Canadian Mines, Ltd. and Quebec Asbestos Corporation; THE CELOTEX CORPORATION, in its own right and as successor-in-interest to The Philip Carey Manufacturing Company, Philip Carey Corporation, Briggs Manufacturing Company and/or Panaccon Corporation, COMBUSTION ENGINEERING, INC.; DIXON TICONDEROGA COMPANY, and its division New Castle Refractories Co.; DRESSER INDUSTRIES, INC., and its division Harbison-Walker Refractories; EAGLE-PICHER INDUSTRIES, INC.; FOSECO, INC.; GAF CORPORATION, in its own right and as successor-in-interest to The Ruberoid Company; THE GAGE COMPANY, formerly Pittsburgh Gage and Supply Co., GENERAL REFRACTORIES COMPANY, H.K. PORTER COMPANY, INC., in its own right and as successor-in-interest to Southern Textile Company, formerly Southern Asbestos Company, HEDMAN MINES, LTD.; INSUL COMPANY, INC.; J. H. FRANCE REFRACTORIES COMPANY; KAISER ALUMINUM & CHEMICAL CORPORATION; and its division Kaiser Refractories, KEENE CORPORATION, in its own right and as successor-in-interest to Baldwin Hill Co., Baldwin-Ehret-Hill, Inc. Ehret Magnesia Manufacturing Company, the Insulation Division of Mundet Cork Company, Mundet Company, and to Keene Building Products Corporation; THE LINCOLN ELECTRIC COMPANY; NEW JERSEY PULVERIZING COMPANY, INC.; NICOLET, INC.; in its own right and as successor-in-interest to Nicolet Industries, Inc., and to the Industrial Products Division of Keasbey & Mattison Co.; NORTH AMERICAN REFRACTORIES COMPANY; OGLEBAY NORTON COMPANY, and its division, Ferro Engineering; OWENS-CORNING FIBERGLAS CORPORATION; OWENS-ILLINOIS, INC.; PENNSYLVANIA GLASS SAND CORPORATION; PITTSBURGH CORNING CORPORATION; QUIGLEY COMPANY, INC.; RAYMARK INDUSTRIES, INC., in its own right and as successor-in-interest to Raybestos-Manhattan, Inc.; SAFETY FIRST INDUSTRIES, INC.; in its own right and as successor-in-interest to Safety First Supply, Inc.; THE SAGER CORPORATION, in its own right and as successor-in-interest to The Sager Glove Corporation; SET PRODUCTS, INC.; THEIM CORPORATION, and its division, Universal Refractories, TURNER & NEWALL, PLC, in its own right and as successor-in-interest to the Keasbey & Mattison Co.; TYK REFRACTORIES COMPANY, in its own right and as successor-in-interest to Swank Refractories; WALTER C. BEST, INC., and WESTINGHOUSE ELECTRIC CORPORATION, Appellees

No. 32 Western District Appeal Docket 1994

SUPREME COURT OF PENNSYLVANIA

542 Pa. 124; 665 A.2d 1167; 1995 Pa. LEXIS 968; CCH Prod. Liab. Rep. P14,385

March 7, 1995, ARGUED
October 18, 1995, DECIDED

542 Pa. 124, *; 665 A.2d 1167, **;
1995 Pa. LEXIS 968, ***; CCH Prod. Liab. Rep. P14,385

PRIOR HISTORY: [***1] Appeal from the Order of the Superior Court entered July 15, 1993 at No. 1545 Pittsburgh 1991, vacating the order entered September 19, 1991 of the Court of Common Pleas of Cambria County, Civil Division, No. 1987-434(B)(10). *428 Pa. Super. 167, 630 A.2d 874 (1993)*.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL:

FOR APPELLANTS: Robert L. Jennings, Jr., Tybe A. Brett, Goldberg, Persky, Jennings & White, P.C. John M. Burkoff, Marcus & Shapira.

FOR AMICUS CURIAE: Michael J. Panichelli, Litvin, Blumberg, Matusow & Young, (For Pennsylvania Trial Lawyers Association).

FOR APPELLEES: Joseph S.D. Christof Dickie, McCamey & Chilcote, (For Walter C. Best, Inc.). J. W. Montgomery, III, John D. Goetz, Jones, Day, Reavis & Pogue, (For Pennsylvania Glass Sand Corporation).

FOR AMICUS CURIAE: Willis A. Siegfried, Patricia L. Dellacrocce, Eckert, Seamans, Cherin & Mellott, (For Chemical Manufacturers Association). James M. Beck, Pepper, Hamilton & Scheetz, (For Product Liability Advisory Council, Inc.).

JUDGES: Before MR. CHIEF JUSTICE ROBERT N. C. NIX, JR., FLAHERTY, ZAPPALA, CAPPY, CASTILLE, MONTEMURO, JJ. Mr. Justice Zappala concurs in the result. Mr. Justice Montemuro is sitting by designation.

OPINIONBY: CAPPY

OPINION: [*128] [**1169] OPINION OF THE COURT

MR. JUSTICE CAPPY

DECIDED: October 18, 1995

This is an appeal by allowance from the opinion and order of the Superior Court vacating the judgment entered by the Court of Common Pleas of Cambria County, and entering a judgement notwithstanding the verdict ("j.n.o.v.") for Pennsylvania [*129] Glass Sand Corporation ("Appellee"). n1 We granted review limited to the following two issues: first, whether the Superior Court

erred in determining that Appellants' strict liability/failure-to-warn cause of action would not lie as a matter of law; second, whether the "sophisticated user" defense applied to this case. For reasons that differ from those relied upon by the Superior Court, we affirm.

n1 In both the trial court and the Superior Court, this matter was consolidated with another case, *Harmotta v. Walter C. Best, Inc., et al.* The Harmotta matter is not before this Court and thus it will not be discussed in this opinion.

[***2]

Floyd Phillips ("Appellant-Husband") was employed as a foundry worker from 1951 to 1981 by United States Steel Corporation ("Employer-U.S. Steel"). Throughout his career, Appellant-Husband performed various tasks which brought him into contact with silica sand. n2 Employer-U.S. Steel purchased [**1170] silica sand from several different vendors, one of which was Appellee.

n2 The foundry industry employs silica sand in the production of molds from which steel castings are made. For more than half a century, exposure to silica sand has been linked with the development of silicosis, a disease which causes scarring of the lungs.

A chest x-ray taken March 4, 1985 revealed that Appellant-Husband had contracted silicosis. In 1986, Appellant-Husband and his wife commenced suit based on both strict liability and negligence theories of recovery. Appellants' strict liability claim against Appellee asserted that Appellee was liable because it had failed to warn Appellant-Husband that exposure to silica sand could cause silicosis. [***3]

The jury returned a verdict in favor of Appellee on the negligence count, but afforded relief to Appellants on the strict liability claim. Appellee filed a motion for post-trial relief, requesting the entry of a j.n.o.v. on the strict liability count. This motion was denied and Appellee appealed.

The Superior Court vacated the order of the trial court and entered a j.n.o.v. in favor of Appellee. The Superior Court determined that Appellee could not be held liable on the strict liability claim as a matter of law, and gave two reasons to support its determination. First, the Superior Court decided [*130] that silica sand was not an "unreasonably dangerous" product, and thus Appellee could not be held strictly liable as a matter of law. The Superior Court's second reason was that Appellee

542 Pa. 124, *, 665 A.2d 1167, **;
1995 Pa. LEXIS 968, ***; CCH Prod. Liab. Rep. P14,385

was shielded from liability by the negligence-based defense of § 388 of the *Restatement (Second) of Torts*, a defense which is commonly referred to as the "sophisticated user" defense. n3 The Superior Court noted that its application of § 388 to this matter was the first time that the defense had ever been applied to a § 402A case. Appellants appealed to this Court, and we granted allocatur. n4

n3 As the learned Judge Hudock noted in his concurring opinion below, such discussion of a possible defense for Appellee was dicta as the majority had already determined that Appellee could not be held strictly liable as a matter of law. *Phillips*, 428 Pa. Super. 167, 186, 630 A.2d 874, 884 (concurring opinion).

[***4]

n4 We granted allocatur on two separate dates. We first granted allocatur on May 11, 1994, and limited review to the "sophisticated user" issue. Subsequently, we granted allocatur on March 8, 1995 to determine whether the Superior Court properly held that Appellee was not strictly liable as a matter of law.

In reviewing this entry of a j.n.o.v., we note that

there are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first a court reviews the record and concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor

Moure v. Raeuchle, 529 Pa. 394, 402-403, 604 A.2d 1003, 1007 (1992) (citations omitted). In this instance, the Superior Court relied on the first basis and determined that Appellee was entitled to a j.n.o.v. as a matter of law. In examining this determination, our scope of review [***5] is plenary, as it is with any review of questions of law. See *Young v. Young*, 507 Pa. 40, 44, 488 A.2d 264, 265 (1985).

In this case, our first inquiry is whether the Superior Court correctly determined that Appellee, as a matter of law, cannot be held liable on the strict liability failure to warn claim. We [*131] conclude that the result reached by the Superior Court was correct, although our reasoning in support of this holding differs from that offered by the lower court.

Strict liability allows a plaintiff to recover where a product in "a defective condition unreasonably dangerous to the user or consumer" causes harm to the plaintiff. *Section 402A, Restatement (Second) of Torts*. See also *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966) (adopting § 402A). There are three different types of defective conditions that can give rise to a strict liability claim: design defect, manufacturing defect, and failure-to-warn defect. *Walton v. AVCO Corp.*, 530 Pa. 568, 576, 610 A.2d 454, 458 (1992). Only the third type, the failure-to-warn [**1171] defect, was alleged in this case. A product is defective due to a failure-to-warn where the product was "distributed without sufficient warnings [***6] to notify the ultimate user of the dangers inherent in the product." *Mackowick v. Westinghouse Electric*, 525 Pa. 52, 56, 575 A.2d 100, 102 (1990).

As with the other two types of strict liability claims, a plaintiff raising a failure-to-warn claim must establish only two things: that the product was sold in a defective condition "unreasonably dangerous" to the user, n5 and that the defect caused plaintiff's injury. *Walton*, 530 Pa. at 576, 610 A.2d at 458. To establish that the product was defective, the plaintiff must show that a warning of a particular danger was either inadequate or altogether lacking, and that this deficiency in warning made the product "unreasonably dangerous." For the plaintiff in a failure-to-warn claim to establish the second element, causation, the plaintiff must demonstrate that the user of the product would have avoided the risk had he or she been warned of it by the seller. See *Sherk v. Daisy-Heddon*, 498 Pa. 594, 598, 602, 450 A.2d 615, 617 and 619 (1982) [*132] (plurality opinion). If the plaintiff fails to establish either of these two elements, the plaintiff is barred from recovery as a matter of law. n6

n5 The determination of whether an alleged defect would render a product "unreasonably dangerous" is a question of law. *Azzarello v. Black Brothers Company, Inc.*, 480 Pa. 547, 558, 391 A.2d 1020, 1026 (Pa. 1978). Thus, it is incumbent upon the trial judge to "decide whether, under plaintiff's averment of the facts, recovery would be justified" prior to submitting the case to the jury. *Id.*

[***7]

n6 See also *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wash. 2d 747, 818 P.2d 1337 (1992). In Ayers, our sister state of Washington provided an excellent analysis of the cau-

sation issue in the context of a strict liability failure-to-warn claim.

In this matter, Appellants failed to carry their burden: regardless of whether Appellee's silica sand was defective due to a lack of a warning, Appellants cannot recover because they have failed to establish causation.

Appellants did attempt to establish that the alleged defect, Appellee's failure-to-warn, caused Appellant-Husband's injury. Appellants introduced the testimony of Appellant-Husband that he had never been told of the health hazards of silica sand, and did not know that he could injure his lungs due to exposure to silica dust. See, e.g., R.R. at 464 and 466. Appellee introduced rebuttal evidence that Employer-U.S. Steel provided dust masks to its workers and also had an extensive employee training program to educate its workers about the dangers of silica sand. See, e.g., 879, 1017-1019. Also, Appellee introduced [***8] into evidence that Appellant-Husband had stated during a deposition that he knew exposure to silica sand was harmful. See, e.g., R.R. at 487-488. The jury found Appellee's version to be the more credible; it specifically determined that Appellant-Husband knew that he could contract silicosis by exposing himself to respirable silica dust, and voluntarily proceeded to expose himself to the product. Special Verdict Form RE: Floyd Phillips, R.R. at p. 1666. Thus, Appellants did not and cannot establish that Appellee's alleged failure to warn about the dangers of silica sand caused Appellant-Husband's silicosis because, as the jury found, Appellant-Husband knew of that risk about which the missing warning would have cautioned.

This holding is consistent with prior case law. In *Sherk v. Daisy-Heddon*, *supra*, plaintiff's decedent was killed when a friend of the decedent fired a BB gun at the decedent's head. Plaintiff alleged that the manufacturer should be held strictly liable because it had failed to warn the user of the dangers of [*133] a BB gun. It was established at trial that the user actually knew of the dangers of the BB gun even absent the warning. Based on this actual [***9] knowledge of the danger on the part of the user, Mr. Justice Roberts, writing the opinion announcing the Judgment of the Court, reasoned that the manufacturer could not be held strictly liable since the alleged deficiency in the warnings was not the cause of the accident. n7

n7 We note that while we come to the same conclusion as was reached by the Superior Court, our reasoning differs from that offered by the lower court.

The Superior Court determined that Appellee's product was not in a defective condition unreasonably dangerous to the consumer. The court trained its analysis on the hazards and efficacy of silica sand in general. This was not the proper focus of the court's analysis. In a failure-to-warn claim, the allegation is not that the product in general is defective, but rather is that the product was defective because it lacked a warning to make it safe. Thus, the analysis here should have been on whether Appellee's product was defective absent a warning.

Although we do not approve of the Superior Court's analysis of whether Appellee's product was defective, neither do we mean to intimate that their ultimate conclusion on this issue was necessarily incorrect. We need not and do not here determine whether Appellee's product was indeed defective absent a warning; rather, our decision is based upon the determination that entry of a j.n.o.v. in Appellee's favor was appropriate because Appellant had failed, as a matter of law, to establish causation.

Finally, we emphasize that this opinion does not speak to the doctrine that the duty to warn is non-delegable. See *Walton*, 530 Pa. at 577, 610 A.2d at 459. Whether Appellee breached its duty to warn would be relevant to determining whether Appellee's product was defective absent a warning, an issue which is not addressed by this Court. Thus, this opinion does not abrogate or in any manner modify the non-delegability doctrine enunciated in *Walton*.

[***10]

[**1172] Since we have resolved the first issue in favor of Appellee, we need not discuss the merits of importing the negligence-based "sophisticated user" defense embodied in § 388 of the *Restatement (Second) of Torts* into our strict liability law. To discuss whether Appellee would have a defense to a strict liability claim after we have decided that no strict liability action will lie would be to engage in mere obiter dicta. An analysis of whether a § 388 defense may be raised in a strict liability action must thus await a future case.

Accordingly, for the reasons stated herein, we affirm the disposition of the Superior Court.

[*134] Mr. Justice Zappala concurs in the result.

Mr. Justice Montemuro is sitting by designation.

BRUCE L. POWELL et al., Plaintiffs and Appellants, v. STANDARD BRANDS
PAINT COMPANY, Defendant and Respondent

Civ. No. 23427

Court of Appeal of California, Third Appellate District

166 Cal. App. 3d 357; 212 Cal. Rptr. 395; 1985 Cal. App. LEXIS 1839; CCH Prod.
Liab. Rep. P10,535

March 28, 1985

PRIOR HISTORY: [***1]

Superior Court of Sacramento County, No. 305094, Fred
W. Marler, Jr. Judge.

DISPOSITION:

The judgment is affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Friedman, Collard & Poswall and Allan J. Owen for
Plaintiffs and Appellants.

Curotto Law Offices and William E. Barnes for De-
fendant and Respondent.

JUDGES:

Opinion by Sims, J., with Regan, Acting P. J., and
Carr, J., concurring.

OPINIONBY:

SIMS

OPINION:

[*360] [**395] Plaintiffs Bruce Powell and Dale
Mereness appeal from a summary judgment granted in
favor of defendant Standard Brands Paint Company
(Standard Brands) in an action for personal injuries. We
affirm.

Factual and Procedural Background

As relevant to this appeal, the complaint prepared by
plaintiffs' attorneys stated that defendant Standard
Brands and other defendants were the suppliers or manu-
facturers "of certain equipment and cleaning solvents,

specifically being, but not limited to a buffer and/or thin-
ner referred to herein." The complaint further alleged that
Standard Brands and other defendants "negligently and
carelessly operated, controlled, warned, supplied, main-
tained, managed, designed, manufactured, or modified
said buffer and/or thinner which proximately caused the
injuries and [**2] damages to plaintiff as herein de-
scribed." Paragraph [**396] X of the complaint pleaded
in pertinent part, "That on or about June 10, 1982, . . .
*while plaintiff was stripping a tile floor with said buffer
and thinner*, an explosion occurred due to the negligence
of the defendants, and each of them, proximately causing
the hereinafter described injuries and damages to plain-
tiff." (Italics added.)

[*361] As relevant here, plaintiff sought recovery
for damages on theories of negligence and strict liability.

In moving for summary judgment, Standard Brands
competently showed that plaintiffs commenced work on
June 9, 1982, using lacquer thinner supplied by Standard
Brands to remove sealer from ceramic tile. They worked
without incident throughout the evening until they had
used up the Standard Brands lacquer thinner. However,
plaintiffs were unable to finish the job on June 9. The
following day, June 10, plaintiffs' employer ordered two
five-gallon containers of lacquer thinner from codefen-
dant Harris Automotive (Harris). This lacquer thinner
was manufactured by codefendant Grow Chemical Coat-
ings Company (Grow). n1 Working in an area approxi-
mately 25-50 feet from where [**3] they had worked
the previous evening, plaintiffs commenced pouring the
Grow lacquer thinner on the tile floor and buffing the
thinner with the electric buffer. During this operation, an
explosion occurred, seriously injuring both plaintiffs and
giving rise to the instant lawsuit.

n1 The declarations submitted on the motion
for summary judgment do not indicate whether

the Grow thinner contained warnings. Defendant asks us to take judicial notice of evidentiary materials submitted by codefendant Harris in the trial court in connection with a motion for summary judgment heard after this case was on appeal. Since the materials were not before the trial court when it ruled on Standard Brands' motion, the request for judicial notice is denied. Plaintiffs' complaint alleged that defendants Grow and Harris wrongfully failed to warn of risks of their product. The burden was on defendant Standard Brands to refute those pleaded allegations by competent evidence. (See *Conn v. National Can Corp.* (1981) 124 Cal.app.3d 630, 639 [177 Cal.Rptr. 445].) It did not do so. For present purposes, we must assume the unchallenged allegations of the complaint control and that the Grow lacquer thinner contained inadequate warnings.

[***4]

Plaintiffs relied primarily on the declaration of plaintiff Powell. n2 Powell declared that the lacquer thinner purchased from Standard Brands contained neither warnings nor safety instructions and that "Had anyone at Standard Brands advised us of the dangerous nature of lacquer thinner or of its highly flammable characteristics, I would not have used it on the job and would not have been using it at the time of my injury."

n2 Plaintiffs' attorneys filed an inordinately truncated response to the motion for summary judgment. Their two and one-half page memorandum of points and authorities cited only one case -- *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 [163 Cal.Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061] -- on the question of applicable tort duties

The trial court granted the motion and plaintiffs appeal from the summary judgment entered in favor of Standard Brands.

Discussion

(1a) The purpose of a motion for summary judgment is to determine if there are any triable [***5] issues of material fact, or whether the moving party is [*362] entitled to judgment as a matter of law. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 874 [191 Cal.Rptr. 619, 663 P.2d 177].) (2) Because summary judgment is a drastic procedure all doubts should be resolved in favor of the party opposing the motion. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 183 [203 Cal.Rptr.

626, 681 P.2d 893].) However, where, as here, the facts are not in dispute, summary judgment is properly granted when dispositive issues of law are determined in favor of the moving party. (*Allis-Chalmers Corp. v. City of Oxnard* (1981) 126 Cal.App.3d 814, 818 [179 Cal.Rptr. 159]; see *Miller v. Bechtel Corp.*, *supra*, 33 Cal.3d at p. 876.)

(3a) As best we understand it, plaintiffs assert on appeal that Standard Brands owed them a duty to warn them of the dangerous properties of its lacquer thinner, that it breached its duty to warn, and that its failure to warn was a legal proximate cause of the injuries suffered by plaintiffs. To our knowledge, no reported decision has held a manufacturer [***6] liable for its failure to [***397] warn of risks of using its product, where it is shown that the immediate efficient cause of injury is a product manufactured by someone else. Unfortunately, in addressing the merits of plaintiffs' important and novel contention, we find the meagre brief filed by plaintiffs' attorneys of little assistance. n3 Needless to say, however, we believe our own research has produced a correct result.

(4a) (5a) The premise of plaintiffs' argument is clearly correct; a manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product. (See, e.g., *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 699 [200 Cal.Rptr. 870, 677 P.2d 1147]; *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 428 [143 Cal.Rptr. 225, 573 P.2d 443, 96 A.L.R.3d 1]; *Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 347 [157 Cal.Rptr. 142]; *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 772 [150 Cal.Rptr. 419]; *Barth v. B.F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228, 244-245 [71 Cal.Rptr. 306]; [***7] *Canifax v. Hercules Powder Co.* (1965) 237 Cal.App.2d 44, 54-55 [46 Cal.Rptr. 552] [all decided upon principles of strict liability]; see also *McEvoy v. American Pool Corp.* (1948) 32 Cal.2d 295 [195 P.2d 783]; *Tingey v. E. F. Houghton & Co.* (1947) 30 Cal.2d 97, 103 [179 P.2d 807]; *Larramendy v. Myres* (1954) 126 Cal.App.2d 636, 640 [272 P.2d 824]; *Gall v. Union Ice Company* [*363] (1951) 108 Cal.App.2d 303, 310 [239 P.2d 48] [all decided upon principles of negligence].) n4

n4 Section 388 of both the Restatement First and Second of Torts states: "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use

of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

"(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

"(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

"(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

[***8]

(3b) Standard Brands has not refuted plaintiffs' pleaded assertions that said defendant owed plaintiffs a duty to warn of risks of *its* product and that it breached its duty. However, the evidence is undisputed that the immediate efficient cause of plaintiffs' injuries was the explosion of a product manufactured not by Standard Brands but rather by Grow. The question posed is whether Standard Brands' failure to warn was a legal proximate cause of plaintiffs' injuries. We conclude, in the circumstances of this case, it was not.

(6) As a general rule, the imposition of liability in tort for personal injuries depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. (*Sindell v. Abbott Laboratories, supra*, 26 Cal.3d at p. 597.) "(7) Proximate cause is a necessary element of both negligence and strict products liability actions. [Citations.]" (*Bigbee v. Pacific Tel. & Tel. Co. (1983)* 34 Cal.3d 49, 54, fn. 4 [192 Cal.Rptr. 857, 665 P.2d 947].)

In *Bigbee v. Pacific Tel. & Tel. Co., supra*, [***9] our Supreme Court characterized the questions of duty and proximate cause as presenting "the same issue in different guises." (34 Cal.3d at p. 56.) Each construct, said the court, involves the question whether the risk of injury to the plaintiff was reasonably foreseeable. (*Ibid.*) The court stated that ordinarily foreseeability is a question of fact for the jury. (*Ibid.*) (8) However, the question of reasonable foreseeability may be decided as a question of law if, under the undisputed facts, there is no room for a reasonable difference of opinion. (*Ibid.*; see, e.g., *Richard v. Stanley (1954)* 43 Cal.2d 60, 66 [271 P.2d 23] (opn. by Traynor, J.) [as a matter of law, defendant who left keys in car had no reason to [***398] believe that a car thief would be an incompetent driver]; compare *Palma v. U.S. Industrial Fasteners, Inc., supra*, 36 Cal.3d at pp. 183-186.)

[*364] (9) Where a defendant has committed a wrongful act, and where a third person also commits a

later wrongful act, and both are alleged to have caused plaintiff's injuries, the courts have asked whether the subsequent act of the [***10] third party was a superseding cause that served to break the requisite chain of causation between defendant's wrongful act and the injury. (See, e.g., *Stultz v. Benson Lumber Co. (1936)* 6 Cal.2d 688, 693 [59 P.2d 100] [negligence of assembler of scaffold using defective board without inspection was superseding cause exonerating manufacturer of defective board from liability].) Whether the act of the third person is a superseding cause depends in part on whether it (and plaintiff's injury) was reasonably foreseeable. n5

n5 Section 442A of the Restatement Second of Torts provides: "Where the negligent conduct of the actor creates or increases the *foreseeable risk of harm* through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause." (Italics added.)

(3c) On the undisputed facts tendered in this case, we conclude the explosion of Grow's product, and plaintiffs' consequent [***11] injuries, were not reasonably foreseeable consequences of Standard Brands' failure to warn as a matter of law. We explain.

(3d) (4b) (5b) Although there appears to be some uncertainty about the knowledge required of a manufacturer to justify liability for failure to warn of *its* product (see *Finn v. G. D. Searle & Co., supra*, 35 Cal.3d at p. 699), it is clear the manufacturer's duty is restricted to warnings based on the characteristics of the *manufacturer's own product*. (See, e.g., *Sindell v. Abbott Laboratories, supra*, 26 Cal.3d at p. 611; *Cronin v. J.B.E. Olson Corp. (1972)* 8 Cal.3d 121, 129 [104 Cal.Rptr. 433, 501 P.2d 1153]; *Blackwell v. Phelps Dodge Corp. (1984)* 157 Cal.App.3d 372, 377 [203 Cal.Rptr. 706]; *Garman v. Magic Chef, Inc. (1981)* 117 Cal.App.3d 634, 638 [173 Cal.Rptr. 20].) Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products. A manufacturer's decision to supply warnings, and the nature of any warnings, are therefore necessarily based [***12] upon and tailored to the risks of use of the manufacturer's own product. Thus, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are the only risks he is required to know.

From the foregoing, it follows that if plaintiff's theory of liability (asserted on appeal) has any validity, it would be limited to situations where the risks of use of

the product immediately causing injury are identical to the risks of use of the product previously used with inadequate warnings. [*365] No other risks are reasonably foreseeable. As a practical matter, a contrary conclusion would require each manufacturer to ascertain the risks of products manufactured by others within an industry and to warn of the highest risks a consumer might encounter. Such a requirement would place on each manufacturer an untoward duty and would penalize inventive manufacturers whose products are, in fact, of lower risk than other products in the industry.

(10) (3e) We therefore believe the theory of liability now asserted by plaintiffs would require [***13] at a minimum that: (a) the product immediately causing injury (product B) was subject to the same generic description as the product previously used with inadequate warnings (product A), e.g., "lawnmower," "electric drill," "aspirin," etc.; (b) product B was generally used for the same purposes as product A by consumers; (c) product B's warnings were inadequate; and (d) *product B had risks of use identical to those of product A*. This theory of liability gains credence to the extent a generically [***399] identical product (with presumably identical risks of use) is made by a limited number of manufacturers in an industry, and there is an industry-wide practice of omitting warnings on the product. (See, e.g., *Hall v. E. I. Du Pont de Nemours & Co., Inc.* (E.D.N.Y. 1972) 345 F.Supp. 353, see also *Sindell v. Abbott Laboratories, supra*, 26 Cal.3d at pp. 607-610.) In such a situation, each manufacturer has reason to know that the risks of use associated with its product are the same as the risks of the other products and that a consumer will receive no adequate warnings from the other products. n6

n6 This would seem to be particularly so where there is little brand-name loyalty by consumers using the products, so any given manufacturer could expect consumers to use generically identical products made by others in one industry.

[***14]

In this case we need not decide whether a manufacturer who fails to warn of its product may be held liable for injuries immediately caused by the use of a product with the same generic description and identical risks of use, because it is clear plaintiffs' attorneys never pleaded facts necessary to support that legal theory, nor anything remotely resembling it, in the trial court. (See *Finn v. G. D. Searle & Co., supra*, 35 Cal.3d at p. 699; *Sindell v. Abbott Laboratories, supra*, 26 Cal.3d at p. 605.) "(11) On motion for summary judgment the pleadings define the issues; thus "[In] the absence of some request for amendment there is no occasion to inquire about possible

issues not raised by the pleadings." (*Krupp v. Mullen* (1953) 120 Cal.App.2d 53, 57 [260 P.2d 629]; *Gardenswartz v. Equitable etc. Soc.* (1937) 23 Cal.App.2d Supp. 745, 752 [68 P.2d 322]; see *Dawson v. Rash* (1958) 160 Cal.App.2d 154, 161 [324 P.2d 959].) (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885 [164 Cal.Rptr. 510, 610 P.2d [*366] 407].) We have recently [***15] remarked, "The law and facts of a case bear a chicken and egg relationship. The law identifies the kinds of facts which are material to the case. The facts delimit the applicable propositions of law. [Citations.] Properly drafted pleadings display this recursive relationship. (1b) *The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute.*" (*Andalon v. Superior Court* (1984) 162 Cal.app.3d 600, 604-605 [208 Cal.Rptr. 899], fn. omitted, italics added.)

(3f) The complaint prepared by plaintiffs' attorneys did not plead that Standard Brands' absence of warnings caused plaintiffs to use a generically identical product, nor a product with the same risks of use, nor even a substantially similar product, without knowledge of its dangers. Indeed, the complaint pleads no relationship of similarity whatsoever between the Standard Brands and the Grow products. Rather, the complaint prepared by plaintiffs' attorneys states plaintiffs were using Standard Brands' product when an explosion occurred. The complaint tendered [***16] a theory that the Standard Brands product was the immediate efficient cause of injury, i.e., plaintiffs were using it when it exploded. That pleading was the one defendant had to encounter on its motion for summary judgment. (*Metromedia, Inc. v. City of San Diego, supra*, 26 Cal.3d at p. 885.) Standard Brands showed, contrary to plaintiffs' pleading, plaintiffs were not using its product at the time of the explosion. Standard Brands therefore refuted the only theory of causation pleaded by plaintiffs' attorneys. There was no other viable theory of causation pleaded, n7 and the trial court had [***400] no duty to invent one. "Neither a trial court nor a reviewing court in a civil action is obligated to seek out theories plaintiff might have advanced, or to articulate for him that which he has left unspoken." (*Finn v. G. D. Searle & Co., supra*, 35 Cal.3d at pp. 701-702.)

n7 Nor did plaintiffs' attorneys seek leave to amend their complaint. Nor was evidence presented on the motion for summary judgment indicating the Standard Brands and Grow products were generically identical or had the same risks of use. Indeed, the only evidence on the question before the court was contained in the deposition testimony of Gary Fischer, who worked with

166 Cal. App. 3d 357, *; 212 Cal. Rptr. 395, **;
1985 Cal. App. LEXIS 1839, ***; CCH Prod. Liab. Rep. P10,535

plaintiffs and actually purchased the Grow lacquer thinner for their use. Fischer testified he had heard after the accident that the Grow lacquer thinner "was an extremely flammable lacquer thinner." The record presents no basis upon which an appropriate amendment of the complaint may be implied. (Compare *Davis v. Cordova Recreation & Park Dis.* (1972) 24 Cal.App.3d 789, 794 [101 Cal.Rptr. 358].

[***17]

We conclude, on the facts pleaded and adjudicated on the motion for summary judgment, it was not reasonably foreseeable as a matter of law that Standard Brands' failure to warn of risks of its product would cause plaintiffs to suffer injuries while using the product of another. (See *Richards v. Stanley, supra*, 43 Cal.2d at p. 66.) In the circumstances, the explosion [*367] of Grow's product was an intervening and superceding cause of injury to plaintiffs. Consequently, Standard Brands' failure to warn was not a proximate cause of plaintiffs' injuries as a matter of law. (See *Stultz v. Ben-*

son Lumber Co., supra, 6 Cal.2d at p. 693.) Standard Brands' motion for summary judgment was properly granted. n8

n8 We note in passing that *Sindell v. Abbott Laboratories, supra*, 26 Cal.3d 588, does not aid plaintiffs. There, the product (the drug DES) was "produced from an identical formula." (P. 593.) Moreover, the case does not stand for the proposition that the manufacturer of product A is liable where the immediate efficient cause of a plaintiff's injury is product B. The case merely shifted the burden of proof to defendants "to demonstrate that they could not have made the substance which injured plaintiff. . . ." (P. 612.) Here, in our view, Standard Brands has met its burden.

[***18]

The judgment is affirmed.

**Shaul Pulka, Respondent, v. Lillian Edelman et al., Defendants, and Ace Garage,
Appellant**

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

40 N.Y.2d 781; 358 N.E.2d 1019; 390 N.Y.S.2d 393; 1976 N.Y. LEXIS 3120

October 19, 1976, Argued

December 2, 1976, Decided

PRIOR HISTORY:

Pulka v Edelman, 50 Ad2d 514.

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered November 6, 1975, which affirmed an order of the Appellate Term of the Supreme Court in the First Judicial Department, modifying a judgment of the Civil Court of the City of New York, New York County (Harry W. Davis, J.), which awarded judgment on the issue of liability in favor of defendant Ace Garage against plaintiff, notwithstanding a jury verdict in plaintiff's favor. The modification consisted of reversing so much of the judgment as set aside the verdict and awarded judgment to defendant, and reinstating the verdict. The following question was certified by the Appellate Division: "Was the order of the Appellate Term, as affirmed by this Court, properly made?"

DISPOSITION:

Order reversed, with costs, and the judgment of the Civil Court of the City of New York, New York County, reinstated. Question certified answered in the negative.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, injured pedestrian, sought review of the decision from the Appellate Division of the Supreme Court in the First Judicial Department (New York) which affirmed an order by which the appellate term court modified a judgment of the civil court awarding a judgment on the issue of liability in favor of defendant garage against the injured pedestrian notwithstanding a jury verdict in the injured pedestrian's favor.

OVERVIEW: An injured pedestrian brought suit against the garage, seeking recovery for injuries sustained when the injured pedestrian was struck by a car while it was being driven out of the garage and across an adjacent sidewalk, by a patron of the garage. On review, the court held that the garage did not have a duty to control the conduct of its patrons for the protection of off-premises pedestrians. The court held that to say that a duty to use care arose from the relationship of the garage to its patrons when there was no opportunity to fulfill that duty, would have placed an unreasonable burden on the garage. The court held that not all relationships give rise to a duty. The court held that foreseeability should not be employed as the sole means to create duty where none existed before. The court held that there was no basis in the law for the imposition of the burden on the garage.

OUTCOME: The court reversed the order of the appellate division, which awarded judgment to the injured pedestrian. The court reinstated the judgment of the civil court and held that the garage was not liable in negligence for the injured pedestrian's injuries.

LexisNexis(R) Headnotes

Torts > Negligence > Duty > Duty Generally

[HN1] Before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff. In the absence of duty, there is no breach and without a breach there is no liability.

Transportation Law > Private Motor Vehicles > Traffic Regulation

[HN2] The driver of a vehicle within a business or residence district emerging from an alley, driveway, or

40 N.Y.2d 781, *; 358 N.E.2d 1019, **;
390 N.Y.S.2d 393, ***; 1976 N.Y. LEXIS 3120

building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right of way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right of way to all vehicles approaching on said roadway. N.Y. Veh. & Traf. Law § 1959, ch. 775.

Torts > Negligence > Duty > Control of Third Parties

[HN3] The duty to control others arises when the relationship between the defendant and the person who threatens the harm to the third person may be such as to require the defendant to attempt to control the other's conduct or there may be a relationship between the defendant and the person exposed to harm which requires the defendant to afford protection from certain dangers including the conduct of others.

Torts > Negligence > Duty > Control of Third Parties

[HN4] A duty to prevent such negligence should not be imposed on one who does not control the tort-feasor.

Torts > Negligence > Duty > Duty Generally

[HN5] Foreseeability should not be confused with duty. The principle expressed in *Palsgraf v Long Is. R. R. Co.*, 248 NY 339, is applicable to determine the scope of duty only after it has been determined that there is a duty.

Torts > Negligence > Duty > Duty Generally

[HN6] A court might impose a legal duty where none existed before, but such an imposition must be exercised with extreme care, for legal duty imposes legal liability.

HEADNOTES: Negligence – scope of duty – protection of pedestrians from vehicles crossing sidewalk.

The defendant operators of a parking garage should not have been held liable in negligence for an injury to a pedestrian struck by a car being driven out of the garage and across an adjacent sidewalk by a patron of the garage, since the garage had no duty to protect pedestrians from the negligent conduct of its patrons. No duty could arise from the relationship of the garage either to its patrons or to pedestrians where there was no opportunity to fulfill that duty because the garage would be unable to stop drivers from disregarding any precautions it might take. The imposition of a duty upon one unable to control the tort-feasor would be unreasonably burdensome, and the foreseeability that a driver will violate his duty to a pedestrian and the requirements of *section 1173 of the Vehicle and Traffic Law* that he stop prior to crossing a sidewalk cannot create a duty. Accordingly, the trial

court properly set aside a verdict for the plaintiff pedestrian against the garage operators.

COUNSEL:

Abraham Shapiro and *A. Allen Stanger*, New York City, for appellant.

Joseph Kelner and *Gilbert S. Glotzer*, New York City, for respondent.

JUDGES:

Chief Judge Breitel and Judges Jasen and Jones concur with Judge Cooke; Judges Gabrielli, Wachtler and Fuchsberg dissent and vote to affirm in a memorandum.

OPINIONBY:

COOKE

OPINION:

[*781] [**1020] [***394] We determine here whether the operators of a parking garage are liable in negligence for an injury to a pedestrian struck by a car while it was being driven out of the garage and across an adjacent sidewalk, not by a garage employee, but by a patron of the garage.

After trial in the Civil Court of the City of New York, a [*782] verdict was returned in favor of plaintiff against the owner and operator of the car and the operators of the garage, but not against a truck which struck the plaintiff after he was struck by the car. The jury apportioned 75% liability to the car and 25% liability to the garage. Upon motion, the Trial Judge set aside the verdict against the garage on the basis of his conclusion "that the negligence of the Garage was not approximate cause nor a concurring cause of the injuries sustained by the plaintiff herein and that the sole proximate cause of the injuries was the failure of [the driver] to give the plaintiff the right of way as required by § 1173 V. & T. Law."

Appellate Term reversed and reinstated the verdict in an opinion which stated that since there was evidence in the record from which it could be found that the manner of operation of the garage was a source of potential injury to pedestrians and it was reasonably foreseeable that injuries to such pedestrians would be inflicted by vehicles operated by third persons, the issue was "at the very least" a question of fact for the jury. The Appellate Division affirmed Appellate Term, without opinion, with one dissent. We reverse.

We agree that the garage is not liable in negligence for plaintiff's injuries. As pointed out in the Appellate Division dissent, as well as by the Trial Judge, attempts

40 N.Y.2d 781, *; 358 N.E.2d 1019, **;
390 N.Y.S.2d 393, ***; 1976 N.Y. LEXIS 3120

by plaintiffs in similar circumstances to show a causal connection between the operation of the premises and the negligent operation of the vehicle have been rejected (see, e.g., *Weber v City of New York* 24 AD2d 618, affd 17 NY2d 790; *Turaso v Texas Co.*, 275 App Div 856, affd 300 NY 567). We need not, however, decide the case on that basis, because, regardless of proximate cause, a garage owes no duty to pedestrians in this type of case.

It is well established that [HN1] before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 342; [***395] see, also, 1 Shearman and Redfield, *Negligence* [Rev ed], § 4, pp 10-11). In the absence of duty, there is no breach and without a breach there is no liability (*Kimbar v Estis*, 1 NY2d 399, 405). This requirement is expressed in the often-quoted remark: "Negligence in the air, so to speak, [**1021] will not do" (Pollock, *Torts* [13th ed], p 468). The question of duty, however, is best expressed as "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct" (Prosser, *Torts* [4th ed], § 53, p 325).

[*783] In the case before us, the fundamental issue is whether the defendant garage owed a duty to the plaintiff. It is undisputed that the driver of the car owed a duty to the plaintiff, if not because of his operation of the car, then surely from the statute which at that time provided: [HN2] "The driver of a vehicle within a business or residence district emerging from an alley, driveway, or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right of way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right of way to all vehicles approaching on said roadway." (L 1959, ch 775.) * Since the statute specifies "the driver", it is clear that any duty owed to pedestrians by the garage is not to be found therein.

* Section 1173 of the *Vehicle and Traffic Law*, as amended by chapter 603 of the Laws of 1970, does not change the requirement that the "driver" stop the vehicle prior to driving on the sidewalk.

The question then is whether, since there was evidence that patrons of the garage often drove their cars out of the garage and across the sidewalk without stopping, there arose a duty on the part of the garage to take measures to prevent or discourage this practice. Stated another way, the question is whether this garage, or any garage, has a duty to control the conduct of its patrons for the protection of off-premises pedestrians.

Commentators have pointed out that [HN3] the duty to control others arises only in the following relationships: (1) "[the] relationship between the defendant and the person who threatens the harm to the third person may be such as to require the defendant to attempt to control the other's conduct" or (2) "there may be a relationship between the defendant and the person exposed to harm which requires the defendant to afford protection from certain dangers including the conduct of others" (Harper & Kime, *Duty to Control the Conduct of Another*, 43 *Yale LJ* 886, 887-888). While either of the above relationships may superficially appear to be applicable in the case before us, an examination of the situations in which these principles have been applied shows that there is no duty owed here.

With respect to the first relationship described above, one example of a situation in which there is a duty to use care to [*784] control another's conduct is the master and servant relationship. The relationship between the garage and its patron obviously would not fit that characterization. Yet another example is the duty of the owner of a vehicle to use care to control the conduct of the driver when the owner is riding in the vehicle. Even in that type of case, however, it is stated that: "the defendant must be shown to have had in fact a reasonable opportunity to control the driver" (2 Harper & James, *Torts* [Rev ed], § 18.7, p 1055). (This type of liability is not to be confused with vicarious liability which is imposed on the owner of the vehicle by section 388 of the *Vehicle and Traffic Law* without regard to whether the owner was able to control the driver.) In the instant case, the garage may have taken precautions, but, in no sense, can it be said that there was, in fact, a reasonable opportunity to stop drivers from disregarding these precautions in the same way that such drivers disregard their own sense of the danger to pedestrians [***396] caused by not stopping or by proceeding recklessly. Accordingly, to say that a duty to use care arose from the relationship of the garage to its patrons when there was no opportunity to fulfill that duty, places an unreasonable burden on the garage, indeed.

With respect to the second relationship described above, the question is whether the relationship of a garage to pedestrians who use the sidewalk across which cars leave the garage imposes a duty on the [**1022] garage to take some precautions to protect pedestrians from its patrons. An example of this type of relationship is the duty of a carrier to protect its passengers from fellow travelers (see Harper & Kime, 43 *Yale LJ*, at pp 901-903). This duty may obviously be implied from the contract of carriage and stems from control of the carrier (see *Higgins v Watervliet Turnpike Co.*, 46 NY 23, 26). The relationship of the garage to pedestrians is, however, at best somewhat tenuous. The garage obviously owes a

40 N.Y.2d 781, *, 358 N.E.2d 1019, **;
390 N.Y.S.2d 393, ***; 1976 N.Y. LEXIS 3120

duty to protect pedestrians from the acts of its own employees when driving a patron's vehicle across the path of pedestrians. On the other hand, it would be most unfair to impose that duty on the garage with respect to acts of its patrons. [HN4] A duty to prevent such negligence should not be imposed on one who does not control the tort-feasor (see *Clayton v Monaco*, 24 Misc 2d 27 [Pitoni, J.]; see, also, *Parking Lot-Liability-Moving Vehicle*, Ann., 38 ALR3d 138, 145-146; cf. *Friedman v Gearrity*, 33 AD2d 1044).

[*785] The present legislation with respect to driveways supports this analysis. The Legislature could have prescribed requirements as to the type of precautions, e.g., stop or warning signs, or steps garages must take to protect pedestrians from the negligence of its patrons. More specifically, the Legislature could have made it a requirement that garages have their employees drive the patron's vehicles out onto the street, thereby placing the responsibility directly on the garage to see to it that pedestrians are not injured by vehicles leaving the garage. Instead, section 1173 of the *Vehicle and Traffic Law* imposes the duty on the driver of the vehicle, whether such driver is the patron or the employee of the garage. (See, also, *Vehicle and Traffic Law*, § 1143, with respect to the duty to yield the right of way to vehicles, which also imposes the duty on the driver.)

The statutes impose a duty on the driver because pedestrians are entitled to legal protection from the conduct of the driver. To this extent they may seek legal redress and are not without a remedy. To hold that pedestrians are similarly entitled to legal protection from the garage for the conduct of its patrons would be to create an unnecessary extension of a duty beyond the limits required under the law of negligence as we know it. That in this particular case there was evidence that no significant precautionary measures were taken to prevent the negligent conduct of its patrons does not justify the imposition of any duty. Although it is reasonable to require one person to be responsible for the negligent conduct of another in some instances, it is unreasonable to impose that duty where the realities of every day experience show us that, regardless of the measures taken, there is little expectation that the one made responsible could prevent the negligent conduct.

[HN5] Foreseeability should not be confused with duty. The principle expressed in *Palsgraf v Long Is. R. R. Co.* (248 NY 339, *supra*), quoted by the dissent, is applicable to determine the scope of duty-only after it has been determined that there is a duty. Since there is no duty here, that principle is inapplicable. In holding that there is no duty here, it must be stressed that not all relationships give rise to a duty. One should not be held legally responsible for the conduct of others merely because they are within our sight or environs. Neither

should one be answerable merely because there are others whose [*786] activities are such as [***397] to cause one to envision damages or injuries as a consequence of those activities. In this respect, a moral duty should also be distinguished from a legal duty. The former is defined by the limits of conscience; the latter by the limits of law. A person may have a moral duty to prevent injury to another, but no legal duty. [HN6] While a court might impose a legal duty where none existed before (see, generally, 1A Warren's *Negligence*, § 3.13, subd [2], pp 166-167), such an imposition must be exercised with extreme care, for legal duty imposes legal liability. When a duty exists, nonliability in a particular case may be justified on the [**1023] basis that an injury is not foreseeable. In such a case, it can thus be said that foreseeability is a limitation on duty. In the instant matter, however, we are concerned with whether foreseeability should be employed as the sole means to create duty where none existed before (see 2 Harper & James, *Torts*, § 18.2, particularly p 1027; see, generally, § 18.3-18.5).

If a rule of law were established so that liability would be imposed in an instance such as this, it is difficult to conceive of the bounds to which liability logically would flow. The liability potential would be all but limitless and the outside boundaries of that liability, both in respect to space and the extent of care to be exercised, particularly in the absence of control, would be difficult of definition. Consider a city like New York with its almost countless parking garages and lots. Think especially of those in the theatre districts and around sporting stadiums and convention halls with the mass exoduses that occur upon cessation of the events which draw the crowds. Think also of the parking facilities at some hotels, office buildings and shopping centers. The burden cast on the operators of these parking establishments in order to discharge their responsibilities in respect to patron-operated vehicles beyond the confines of their properties would be an impractical and unbearable one. More importantly, there is no basis in the law for the imposition of this burden.

The order of the Appellate Division should be reversed and the judgment of the Civil Court reinstated.

DISSENTBY:

GABRIELLI; WACHTLER; FUCHSBERG

DISSENT:

Gabrielli, Wachtler and Fuchsberg, JJ. (dissenting). There is evidence in this record, in part from the lips of employees of Ace Garage, that cars driven by their owners as well as by garage attendants would come down the garage ramp, cross the sidewalk and proceed out into the

40 N.Y.2d 781, *, 358 N.E.2d 1019, **;
390 N.Y.S.2d 393, ***; 1976 N.Y. LEXIS 3120

street without stopping. There is also evidence that no significant [*787] precautionary measures were taken by the garage to discourage or prevent such practice or to warn pedestrians of the emergence of exiting vehicles. Such proof was adequate to sustain the conclusion drawn by the jury that the garage violated a duty of reasonable care owed to plaintiff, a traveler on the public sidewalk who was exposed to a foreseeable danger by the inaction of defendant. In the classic language of *Palsgraf v Long Is. R. R. Co.* (248 NY 339, 344), "[the] risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension".

It follows that the jury here was warranted in concluding that the foreseeability of danger to pedestrians who might be expected to be on the sidewalk spawned a duty on the part of the operator of this parking facility to exercise reasonable care to avert harmful consequences. The respondent, the nature of whose business as a public garage operator attracted the flow of automobile traffic across the public sidewalk, cannot close his eyes to the duty to pedestrians who are thereby imperiled. The obligation of due care might have been discharged by restricting operation of departing vehicles to garage employees, by cautioning patron drivers of the possible

presence of sidewalk pedestrians, by warning the pedestrians themselves, or by some combination of such methods, or by resort to some other means of protecting against [***398] injury to passersby. Liability would not necessarily be predicated on an obligation of the garage to control the conduct of its patrons; the responsibility of due care might otherwise have been discharged by the expenditure of some effort and attention. In the present instance there was no evidencethat any attempt was made to protect users of the sidewalk.

The fact that no statute imposes on garage owners a duty of prescribed conduct with respect to emerging vehicles is not sufficient to relieve this defendant of its liability. The common-law duty of reasonable care to those within the ambit of foreseeable danger requires no buttressing by legislative enactment; nor does the absence [**1024] of such legislation in the present instance exclude the possibility of liability.

Accordingly, the reinstatement of the jury's resolutions of the factual issues as to the existence of duty and its violation and as to causal relation, supported as they are by the evidence in the record, should not have been disturbed. The order of the Appellate Division should therefore be affirmed.

Francene Rastelli, as Administratrix of the Estate of John A. Wunderlich, Deceased,
Respondent, v. Goodyear Tire & Rubber Company, Appellant, et al., Defendants.

No. 38

COURT OF APPEAL OF NEW YORK,

79 N.Y.2d 289; 591 N.E.2d 222; 582 N.Y.S.2d 373; 1992 N.Y. LEXIS 935; 63
A.L.R.5th 799; CCH Prod. Liab. Rep. P13,160

February 12, 1992, Argued March 31, 1992, Decided

PRIOR HISTORY:

Appeal, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court, entered March 8, 1991 (the appeal having been transferred by order of the Appellate Division of the Supreme Court in the Second Judicial Department), which modified, on the law, and, as modified, affirmed an order of the Supreme Court (George M. Bergerman, J.), entered in Rockland County, *inter alia*, denying a motion by defendant Goodyear Tire & Rubber Company for summary judgment dismissing the amended complaint and all cross claims against it, with leave to renew after completion of discovery. The modification consisted of reversing Supreme Court's order to the extent of granting defendant Goodyear's motion for summary judgment insofar as it sought dismissal of the fifth and sixth causes of action of plaintiff's amended complaint asserting breach of warranty claims. The following question was certified by the Appellate Division: "Did this Court err as a matter of law in modifying the order of the Supreme Court by reversing so much thereof as denied the motion[] by defendant[] Goodyear Tire & Rubber Company ... for summary judgment regarding the fifth and sixth causes of action in the complaint, granting the motion to that extent and dismissing those causes of action against said defendant[], and, as so modified, affirming the order?"

Rastelli v Goodyear Tire & Rubber Co., 165 AD2d 111, reversed.

DISPOSITION: Order reversed, etc.

LexisNexis(R) Headnotes

COUNSEL: Alan D. Kaplan, James A. Gallagher, Jr., and Edward M. O'Brien for appellant. I. The tort theory of concert of action has *never* before been applied to a

products liability action in New York where plaintiff could identify the manufacturer of the actual product, nor has this State adopted it for use in cases involving unidentifiable manufacturers. Accordingly, the failure of the court below to dismiss the causes of action based on this theory was improper as a matter of law. (*Hymowitz v Lilly & Co.*, 73 NY2d 487, 493 US 944; *Morrissey v Conservative Gas Corp.*, 285 App Div 825, 1 NY2d 741; *De Carvalho v Brunner*, 223 NY 284; *Hall v Du Pont De Nemours & Co.*, 345 F Supp 353; *Bichler v Lilly & Co.*, 79 AD2d 317; *Kaufman v Lilly & Co.*, 65 NY2d 449; *Schaeffer v Lilly & Co.*, 113 AD2d 827; *Walicki v Mik-Lee Food Stores*, 144 Misc 2d 156; *Catherwood v American Sterilizer Co.*, 139 Misc 2d 901, 148 AD2d 985.) II. Since Goodyear did not manufacture or market the rim which allegedly caused the subject accident, the court below improperly failed to dismiss plaintiff-respondent's strict liability-based causes of action. (*Watford v Jack LaLanne Long Is.*, 151 AD2d 742; *Smith v City of New York*, 133 AD2d 818.) III. Product manufacturers should not be required to warn about "inherent" dangers of a separate product manufactured by another company, which is alleged to have caused the subject accident. Accordingly, the failure of the court below to dismiss all warning based claims was in error. (*Gaeta v New York News*, 62 NY2d 340; *Baughman v General Motors Co.*, 780 F2d 1131; *Blackburn v Johnson Chem. Co.*, 128 Misc 2d 623; *Hansen v Honda Motor Co.*, 104 AD2d 850; *Gifaldi v Dumont Co.*, 172 AD2d 1025; *Leahy v Mid-West Conveyor Co.*, 120 AD2d 16.)

Susan Corcoran for respondent. I. Concerted action liability is properly applied where manufacturers' actions affirmatively assist in keeping a competitor's known, dangerously defective product in the stream of commerce. (*Jackson v Firestone Tire & Rubber Co.*, 788 F2d 1070; *Hall v Du Pont De Nemours & Co.*, 345 F Supp 353; *Marshall v Celotex Corp.*, 652 F Supp 1581.) II. If Goodyear is accountable under concerted action

79 N.Y.2d 289, *; 591 N.E.2d 222, **;
582 N.Y.S.2d 373, ***; 1992 N.Y. LEXIS 935

liability, then it is accountable in strict products liability. (*Brumbaugh v CEJJ, Inc.*, 152 AD2d 69; *Blackburn v Johnson Chem. Co.*, 128 Misc 2d 623.) III. Goodyear is liable on the separate ground that it manufactured the tire that was inherently dangerous and defective for failure to carry a warning. (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102.) IV. There is no First Amendment right of a manufacturer to lie to or to conceal relevant information from a Federal regulatory agency. (*California Transp. v Trucking Unlimited*, 404 US 508; *Senart v Mobay Chem. Corp.*, 597 F Supp 502; *Braniff Airways v Curtiss-Wright Corp.*, 411 F2d 451.) V. No issue in this case is so simple that summary judgment can be granted before affording plaintiff adequate disclosure.

John Lawler Hash, of the North Carolina Bar, admitted *pro hac vice*, and *Michael C. Hayer*, of the Washington, D.C., Bar, admitted *pro hac vice*, for Association of Trial Lawyers of America, *amicus curiae*.

Sheila L. Birnbaum, *Barbara Wrubel* and *Douglas W. Dunham* for Product Liability Advisory Council, Inc., *amicus curiae*. I. The court below erroneously held that a claim for concerted action can lie against Goodyear under New York law. (*Hymowitz v Lilly & Co.*, 73 NY2d 487, 493 US 944; *Pulka v Edelman*, 40 NY2d 781; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339; *Waters v New York City Hous. Auth.*, 69 NY2d 225; *MacPherson v Buick Motor Co.*, 217 NY 382; *Carrier v Riddell, Inc.*, 721 F2d 867; *Baughman v General Motors Corp.*, 780 F2d 1131; *De Carvalho v Brunner*, 223 NY 284; *Hanrahan v Cochran*, 12 App Div 91; *Bradley v Firestone Tire & Rubber Co.*, 590 F Supp 1177.) II. The efforts of Goodyear and other rim assembly manufacturers to influence government regulatory agencies cannot be the basis of concerted action liability for the further reason that such conduct is constitutionally protected. (*Eastern R. R. Conference v Noerr Motor Frgt.*, 365 US 127; *Brownsville Golden Age Nursing Home v Wells*, 839 F2d 155; *Video Intl. Prod. v Warner-Amex Cable Communications*, 858 F2d 1075, *cert denied sub nom. City of Dallas v Video Intl. Prods.*, 490 US 1047; *Senart v Mobay Chem. Corp.*, 597 F Supp 502; *Boone v Redevelopment Agency*, 841 F2d 886; *California Transp. v Trucking Unlimited*, 404 US 508; *Immuno AG v Moor-Jankowski*, 77 NY2d 235; *Karaduman v Newsday, Inc.*, 51 NY2d 531; *New York Times Co. v Sullivan*, 376 US 254.) III. None of the equitable considerations that have prompted courts in some products liability cases to resort to expanded industrywide theories of recovery, including concerted action, are present in this case. (*Hymowitz v Lilly & Co.*, 73 NY2d 487, 493 US 944; *Catherwood v American Sterilizer Co.*, 139 Misc 2d 901, 148 AD2d 985; 74 NY2d 791; *Beasock v Dioguardi Enters.*, 130 Misc 2d 25, 117 AD2d 1015; *Walicki v Mik-Lee Food*

Stores, 144 Misc 2d 156; *Schaeffer v Lilly & Co.*, 113 AD2d 827; *Marshall v Celotex Corp.*, 652 F Supp 1581; *Hall v Du Pont De Nemours & Co.*, 345 F Supp 353.) IV. The court below erroneously concluded that Goodyear could be held liable for not placing a warning on its tires about alleged dangers in the multipiece rim assembly at issue, which Goodyear neither manufactured nor sold. (*Codling v Paglia*, 32 NY2d 330; *Howard v Poseidon Pools*, 72 NY2d 972; *Alfieri v Cabot Corp.*, 17 AD2d 455, 13 NY2d 1027; *Grzesiak v General Elec. Co.*, 68 NY2d 937; *Baughman v General Motors Corp.*, 780 F2d 1131.)

Daniel J. Popeo, *Richard K. Willard*, *Thomas M. Barba*, *Thomas M. Koutsky* and *Paul D. Kamenar*, of the Washington, D.C., Bar, admitted *pro hac vice*, for Washington Legal Foundation, *amicus curiae*. I. The decision below creates a new and expansive theory of products liability which will result in the imposition of industrywide liability for manufacturers of similar products. (*Hymowitz v Lilly & Co.*, 73 NY2d 487, 493 US 944; *Bradley v Firestone Tire & Rubber Co.*, 590 F Supp 1177; *Rastelli v Goodyear Tire & Rubber Co.*, 165 AD2d 111; *Hall v Du Pont De Nemours & Co.*, 345 F Supp 353.) II. This expansive application of concert-of-action liability would create perverse incentives throughout the economic system.

JUDGES: Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Bellacosa concur.

OPINIONBY: Hancock, Jr., J.

OPINION: [*293] [**223] [***374]

Plaintiff's decedent was killed while inflating a truck tire, manufactured by Goodyear, when the multipiece tire rim, not manufactured by Goodyear, separated explosively. The issues are whether (1) Goodyear may be subject to concerted action liability under the alleged facts in this product liability action and (2) Goodyear has a duty to warn against its nondefective tire being used with an allegedly defective tire rim manufactured by others. For the reasons stated below, we conclude that plaintiff's claims under both theories of liability should be dismissed. Accordingly, we reverse the order of the Appellate Division.

I

In June 1984, John Wunderlich was inflating a tire on his employer's 1970 Chevrolet dump truck when the multipiece tire rim, upon which the tire was mounted, violently flew apart. A piece of the rim struck Wunderlich in the head, killing him instantly.

79 N.Y.2d 289, *; 591 N.E.2d 222, **;
582 N.Y.S.2d 373, ***; 1992 N.Y. LEXIS 935

Multipiece rims are not a uniform product. The tire, manufactured by defendant Goodyear Tire & Rubber Company, was compatible for use on some but not all multipiece rim assemblies. n1 [*294] The particular rim assembly involved in this case was an RH5 degree (RH5) model, consisting of a side or locking ring marked "Firestone, 20 * 6.0, RH5" and a rim base marked "K-H" for the Kelsey-Hayes Company. The Appellate Division concluded that Goodyear neither manufactured nor sold the subject rim or its parts (165 AD2d 111, 114). Moreover, Goodyear's proof that it never has been a manufacturer or marketer of the RH5 rim assembly model or its component parts is not disputed by anything in the record.

n1 The record indicates that the subject tire could be used with 24 different models of multipiece rims, out of the approximately 200 types of multipiece rims sold in the United States. The tire comported with size standards published by the Tire and Rim Association.

In August 1985, plaintiff Francene Rastelli, as administratrix of the decedent's estate, brought suit for decedent's pain and suffering and wrongful death against Goodyear, Firestone Tire and Rubber Company, Kelsey-Hayes Company, and the Budd Company (the manufacturers of substantially all multipiece tire rims produced in the United States). The complaint sets forth causes of action based upon four theories of liability: (1) negligence, (2) strict products liability, (3) breach of warranty, and (4) concerted action. Goodyear moved for summary judgment based upon proof that it had not designed, manufactured or marketed any part of the rim involved in decedent's accident. Supreme Court denied Goodyear's motion, with leave to renew after the completion of discovery. The Appellate Division modified by reversing to the extent of granting Goodyear summary judgment on the breach of warranty claims, and otherwise affirmed the denial of summary judgment on the concerted action, strict products liability and negligence claims.

The Appellate Division held that plaintiff's failure to counter the proof that Goodyear did not manufacture or market any part of the rim defeated her breach of warranty claims. However, it concluded that plaintiff's submissions for her concerted action claims "were sufficient to demonstrate that further discovery may disclose an express agreement or tacit understanding among Goodyear ... and the [*224] [***375] other major manufacturers of multipiece truck tire rims to prevent public awareness of the extreme propensity of *all such rims* to explode, and to block governmental action which would

have required the manufacturers to recall the products" (165 AD2d 111, 115, [emphasis in original]). The court also held [*295] that plaintiff's negligence and strict products liability claims set forth an alternative basis for liability not dependent on establishing that Goodyear manufactured the rim. Specifically, it stated that plaintiff's allegations that the subject Goodyear tire was made exclusively for use on inherently dangerous multipiece rims "could support recovery based upon Goodyear's failure to warn of the dangers of using its tires with multipiece rims" (*id.*, at 116).

Goodyear appeals pursuant to leave granted by the Appellate Division, arguing (1) that the tort theory of concerted action is not applicable in this products liability case and (2) product manufacturers should not be required to warn about the inherent dangers of a separate product manufactured by another company. We address Goodyear's arguments in that order.

II

The theory of concerted action "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in 'a common plan or design to commit a tortious act'" (*Hymowitz v Lilly & Co.*, 73 NY2d 487, 506 [quoting Prosser and Keeton, Torts § 46, at 323 (5th ed)]; *see, Bichler v Lilly & Co.*, 55 NY2d 571, 580-581; *De Carvalho v Brunner*, 223 NY 284; *Restatement [Second] of Torts* § 876). It is essential that each defendant charged with acting in concert have acted tortiously and that one of the defendants committed an act in pursuance of the agreement which constitutes a tort (*see, Prosser and Keeton, op. cit.*, at 324). Parallel activity among companies developing and marketing the same product, without more, we have held, "is insufficient to establish the agreement element necessary to maintain a concerted action claim" (*Hymowitz v Lilly & Co.*, *supra*, at 506).

In *Hymowitz*, this Court declined to adopt a modified version of concerted action, holding that inferring agreement from the common occurrence of parallel activity alone would improperly expand the concept of concerted action beyond a rational or fair limit (*id.*, at 508). We explained that because application of concerted action renders each manufacturer jointly liable for all damages stemming from any defective product of an entire industry, parallel activity by manufacturers is not sufficient justification for making one manufacturer responsible for the liability caused by the product of another [*296] manufacturer (*see, id.; Bichler v Lilly & Co.*, *supra*, at 581). Accordingly, we must determine here whether plaintiff has made any showing that the rim manufacturers engaged in more than parallel activity and, if not, whether the circumstances warrant expanding the concerted action theory so that it applies in this case.

79 N.Y.2d 289, *; 591 N.E.2d 222, **;
582 N.Y.S.2d 373, ***; 1992 N.Y. LEXIS 935

In opposition to Goodyear's motion for summary judgment dismissing the concerted action claims, plaintiff alleged that Goodyear engaged in concerted action with Firestone, Kelsey-Hayes and Budd "to perpetuate the use of the deadly multipiece rims, to prevent Government implementation of appropriate safety standards and to prevent a recall." More specifically, plaintiff alleged that the rim manufacturers took the following actions: campaigned through their trade association for OSHA to place the responsibility for safety precautions on truck maintenance employers and not on the manufacturers, decided not to issue warnings, lobbied successfully against a proposed ban on the production of all multipiece rims, and declined to recall the RHS multipiece rim voluntarily.

These allegations and the exhibits plaintiff submitted to support them show parallel activity by the rim manufacturers. But they do not raise an issue of fact as to [**225] [***376] whether the rim manufacturers were parties to an agreement or common scheme to commit a tort. Indeed, plaintiff's affirmation in opposition to Goodyear's motion for summary judgment states no more than that "[t]he events described show parallel actions by the manufacturers". Thus, under *Hymowitz*, plaintiff's showing of the common occurrence of parallel activity among companies manufacturing the same product is insufficient to establish a concerted action claim because parallel activity does not constitute the required agreement between the companies (*Hymowitz v Lilly & Co.*, 73 NY2d 487, 506, *supra*). Moreover, not only must the manufacturers have engaged in more than parallel activity, but their activity must also have been tortious in nature. Plaintiff failed to provide any evidence that the rim manufacturers' lobbying activities were tortious.

We see no reason in this case for extending the concerted action concept to create industrywide liability and make recovery possible when, as here, plaintiff alleges only parallel activity; indeed, plaintiff does not argue that we should do so (*see generally, Cummins v Firestone Tire & Rubber Co.*, 344 Pa Super 9, 495 A2d 963 [concerted action claim not maintainable [*297] in multipiece rim case]; *Tirey v Firestone Tire & Rubber Co.*, 33 Ohio Misc 2d 50, 513 NE2d 825 [same]; *Bradley v Firestone Tire & Rubber Co.*, 590 F Supp 1177 [WD SD] [same]; *but see, Cousineau v Ford Motor Co.*, 140 Mich App 19, 363 NW2d 721 [concerted action claim maintainable]). For the above reasons, we conclude that Goodyear may not be held liable under the concerted action theory for the alleged defective product of another where, as here, no more than parallel activity was shown.

III

Plaintiff's alternative theory of recovery sounds in negligence and strict products liability. She alleges that

the subject Goodyear tire was made for installation on a multipiece rim, that Goodyear was aware of the inherent dangers of using its tires in conjunction with such rims and, thus, that Goodyear had a duty to warn of the dangers resulting from such an intended use of its tires. Plaintiff does not claim that the subject tire was defective. Her claim is based only on the fact that the particular Goodyear tire could be used with multipiece rims which had their own alleged inherent defects. n2

n2 Plaintiff argued for the first time on appeal that the tire was defective because it contained no warnings against using the tire in an underinflated condition or not inflating the tire in a protective cage. This claim was not raised in Supreme Court, has no support in the record, was not addressed by the Appellate Division and, thus, cannot be considered by this Court. Moreover, plaintiff does not claim that such allegedly dangerous conditions caused the accident in this case.

We have held that a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product (*see, Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107; *Torrogrossa v Towmotor Co.*, 44 NY2d 709; *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 62, *affd* 52 NY2d 768). A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known (*see, Cover v Cohen*, 61 NY2d 261, 275; *Alfieri v Cabot Corp.*, 17 AD2d 455, 460, *affd* 13 NY2d 1027; *Donigi v American Cyanamid Co.*, 57 AD2d 760, *affd* 43 NY2d 935; 1 Weinberger, *New York Products Liability* § 18:04; *see also, Grzesiak v General Elec. Co.*, 68 NY2d 937).

Under the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another [*298] manufacturer's product when the first manufacturer produces a sound product [**226] [***377] which is compatible for use with a defective product of the other manufacturer. Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode. Plaintiff does not dispute that if Goodyear's tire had been used with a sound rim, no accident would have occurred (*see, Lytell v Goodyear Tire & Rubber Co.*, 439 So 2d 542 [La Ct App]).

79 N.Y.2d 289, *; 591 N.E.2d 222, **;
582 N.Y.S.2d 373, ***; 1992 N.Y. LEXIS 935

This is not a case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn (*see, Ilosky v Michelin Tire Corp.*, 307 SE2d 603 [W Va]). Nothing in the record suggests that Goodyear created the dangerous condition in this case. Thus, we conclude that Goodyear had no duty to warn about the use of its tire with potentially dangerous multipiece rims produced by another where Goodyear did not contribute to the alleged defect in a product, had no control over it, and did not produce it

(*see, Gifaldi v Dumont Co.*, 172 AD2d 1025; *Hansen v Honda Motor Co.*, 104 AD2d 850; *Baughman v General Motors Corp.*, 780 F2d 1131 [4th Cir]; *Spencer v Ford Motor Co.*, 141 Mich App 356, 367 NW2d 393; *Mitchell v Sky Climber*, 396 Mass 629, 487 NE2d 1374).

Accordingly, the order of the Appellate Division should be reversed, with costs; defendant Goodyear's motion for summary judgment dismissing the amended complaint and all cross claims against it should be granted; and the question the Appellate Division certified to this Court should be answered in the affirmative.

Gerald Robinson, Respondent, v. Reed-Prentice Division of Package Machinery Company, Appellant and Third-Party Plaintiff. Plastic Jewel Parts Company, Inc., Third-Party Defendant-Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

49 N.Y.2d 471; 403 N.E.2d 440; 426 N.Y.S.2d 717; 1980 N.Y. LEXIS 2142; CCH Prod. Liab. Rep. P8658

January 8, 1980, Argued
February 14, 1980, Decided

PRIOR HISTORY:

Appeal, by permission of the Court of Appeals, from a judgment of the Supreme Court, entered April 21, 1978 in New York County upon a stipulation consenting to reduction of a verdict in favor of plaintiff, bringing up for review an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 27, 1979 (67 AD2d 893), which (1) reversed, on the law and the facts, and vacated a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a verdict rendered at a Trial Term (Louis I. Kaplan, J.), awarding plaintiff the sum of \$ 1,250,676.50, to be apportioned 40% against defendant and 60% against third-party defendant, and (2) ordered a new trial on the issue of damages only, unless plaintiff stipulated to reduce the verdict to \$ 600,000 and to entry of an amended judgment in accordance therewith.

Plaintiff, then 17, was employed as a plastic molding machine operator by third-party defendant Plastic Jewel Parts Co. On October 16, 1971, plaintiff suffered severe injuries when his hand was caught between the molds of a plastic molding machine manufactured by defendant Reed-Prentice and sold to Plastic Jewel in 1965, some six and one-half years prior to the accident. After the machine was delivered by Reed-Prentice, Plastic Jewel discovered that its design did not comport with its production requirements. Plastic Jewel modified the safety gate of the machine to serve its needs, and thereby destroyed the practical utility of the safety features incorporated into the design of the machine. Plaintiff's hand somehow went through the opening cut into the safety gate and was drawn into the molding area while the interlocks were engaged. The machine went through the molding cycle, causing plaintiff serious injury. Plaintiff subsequently commenced an action against Reed-Prentice which impleaded third-party defendant Plastic Jewel.

The Court of Appeals reversed the judgment of the Supreme Court and the order of the Appellate Division brought up for review, and dismissed the complaint and third-party complaint, holding, in an opinion by Chief Judge Cooke, that a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries. *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d .

DISPOSITION:

Judgment appealed from and order of the Appellate Division brought up for review reversed, etc.

LexisNexis(R) Headnotes

COUNSEL:

William F. McNulty, Walter A. Donnelly and Anthony J. McNulty for appellant and third-party plaintiff. I. The complaint herein should have been dismissed at the close of the evidence on the ground that plaintiff failed to establish a prima facie case against Reed-Prentice either on the theory of negligence or on the theory of strict products liability. (*Bergen v I.L.G.W.U. Houses*, 38 AD2d 933; *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376; *Gasper v Ford Motor Co.*, 13 NY2d 104; *Borshowsky v Altman & Co.*, 280 App Div 599, 306 NY 798; *Mancino v 1951 5th Ave. Corp.*, 20 AD2d 771, 16 NY2d 527; *Behm v Seaman*, 45 AD2d 673; *Codling v Paglia*, 32 NY2d 330.) II. Even though it be assumed, *arguendo*, that the proof may have raised issues of fact for the jury respecting the liability of

49 N.Y.2d 471, *; 403 N.E.2d 440, **;
426 N.Y.S.2d 717, ***; 1980 N.Y. LEXIS 2142

Reed-Prentice in this case, the charge of the Trial Justice finds no support in any reported case decided either in New York or in any other American jurisdiction under facts in any way comparable to the novel facts presented in the case at bar. (*Campo v Scofield*, 301 NY 468; *Codling v Paglia*, 32 NY2d 330; *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395; *Fogal v Genesee Hosp.*, 41 AD2d 468; *Halloran v Virginia Chems.*, 41 NY2d 386; *Resenzweig v Aristo Truck Renting Corp.*, 34 AD2d 542; *Cascia v Maze Woodenware Co.*, 29 AD2d 964; *Fernandez v Chios Shipping Co.*, 542 F2d 145; *Hagans v Oliver Mach. Co.*, 576 F2d 97; *Hanlon v Cyril Bath Co.*, 541 F2d 343.) III. Other errors at least mandating a new trial of this action were committed by the Trial Justice. (*Winnick v New York State Elec. & Gas Corp.*, 38 AD2d 623, 32 NY2d 624; *Codling v Paglia*, 32 NY2d 330; *Ashe v Niagara Mach. & Tool Works*, 60 AD2d 616; *Kasper v Buffalo Bills of Western N. Y.*, 42 AD2d 87; *Gilliard v Long Is. R. R. Co.*, 45 NY2d 996.)

Steven B. Prystowsky for third-party defendant-appellant. I. The manufacturer of a product is not liable to any person injured under the theory of strict liability in tort if, after the product leaves the manufacturer's control, there is a subsequent modification which substantially alters the product. Further, assuming, *arguendo*, there was a design defect in the product, a manufacturer is not liable to anyone injured under general principles of negligence if knowledge of the design defect was brought home to the purchaser and the purchaser was in a better position to correct the design defect but failed to do so. (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376; *Biss v Tenneco*, 64 AD2d 204, 46 NY2d 711; *Ashe v Niagara Mach. & Tool Works*, 60 AD2d 616; *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62; *Bolm v Triumph Corp.*, 33 NY2d 151; *Cousins v Instrument Flyers*, 58 AD2d 336, 44 NY2d 698; *Bergen v I.L.G.W.U. Houses*, 38 AD2d 933; *Hardy v Hull Corp.*, 446 F2d 34; *Young v Aeroil Prods.*, 248 F2d 185; *Speyer, Inc. v Humble Oil & Refining Co.*, 403 F2d 766.) II. The Trial Judge's instructions to the jury were confusing and contradictory, requiring a new trial in the interest of justice. (*Bolm v Triumph Corp.*, 58 AD2d 1014; *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376; *Culver v Gloop*, 27 AD2d 698; *Boerio v Haiss Motor Trucking Co.*, 7 AD2d 228; *Arroyo v Judena Taxi*, 20 AD2d 888; *Smith v Gray*, 19 App Div 262, 162 NY 643; *Meyers v Grand Union Co.*, 26 AD2d 646; *Green v Downs*, 27 NY2d 205; *France v Shannon*, 36 AD2d 651.)

Richard E. Shandell for respondent. I. Defendant was properly held legally responsible for plaintiff's injuries. (*Codling v Paglia*, 32 NY2d 330; *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376; *Merced v Auto Pak Co.*, 533 F2d 71; *Tucci v Bossert*, 53

AD2d 291; *Parks v Simpson Timber Co.*, 388 U.S. 459; *Thomas v American Cystoscope Makers*, 414 F Supp 255; *Mazzi v Greenlee Tool Co.*, 320 F2d 821; *McPherson v Buick Motor Co.*, 217 NY 382; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339; *Grant v Knepper*, 245 NY 158.) II. Defendants' breach of duty was a proximate cause of plaintiff's injuries. (*Bolm v Triumph Corp.*, 33 NY2d 151.) III. Contributory negligence, if any, of the infant plaintiff was an issue properly left to the jury. (*Wartels v County Asphalt*, 29 NY2d 372; *Rossmann v La Grega*, 28 NY2d 300; *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick & Fayette*, 289 NY 800; *Broderick v Cauldwall-Wingate Co.*, 301 NY 182; *Merced v Auto Pak Co.*, 533 F2d 71; *Boerio v Haiss Motor Trucking Co.*, 7 AD2d 228; *Kaplan v 48th Ave. Corp.*, 267 App Div 272.) IV. The letter of Reed-Prentice expressing its refusal to make any attempt to improve the safety of its machine was admissible into evidence. (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376.) V. The statement of Marone was properly submitted to the jury. (*Spampinato v A. B. C. Cons. Corp.*, 35 NY2d 283; *Kasper v Buffalo Bills of Western N. Y.*, 42 AD2d 87; *Letendre v Hartford Acc. & Ind. Co.*, 21 NY2d 518; *McPherson v Buick Motor Co.*, 217 NY 382.) VI. The trial court properly set forth the issues to the jury in its charge. (*Arroyo v Judena Taxi*, 20 AD2d 888; *Anchor Motor Frgt. v Shapiro*, 56 AD2d 573; *Green v Downs*, 27 NY2d 205.) VII. The trial court's charge on contributory negligence was wholly proper. (*Kalish v Krieger*, 35 NY2d 864.)

JUDGES:

Judges Jasen, Gabrielli, Jones, Wachtler and Meyer concur with Chief Judge Cooke; Judge Fuchsberg dissents and votes to affirm in a separate opinion.

OPINION BY:

COOKE

OPINION:

[*475] [**441] [***718] OPINION OF THE COURT

We hold that a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries.

Plaintiff Gerald Robinson, then 17, was employed as a plastic molding machine operator by third-party defendant Plastic Jewel Parts Co. A recent arrival to New York from [*476] South Carolina where he had been an

itinerant farm worker, Robinson had been employed by Plastic Jewel for approximately three weeks. On October 15, 1971, plaintiff suffered severe injuries when his hand was caught between the molds of a plastic molding machine manufactured by defendant Reed-Prentice and sold to Plastic Jewel in 1965, some six and one-half years prior to the accident.

Plaintiff commenced this action against Reed-Prentice which impleaded third-party defendant Plastic Jewel. At the close of proof, causes of action in strict products liability and negligence in the design and manufacture of the machine were submitted to the jury. A sizeable general verdict was returned in favor of plaintiff, the jury apportioning 40% of the liability against Reed-Prentice, the remainder against Plastic Jewel. On appeal, the Appellate Division reversed and ordered a new trial limited to the issue of damages unless plaintiff stipulated to a reduced verdict. Plaintiff so stipulated and the judgment, as amended and reduced, was affirmed. This court then granted Reed-Prentice and Plastic Jewel leave to appeal (*CPLR 5602*, subd [a], par 1, cl [ii]). We now reverse.

The plastic injection molding machine is designed to melt pelletized plastic inside a heating chamber. From the heating chamber, the liquefied plastic is forced into the mold area by means of a plunger. The mold area itself is composed of two rectangular platens on which the plastic molds are attached. One of the platens moves horizontally to open and close the mold; the other remains stationary. When the operating cycle is begun, hydraulic pressure causes the movable platen to be brought up against the stationary platen, thus forming a completed mold into which the heated plastic is pumped. After the plastic is cured, the movable platen returns to its original position, thereby permitting the operator to manually remove the finished product from its mold.

To protect the operator from the mold area, Reed-Prentice equipped the machine with a safety gate mounted on rollers and connecting interlocks in conformity with the State Industrial Code (12 NYCRR 19.34). Completely covering the mold area, the metal safety gate contained a Plexiglas window allowing the operator to monitor the molding process. Since the gate shielded the mold area, access to the platens was impossible while the machine was operating. [***719] Only when the molding sequence was completed could the operator roll the safety gate to the open position, allowing him to reach into [*477] the mold area to remove the finished product. The interlocks were connected to electrical switches which activated the hydraulic pump. When the safety gate was closed, the interlocks complete a circuit that activates the hydraulic pump, [**442] thereby causing the movable platen to close upon its stationary counterpart. When the safety gate was opened, however, this

essential circuit would not be completed and hence the machine would not be activated.

After the machine was delivered by Reed-Prentice, Plastic Jewel discovered that its design did not comport with its production requirements. Plastic Jewel purchased the machine in order to mold beads directly onto a nylon cord. The cord was stored in spools at the back of the machine and fed through the mold where the beads were molded around it. After each molding cycle, the beads were pulled out of the mold and the nylon cord was reset in the mold for the next cycle. To allow the beads to be molded on a continuous line, Plastic Jewel determined that it was necessary to cut a hole of approximately 6 by 14 inches in the Plexiglas portion of the safety gate. The machine, as designed, contracted for and delivered, made no provision for such an aperture. At the end of each cycle, the now corded beads would be pulled through the opening in the gate, the nylon cord would be restrung, and the next cycle would be started by opening and then closing the safety gate without breaking the continuous line of beads. While modification of the safety gate served Plastic Jewel's production needs, it also destroyed the practical utility of the safety features incorporated into the design of the machine for it permitted access into the molding area while the interlocking circuits were completed. Although the record is unclear on this point, plaintiff's hand somehow went through the opening cut into the safety gate and was drawn into the molding area while the interlocks were engaged. The machine went through the molding cycle, causing plaintiff serious injury.

The record contains evidence that Reed-Prentice knew, or should have known, the particular safety gate designed for the machine made it impossible to manufacture beads on strings. During the period immediately prior to the purchase of the machine, Reed-Prentice representatives visited the Plastic Jewel plant and observed two identical machines with holes cut in the Plexiglas portion of their safety gates. At that meeting, Plastic Jewel's plant manager discussed the problem with a Reed-Prentice salesman and asked whether a safety [*478] gate compatible with its product needs could be designed. Moreover, a letter sent by Reed-Prentice to Plastic Jewel establishes that the manufacturer knew precisely what its customer was doing to the safety gate and refused to modify its design. However, the letter pointed out that the purchaser had "completely flouted the safeties built into this machine by removing part of the safety window", and that it had not "held up your end of the purchase when you use the machine differently from its design" and the manufacturer stated "[as] concerns changes, we will make none in our safety setup or design of safety gates". At trial, plaintiff's expert indicated that there were two modifications to the safety gate

49 N.Y.2d 471, *; 403 N.E.2d 440, **;
426 N.Y.S.2d 717, ***; 1980 N.Y. LEXIS 2142

which could have been made that would have made it possible to mold beads on a string without rendering the machine unreasonably dangerous. Neither of these modifications were made, or even contemplated, by Reed-Prentice.

Defendants maintain that a manufacturer may not be held to answer in damages where the purchaser of its product deliberately destroys the functional utility of that product's safety features and, as a result of that intentional act, a third party is injured. Once a product which is not defective is injected into the stream of commerce, they argue, the responsibility of the manufacturer is at an end. Thus, having delivered to Plastic Jewel a plastic injection molding [***720] machine which was free from defect and in conformity with State promulgated safety regulations, Reed-Prentice fully discharged any legal duty it may have owed to Plastic Jewel and its employees. Plaintiff asserts that a manufacturer's duty is tempered by principles of foreseeability. Thus, if a manufacturer knows or has reason to know that its product would be used in an unreasonably dangerous manner, for example by cutting a hole in a legally required safety guard, it may not evade responsibility by simply maintaining that the product was safe at the time of sale.

[**443] A cause of action in strict products liability lies where a manufacturer places on the market a product which has a defect that causes injury (*Codling v Paglia*, 32 NY2d 330, 342). As the law has developed thus far, a defect in a product may consist of one of three elements: mistake in manufacturing (*Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395; *Codling v Paglia*, *supra*), improper design (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376; *Bolm v Triumph Corp.*, 33 NY2d 151), or by the inadequacy or absence of warnings for [**479] the use of the product (*Torrogrossa v Towmotor Co.*, 44 NY2d 709). Plaintiff maintains that the safety gate of the molding machine was improperly designed for its intended purpose.

Where a product presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to detailed plans and specifications, it is said to be defectively designed. This rule, however, is tempered by the realization that some products, for example knives, must by their very nature be dangerous in order to be functional. Thus, a defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce (*Restatement, Torts 2d*, § 402A). Design defects, then, unlike manufacturing defects, involve products made in the precise manner intended by the manufacturer (2 Frumer & Friedman, *Products Liability*, § 16A [4] [f]

[iv]). Since no product may be completely accident proof, the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm (*Micallef v Miehle Co.*, *supra*, p 386; 2 Harper and James, *Torts*, § 28.4).

But no manufacturer may be automatically held liable for all accidents caused or occasioned by the use of its product (see Wade, *A Conspectus of Manufacturers' Liability for Products*, 10 *Ind L Rev* 755, 768). While the manufacturer is under a nondelegable duty to design and produce a product that is not defective, that responsibility is gauged as of the time the product leaves the manufacturer's hands (*Restatement, Torts 2d*, § 402A, Comments g, p; *Hanlon v Cyril Bath Co.*, 541 F2d 343, 345; *Santiago v Package Mach. Co.*, 123 Ill App 2d 305, 312; *Temple v Wean United*, 50 Ohio St 2d 317, 322-323). Substantial modifications of a product from its original condition by a third party which render a safe product defective are not the responsibility of the manufacturer (*Keet v Service Mach. Co.*, 472 F2d 138, 140; *Hardy v Hull Corp.*, 446 F2d 34, 35-36; *Coleman v Verson All-steel Press Co.*, 64 Ill App 3d 974; *Ariz Rev Stat Ann*, § 12-683, subd 2; *RI Gen Laws*, § 9-1-32; Proposed Uniform Product Liability Act, § 112, subd [D], 44 *Fed Reg* 62737).

At the time Reed-Prentice sold the molding machine, it was not defective. Had the machine been left intact, the safety [**480] gate and connecting interlocks would [***721] have rendered this tragic industrial accident an impossibility. On closer analysis, then, plaintiff does not seek to premise liability on any defect in the design or manufacture of the machine but on the independent, and presumably foreseeable, act of Plastic Jewel in destroying the functional utility of the safety gate. Principles of foreseeability, however, are inapposite where a third party affirmatively abuses a product by consciously bypassing built-in safety features. While it may be foreseeable that an employer will abuse a product to meet its own self-imposed production needs, responsibility for that willful choice may not fall on the manufacturer. Absent any showing that there was some defect in the design of the safety gate at the time the machine left [**444] the practical control of Reed-Prentice (and there has been none here), Reed-Prentice may not be cast in damages for strict products liability.

Nor does the record disclose any basis for a finding of negligence on the part of Reed-Prentice in the design of the machine. Well settled it is that a manufacturer is under a duty to use reasonable care in designing his product when "used in the manner for which the product was intended * * * as well as an unintended yet reasonably foreseeable use" (*Micallef v Miehle*, *supra*, pp 385-386). Many products may safely and reasonably be used

for purposes other than the one for which they were specifically designed. For example, the manufacturer of a screwdriver must foresee that a consumer will use his product to pry open the lid of a can and is thus under a corresponding duty to design the shank of the product with sufficient strength to accomplish that task. In such a situation, the manufacturer is in a superior position to anticipate the reasonable use to which his product may be put and is obliged to assure that no harm will befall those who use the product in such a manner. It is the manufacturer who must bear the responsibility if its purposeful design choice presents an unreasonable danger to users. A cause of action in negligence will lie where it can be shown that a manufacturer was responsible for a defect that caused injury, and that the manufacturer could have foreseen the injury. Control of the instrumentality at the time of the accident in such a case is irrelevant since the defect arose while the product was in the possession of the manufacturer.

The manufacturer's duty, however, does not extend to designing a product that is impossible to abuse or one whose [*481] safety features may not be circumvented. A manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or even reckless (cf. *Aetna Ins. Co. v Loveland Gas & Elec. Co.*, 369 F2d 648; *Drazen v Otis Elevator Co.*, 96 RI 114). Nor must he trace his product through every link in the chain of distribution to insure that users will not adapt the product to suit their own unique purposes. The duty of a manufacturer, therefore, is not an open-ended one. It extends to the design and manufacture of a finished product which is safe at the time of sale. Material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility. Acceptance of plaintiff's concept of duty would expand the scope of a manufacturer's duty beyond all reasonable bounds and would be tantamount to imposing absolute liability on manufacturers for all product-related injuries (see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 *Col L Rev* 1531).

Unfortunately, as this case bears out, it may often be that an injured party, because of the exclusivity of workers' compensation, is barred from commencing an action against the one who exposes him to unreasonable [***722] peril by affirmatively rendering a safe product dangerous. However, that an employee may have no remedy in tort against his employer gives the courts no license to thrust upon a third-party manufacturer a duty to insure that its product will not be abused or that its

safety features will be callously altered by a purchaser (cf. *McLaughlin v Mine Safety Appliances Co.*, 11 NY2d 62, 71-72). Where the product is marketed in a condition safe for the purposes for which it is intended or could reasonably be intended, the manufacturer has satisfied its duty.

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be reversed, with costs, and the complaint and third-party complaint dismissed.

DISSENTBY:

FUCHSBERG

DISSENT:

[**445] Fuchsberg, J. (dissenting). The majority opinion appears to proceed on the assumption that the plaintiff's suit was based essentially on a strict products liability theory alone and, unwilling to carry the promise of *Codling* and *Micaleff* to its [*482] logical fruition, would deny plaintiff a recovery on that theory. n1 Doing so, however, it ignores the fact that the "first cause of action" -- the one pleaded first and charged first -- rested on traditional common-law negligence theories, two of which at least were firmly supported by the proof and could well serve as solid foundations for the jury's verdict.

n1 The test of the manufacturer's liability is whether the use to which the product was put was the intended one or one which by the exercise of due care was reasonably foreseeable. The anticipatable uses, therefore, will dictate the standards of safety to which the product must conform. This suggests that when the manufacturer has actual notice that the product is to be used for a specific purpose somewhat different from its general use, the manufacturer may be held responsible for taking particular safety precautions appropriate for the product's known use, a matter the further exploration of which, in light of the determination reached by the majority, I leave for another day.

Indeed, the proof was overwhelming that, to the knowledge of Reed-Prentice, the safety device on the machine it was selling to Plastic Jewel would be rendered completely ineffective before the machine was ever put to use. For, as sold, there was no way in which it could turn out Plastic Jewel's product unless the hazardous hole was cut into the safety gate.

49 N.Y.2d 471, *; 403 N.E.2d 440, **;
426 N.Y.S.2d 717, ***; 1980 N.Y. LEXIS 2142

This was not the first such machine Plastic Jewel had purchased from Reed-Prentice. It was the fourth. Each of the first three had been altered in the identical fashion. Before the purchase of the fateful one, Reed-Prentice's representative had visited the Plastic Jewel plant, where he observed the machines operating, each with the gaping hole in plain sight. In fact, the contract of sale was negotiated in Plastic Jewel's factory in full view of the altered, earlier-purchased machines. Conclusively on this point, in a letter to Plastic Jewel, Reed-Prentice had made admissions that the majority recognizes "establishes that the manufacturer knew precisely what its customer was doing to the safety gate". But that did not inhibit it from making the sale, at its price of \$ 28,000 per machine.

Moreover, pathos was added by proof that Plastic Jewel had made frequent but unavailing entreaties of the manufacturer and its sales and service personnel seeking some modification of the machine that would eliminate the need for piercing the safety gate. As expert testimony revealed, the machine could easily have been made safe for the anticipated use by either of at least two simple modifications. One, at a cost of only \$ 200, would be the installation of "dual hand controls", which [*483] would cause the machine to stop unless both of the operator's hands were safely occupied pressing buttons spaced widely apart. The second, at a cost of \$ 400 to \$ 500, would, by conversion of the horizontal gate to a vertical one, allow for the extrusion of the product without a dangerously wide aperture.

[***723] This array of facts proved the allegations that Reed-Prentice had been negligent "in selling and distributing a machine which [it] knew or should have known to be dangerous, defective and unsafe" as well as "in failing to affix proper and adequate warnings of the dangers". The law of negligence therefore required no extension to permit a finding of liability: "[the] risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation" is right on target (*Palsgraf v Long Is. R. R. Co.*, 248 NY 338, 344). Put another way, "[the] parameters of the manufacturer's duties may be said to be whatever is foreseeable by application of due care" (Rheingold, *Expanding Liability of the Product Supplier: A Primer*, 2 *Hofstra L Rev* 521, 538).

Under these standards, it cannot be gainsaid that the risk of injury in this case was substantial and even omnipresent as long as the safety gates were known to have been rendered useless. The injury that occurred was then surely foreseeable, and, indeed, was precisely that which the safety gate [*446] itself was to have anticipated. That the accident would result in part from the purchaser's misuse was but a factor to be weighed in ascertaining whether the harm was foreseeable and, hence, whether, given its resources and expertise, the manufac-

turer acted in a reasonably prudent fashion (see *Finnegan v Havir Mfg. Corp.*, 60 NJ 413, 423; *Thompson v Package Mach. Co.*, 22 Cal App 3d 188, 196; *Byrnes v Economic Mach. Co.*, 41 Mich App 192; Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 42 *Tenn L Rev* 11, 50, 64).

So stated, the manufacturer's conduct may be considered culpable on either of the two negligence theories proposed by plaintiff:

The first theory sounds in "negligent entrustment". n2 Liability [*484] on this basis is cast upon one who places in another's hands an instrumentality capable of doing serious harm if misused while knowing or having strong reason to believe that it will be misused to the detriment of others (*Restatement, Torts 2d*, § 302B, Comment e [E]; see § 390, Comment b; cf. *Hogan v Comac Sales*, 245 App Div 216, 218-219, aff'd 271 NY 562; *Faller v A. Drive Auto Leasing System*, 47 AD2d 530). The principle is hardly new. The situation that typically furnishes its classic illustration is that in which the defendant gives a loaded gun to a young boy who negligently points it at the plaintiff and discharges it (*Dixon v Bell*, 5 M & S 198 [1816]). Closer to the case today and relying on this same theory is *Fredericks v General Motors Corp.* (48 Mich App 580), which held that a manufacturer could be liable for injuries suffered by an employee of a small tool and die shop when the manufacturer had reason to know in advance of its entrustment of a die set to the plaintiff's employer that the latter would use it in an unsafe manner.

n2 Epitomizing the court's instruction in this regard was the exception taken by the defendant's counsel to the charge that the defendant might be found negligent, if the jury were to find that "the defendant sold the machine, reasonably certain to be dangerous if put to its intended use or could be modified so as to become dangerous, and the defendant knew it".

In each of these instances the duty of reasonable care is breached when one passively permits a danger to be created by supplying the product to a probably negligent user; the negligence or misuse by the user is considered to be but a foreseeable intervening cause of the injury (see 2 Harper and James, *Torts*, § 28.2, p 1539; Prosser, *Torts* [4th ed], § 44, pp 272-275). By the same reasoning, then, Reed-Prentice may properly be held liable in negligence for conveying the molding machine to Plastic Jewel; the rationale applies more forcefully, in fact, because Reed-Prentice had the strongest reason to know of its customer's intended misuse of the machine (see *Smith v Hobart Mfg. Co.*, 302 F2d 570, 573-575;

49 N.Y.2d 471, *; 403 N.E.2d 440, **;
426 N.Y.S.2d 717, ***; 1980 N.Y. LEXIS 2142

[***724] *Anderson v Bushong Pontiac Co.*, 404 Pa 382).

The second theory propounded by plaintiff is that Reed-Prentice was negligent in failing to warn foreseeable users of the machine such as the plaintiff of the danger posed by the aperture in the safety gate. The underlying premise for liability has been stated as follows: "[One] who supplies a chattel for another to use for any purpose is subject to liability for physical harm caused by his failure to exercise reasonable care to give those whom he may expect to use the chattel any information as to the character and condition of the chattel which he possesses, and which he should recognize as necessary to enable them to realize the danger of using it" (*Restatement*, [*485] *Torts 2d*, § 388, Comment b; see 37 ATLA LJ 107, esp pp 113-116).

Certainly, Plastic Jewel's misuse of the safety gate does nothing to diminish Reed-Prentice's responsibility. Because the misuse was an open and notorious one, the manufacturer knew when it sold the machine that it could not be used for the purchaser's purpose unless it was modified. Furthermore, it knew exactly how the machine had to be used by employees of Plastic Jewel. For this reason, it does not matter [**447] that Plastic Jewel's misuse may have been in violation of State law (see *Suchomajcz v Hummel Chem. Co.*, 524 F2d 19 [liability imposed on manufacturer of a component part for injuries sustained by remote users under the theory of negligent failure to warn where it supplied chemicals to fabricator of firecracker assembly kits which it knew were being sold in violation of Federal injunction]).

Nor, under the circumstances, could Reed-Prentice rest on the assumption that Plastic Jewel would convey adequate warnings to the users of the machine (see *Shell Oil Co. v Gutierrez*, 119 Ariz 426; *First Nat. Bank v Nor-Am Agric. Prods.*, 88 NM 74; *Dougherty v Hooker Chem Corp.*, 540 F2d 174). The employer's consistent choice of expediency over safety having already been made crystal clear, it would have been pure pollyanna to presume that the necessary safety information would filter down to those who had to work on the machine (see *Restatement, Torts 2d*, § 388, Comment n; 2 Harper and James, *Torts*, § 28.7, pp 1548-1549; cf. *Bexiga v Havir Mfg. Corp.*, 60 NJ 402, 410-411).

Cognizant of both the danger and the continued necessity for Plastic Jewel to cut through the safety gate, and given the long-standing and on-going service relationship between manufacturer and purchaser, it turns logic and common sense upside down to say that Reed-Prentice was absolved of any duty to warn employees of the danger to which they were exposed. Nor was Reed-Prentice to be relieved of its duty to use reasonable care in bringing home the danger to users simply because the

danger might appear to be an obvious one. Users of such a machine may well be unappreciative of the risk, thinking perhaps, as plaintiff's expert attested, that the mere presence of a safety gate, even one altered to create a hole, was adequate protection, or that there were other safety devices to prevent hands from getting caught in the machine. Surely the exact nature of the risk and its more subtle [*486] aspects, including the possibility of the user's being drawn into the machine, could well remain unperceived to the inexperienced 17-year-old plaintiff. Precisely because of such considerations, the perception of the danger by the user has generally been thought to be a jury question (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376; *Bolm v Triumph Corp.*, 33 NY2d 151; *Codling v Paglia*, 32 NY2d 330; *Meyer v Gehl Co.*, 36 NY2d 760, 763 [dissenting opn]; *Merced v Auto Pak Co.*, 533 F2d 71; Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 42 *Tenn L Rev* [***725] 11, 58, 64). The issue was therefore properly submitted at trial. n3

n3 The court's charge accurately reflected these principles: "even if the defendant complied with the [State] regulations [concerning the safety gate] completely, you may still find the defendant negligent if you find that one, it knew or had reason to anticipate that the plaintiff's employer would modify or alter the machine to increase one of the risks of harm which the safety device was designed to prevent, and did not give adequate warning of the dangers of such alteration or did not otherwise prevent, if it could reasonably have done so, such alterations from being made after the machine left its factory and its hand."

In sum, to premise liability on either a theory of negligent entrustment or negligent failure to warn is not to depart from recognized principles. And, contrary to the alarms sounded by the defendant and third-party defendant, the application of these precepts to the case here certainly cannot be said to forebode a limitless expansion of a manufacturer's liability for product-related injuries. While, admittedly, a manufacturer is under no obligation to design "a product that is impossible to abuse or one whose safety features may not be circumvented" (pp 480-481), to uphold a jury finding that the manufacturer was negligent in the case before us would herald no such absurdly burdensome standard. Rather, liability may be reasonably circumscribed within the ambit of foreseeability, [**448] and the attachment of liability is even clearer in this instance because the manufacturer not only could have foreseen the misuse of its product but actually knew of its occurrence.

49 N.Y.2d 471, *; 403 N.E.2d 440, **;
426 N.Y.S.2d 717, ***; 1980 N.Y. LEXIS 2142

Under these circumstances, the majority's dismissal of the complaint simply cannot be justified by that calculus for legal responsibility long professed by this court. For, "a balancing of the likelihood of the harm, and the gravity of the harm if it happens, against the burden of the precaution which would be effective to avoid the harm" would lead, inexorably in my opinion, to a finding of negligence (*Micallef v Miehle Co.*, *supra*, p 386, quoting 2 Harper and James, Torts, § 28.4; [*487]

United States v Carroll Towing Co., 159 F2d 169, 173 [Hand, J.]).

Because I conclude that the jury's verdict was supportable on at least the negligence grounds that were submitted to it, at the very least, upon the court's reversal of the order of the Appellate Division, a new trial should be ordered (see *Clark v Board of Educ.*, 304 NY 488, 490; *Phillipson v Ninno*, 233 NY 223, 226).

ROBERT and REBECCA SPENCER, Plaintiffs-Appellants, v. FORD MOTOR COMPANY, a foreign corporation, Defendant-Appellee, and THE FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation, Defendant.

Docket Nos. 68858, 70317

Court of Appeals of Michigan

141 Mich. App. 356; 367 N.W.2d 393; 1985 Mich. App. LEXIS 2532; CCH Prod. Liab. Rep. P10,551

February 6, 1984, Submitted

March 18, 1985, Decided

DISPOSITION: [***1]

Affirmed in part and reversed in part.

LexisNexis(R) Headnotes

COUNSEL:

Robert A. Tyler, P.C. (by Robert A. Tyler), for plaintiffs.

Harvey, Kruse, Westen & Milan, P.C. (by John A. Kruse, Dale R. Burmeister and Larry W. Davidson), for Ford Motor Company.

Butzel, Long, Gust, Klein & Van Zile (by Xhafer Orhan and Daniel P. Malone), for Firestone Tire & Rubber Company.

JUDGES:

Beasley, P.J., and Gribbs and J. R. Ernst, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINIONBY:

GRIBBS

OPINION:

[*358] [**395] Plaintiffs appeal from the trial court's grant of summary judgment for defendant Ford Motor Company, pursuant to GCR 1963, 117.2(3), on plaintiffs' products liability action. Defendant Firestone Tire & Rubber Company appeals from the trial court's denial of its motion for partial summary judgment pursu-

ant to GCR 1963, 117.2(3), on plaintiffs' duty to warn theory. We affirm in part and reverse in part.

In May of 1977, plaintiff Robert Spencer was employed by a Union 76 automotive service station. One of his duties was to repair truck tires. An employee of Vegeheim Lumber Company brought a Ford truck to the station to have a flat tire repaired. [***2] Plaintiff repaired the tire and reassembled the tire and the multi-piece rim in a safety cage. Such cages are provided because multi-piece rims can explosively disengage. While Robert Spencer was attempting to replace the repaired tire back onto the truck, the multi-piece [*359] rim explosively disengaged and injured him. Certain parts of the tire rim assembly were unexplainedly lost, while plaintiff Robert Spencer retained other parts as evidence.

On May 16, 1980, plaintiffs filed a complaint against Ford, the vehicle manufacturer, and Firestone, the wheel manufacturer. Ford was granted summary judgment pursuant to GCR 1963, 117.2(3). The trial court ruled as a matter of law that Ford had no duty with respect to the design of the wheel rim, and that any breach of duty by Ford was not a proximate cause of plaintiff's injury.

Firestone sought partial summary judgment pursuant to GCR 1963, 117.2(3), on plaintiffs' breach of duty to warn claim. The motion was denied by the trial court which found that an expert's testimony about micrometers used in checking wheel rims might present a factual issue for the jury.

Plaintiffs and Firestone appeal from the trial court's determinations [***3] and the appeals were consolidated by this Court.

Defendant Ford

141 Mich. App. 356, *; 367 N.W.2d 393, **;
1985 Mich. App. LEXIS 2532, ***; CCH Prod. Liab. Rep. P10,551

Plaintiffs appeal from the trial court's grant of summary judgment for Ford on Plaintiffs' claims of (1) negligence and breach of implied warranty as a result of Ford's design, sale and failure to recall a defective vehicle, and (2) negligence and breach of implied warranty as a result of Ford's failure to warn of the danger of the three-piece wheel rims.

Summary judgment was granted pursuant to GCR 1963, 117.2(3). Summary judgment under this court rule should be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pauley v Hall*, 124 Mich App 255, 262; 335 [*360] NW2d 197 (1983), *lv den* 418 Mich 870 (1983). The trial court must be satisfied that the nonmovant's claim cannot be supported at trial as a result of a deficiency which cannot be overcome. *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973).

Plaintiffs based their first negligence and breach of warranty claims on their contention that the Ford vehicle was defective and Ford was thus liable for the design, sale and failure to recall the defective vehicle. [***4] Plaintiffs contend that the vehicle was defective because the vehicle could accommodate a dangerous wheel rim. The trial court correctly pointed out that there was no evidence that Ford trucks required multi-piece rims or were unable to accommodate less dangerous single-piece rims. Plaintiffs also admitted that the multi-piece wheel rim which explosively disengaged was not an original component of the 1965 Ford truck, but was manufactured in 1967.

[**396] "Though a vehicle manufacturer may be held liable for damages caused by defective component parts supplied by another entity, *Comstock v General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959), this duty has not yet been extended to component parts added to a vehicle subsequent to distribution. Assuming the existence of a defect [under either a negligence or breach of implied warranty theory], plaintiff must 'trace that defect into the hands' of the defendant. *Caldwell v Fox*, 394 Mich 401, 410; 231 NW2d 46 (1975). '[The] threshold requirement of any products liability action is identification of the injury-causing product and its manufacturer.' *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984). [***5] Failure of a component not supplied by the manufacturer does not give rise to liability on the manufacturer's part. *Antcliff v State Employees Credit Union*, 95 Mich App 224, 231-233; 290 NW2d 420 (1980), *aff'd* 414 Mich 624; 327 NW2d 814 (1982)." *Cousineau v Ford Motor Co*, 140 Mich App 19, 30-31; 363 NW2d 721 (1985).

[*361] Thus, plaintiffs' contention that Ford should be held liable for a wheel rim component added subsequent

to distribution of the Ford vehicle has no support in our case law. n1

n1 Plaintiffs did not set forth a concert of action theory against vehicle and rim manufacturers as did the plaintiffs in *Cousineau, supra*.

Moreover, finding a vehicle defective or a vehicle manufacturer liable simply because the vehicle could accommodate dangerous or defective replacement components manufactured by another would have far-reaching undesirable results. For example, car manufacturers would be liable every time a defective tire blew up because a defective tire fit the vehicle. [***6]

Plaintiffs' second negligence and breach of implied warranty claims, based on a failure to warn, also fail. Negligence and breach of implied warranty claims based on a failure to warn involve proof of the same elements. *Smith v E R Squibb & Sons, Inc*, 405 Mich 79, 88; 273 NW2d 476 (1979). Products liability actions grounded in negligence or breach of implied warranty require a causal connection between the manufacturer's negligence or product defect and the plaintiff's injury, *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 609; 182 NW2d 800 (1970), and plaintiffs failed to establish that Ford's failure to warn of the danger of the three-piece rims was a cause of plaintiff's injury. n2

n2 Plaintiffs' failure to warn argument centers on Ford's duty to warn of the danger of the three-piece wheel rims. Although we do not discuss whether or not Ford had a duty to warn of the danger of another manufacturer's replacement component, but dispose of plaintiffs' claim on the lack of a causal connection, we do not imply that we accept plaintiffs' argument that Ford had such a duty to warn.

[***7]

Plaintiff Robert Spencer was specifically questioned about his awareness of the nature and extent of danger. He stated that he was aware of [*362] the cause of the explosive disengagement and indicated that if he had read a warning with respect to the danger he would still have followed precisely the same repair procedures. After the accident, he continued to change tires following the same procedure he had followed before the accident despite his awareness of the risk. Thus, by his own testimony, plaintiff refuted a causal connection between the lack of a warning of the danger of three-piece wheel rims and plaintiff's injury.

141 Mich. App. 356, *; 367 N.W.2d 393, **;
1985 Mich. App. LEXIS 2532, ***; CCH Prod. Liab. Rep. P10,551

Thus, Ford was entitled to summary judgment on plaintiffs' negligence and breach of implied warranty claims based on defective product and failure to warn theories.

Defendant Firestone

Plaintiffs' complaint alleged that Firestone had a duty to warn of the danger of the multi-piece rim. Firestone argued that there was no genuine material issue of fact and moved for summary judgment pursuant to GCR 1963, 117.2(3). The trial court denied Firestone's motion, finding [**397] that an expert's testimony about a micrometer used to determine if a rim [***8] base was "out of round" might present a factual issue for the jury.

As discussed above with respect to defendant Ford, the dispositive issue under either a negligence or breach of implied warranty theory in this case is the lack of a causal connection between Firestone's failure to warn and plaintiff's injury. There was no evidence presented to show that a warning would have changed plaintiff's

behavior and prevented his injury. Plaintiff's own testimony revealed that a warning would have made little difference. Thus, Firestone was entitled to summary judgment on plaintiffs' failure to warn theory.

[*363] The trial court's finding that the testimony regarding the micrometer would present a factual issue for the jury was in error. There was no representation that out-of-roundness, as measured by a micrometer, would lead to explosive disengagement. Plaintiff was aware of the danger of disengagement and knew that the wheel rim had to be properly seated to prevent such an occurrence. He could determine whether proper seating occurred by looking at the wheel. If the rim were not properly seated, he might be able to use the micrometer to ascertain *why*, but this would not [***9] be relevant to his awareness to danger. For this reason, any factual issue raised with respect to the micrometer would not be material, *i.e.*, essential to the case. Black's Law Dictionary (4th ed), p 1128.

Affirmed in part and reversed in part.

LEXSEE 571 A.2D 420

Schree TOTH, Surviving Wife of Joseph Patrick Toth, Deceased, as Trustee ad Litem, and Mary Bridget Toth, Executrix of the Estate of Joseph Patrick Toth, Deceased, Appellants, v. ECONOMY FORMS CORPORATION

No. 001161 Pittsburgh, 1989

Superior Court of Pennsylvania

391 Pa. Super. 383; 571 A.2d 420; 573 A.2d 1156; 1990 Pa. Super. LEXIS 403; CCH Prod. Liab. Rep. P12,424

January 25, 1990, Argued
March 1, 1990, Filed

SUBSEQUENT HISTORY: [***1]

Appeal Denied April 16, 1991.

PRIOR HISTORY:

Appeal from the Order of court denying appellants' motion to remove nonsuit entered in the Court of Common Pleas of Allegheny County, Civil Division, No. GD 85-21070.

DISPOSITION:

Order affirmed; judgment of nonsuit affirmed.

COUNSEL:

Michael J. Colarusso, Pittsburgh, for appellants.

Mary J. Bowes, Pittsburgh, for appellee.

JUDGES:

Cavanaugh, Tamlia and Johnson, JJ.

OPINIONBY:

TAMLIA

OPINION:

[*385] [**421] This is an appeal from the Order of court denying appellants' motion to remove nonsuit entered July 27, 1989 following the trial court's granting of appellee's motion for a compulsory nonsuit.

On December 8, 1983, Joseph Patrick Toth, a laborer employed by Cameron Construction Company, was killed in a construction accident. He stepped on a wooden plank supported by scaffolding. The scaffolding

was attached to concrete forming equipment, which was manufactured, sold and supplied by appellee, Economy Forms, to Cameron Construction. The plank, supplied by Mellon Stuart Company [*386] to Cameron, thereupon broke away, causing the decedent to fall to his death.

Appellants, Schree Toth, surviving widow, and Mary Bridget Toth, as Executrix of the Estate of Mr. Toth, contend Economy Forms [***2] corporation designed, manufactured, sold and supplied a defective concrete forming/scaffolding system which supported the plank that broke and this defective system was the proximate cause of Mr. Toth's death. Economy denied liability for Mr. Toth's death.

Following extensive discovery, the case proceeded to trial. Appellants presented the liability aspects of their case, which consisted of the testimony of their expert witness, Ben Lehman, and an offer of [**422] proof from a liability witness who could not be found. Economy Forms thereafter made an oral motion for a compulsory nonsuit, which the trial court granted based on its finding Economy had no connection with the product that caused the injury, i.e. the planking. Appellants subsequently filed a motion to remove the compulsory nonsuit, which was denied. This appeal followed.

The sole issue on appeal is whether the trial court properly granted Economy Forms' motion for a compulsory nonsuit. When a motion for compulsory nonsuit is filed, the plaintiff, appellant here, must be given the benefit of all favorable evidence along with all reasonable inferences of fact arising from the evidence, and any conflict in the evidence [***3] must be resolved in favor of the plaintiff. *Coatesville Contractors v. Borough of Ridley Park*, 509 Pa. 553, 559, 506 A.2d 862, 865 (1986). Furthermore, when the trial court is presented

391 Pa. Super. 383, *; 571 A.2d 420, **;
573 A.2d 1156; 1990 Pa. Super. LEXIS 403, ***

with a choice between two reasonable inferences, the case must be submitted to the jury. *Hawthorne v. Dravo Corp., Keystone Div.*, 313 Pa. Super. 436, 460 A.2d 266 (1983). However where it is clear a cause of action has not been established, a compulsory nonsuit is proper. *Storm v. Golden*, 371 Pa. Super. 368, 538 A.2d 61, 63 (1988).

[*387] At trial, appellants sought recovery based on two theories of liability -- product liability under § 402A of Restatement (Second) of Torts or, in the alternative, negligence. Section 402A R.2d Torts states:

§ 402 A. Special liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in [***4] the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Our Supreme Court adopted § 402A in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). In order to succeed under this section, a plaintiff must establish all of the following: 1) a product; 2) the sale of that product; 3) a user or consumer; 4) the product defect which makes the product unreasonably dangerous; and 5) the product defect was the proximate cause of the harm. See *Ellis v. Chicago Bridge & Iron Co.*, 376 Pa. Super. 220, 238, 545 A.2d 906, 916 (1988) (Popovich, J., concurring); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). In order for liability to attach in a products liability action such as this, the plaintiff must show the [***5] injuries suffered were caused by a product of the particular manufacturer or supplier. *Eckenrod v. GAF Corp.*, 375 Pa. Super. 187, 190-91, 544 A.2d 50, 52

(1988). Appellants concede the wooden plank that broke and caused Mr. Toth to fall to his death was not supplied or [*388] manufactured by appellee (Brief for Appellants, p. 4). There is no legal authority supporting appellants' attempt to hold a supplier liable in strict liability for a product it does not even supply. We believe, under this theory of recovery, appellant must look to the lumber supplier and not appellee.

However, appellants contend appellee's scaffolding system, as designed, was incomplete and thus defective because it failed to supply all of the component parts, i.e., the wooden planks. Therefore, appellants suggest appellee *should* have supplied the lumber, and its failure to do so constitutes a design defect in the scaffolding, which it did supply. To this end, appellants opine it was foreseeable "Cameron would use wood planking which was not suitable for use as scaffolding planks supported by yokes and that one way to guard against this hazard was to supply a complete [***6] [**423] system, including wooden components" (Brief for Appellants, p. 4). We fail to see how this would have been reasonably foreseeable to appellee -- especially where Cameron, a contractor engaged in bridge reconstruction under the auspices of Pennsylvania's Department of Transportation (Penn Dot), is itself subject to OSHA requirements and inspections, Penn Dot requirements and inspections and federal state, and local regulations regarding scaffolding. We reject appellants' assertion the failure to provide wood planks constitutes a design defect in the metal scaffolding.

Alternatively, appellants suggest appellee's scaffolding system was defective because appellee failed to instruct as to its proper use or warn of inherent dangers associated with its use. A "defective condition" is not just limited to defects in design or manufacture, but includes the failure to give such warnings as needed to inform the consumer of the possible risks and limitations involved. *Berkebile, supra*, 337 A.2d at 902. "If the product is defective absent such warnings, and the defect is a proximate cause of the plaintiff's injury, the seller is strictly liable without [***7] proof of negligence." *Id.* Once again, we emphasize appellee did not supply the "defective" product. Appellants' theory would have us impose liability on the [*389] supplier of metal forming equipment to warn of dangers inherent in wood planking that it did not supply. Pennsylvania law does not permit such a result.

Having rejected appellants' first theory of liability, we turn now to their second theory of liability -- negligence. Appellants argue the allegedly defective design and lack of warnings constitute negligence, as well as product liability, and appellee still had an opportunity to correct its negligence, thereby preventing Mr. Toth's death, by providing proper field services. Although ap-

391 Pa. Super. 383, *; 571 A.2d 420, **;
573 A.2d 1156; 1990 Pa. Super. LEXIS 403, ***

pellants allege appellee had a duty to provide proper field services, appellants fail to show how this duty was breached, if at all. Appellants have not even demonstrated how Cameron failed to follow procedures in using appellee's product, much less how this is appellee's fault. It is not enough for appellants to claim appellee had a duty. Appellants must also show how that duty was breached in order to impose liability on appellee. Hav-

ing failed to establish its case in negligence, [***8] we reject appellants' claim.

Because appellants have failed to establish a cause of action under § 402A R.2d torts or in negligence, we affirm the trial court's denial of appellants' motion to remove compulsory nonsuit.

Order affirmed; judgment of nonsuit affirmed.

**TULKU v. MACKWORTH REES DIVISION OF AVIS INDUSTRIES, INC
(ON REMAND)**

Docket No. 48136

Court of Appeals of Michigan

101 Mich. App. 709; 301 N.W.2d 46; 1980 Mich. App. LEXIS 3081

June 10, 1980, Submitted
November 20, 1980, Decided

SUBSEQUENT HISTORY: [*1]**

Leave to appeal applied for.

DISPOSITION:

Remanded for new trial.

COUNSEL:

Goodman, Eden, Millender & Bedrosian (by Joan Lovell, William Goodman, and [***5] James A. Tuck), for plaintiff.

Dice, Sweeney, Sullivan & Feikens, P.C. (by Ronald F. DeNardis), for defendant Mackworth Rees.

Kitch & Suhrheinrich, P.C., for defendant Illinois Tool Works, Inc.

JUDGES:

Bashara, P.J., and D. C. Riley and E. A. Quinnell, *
JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINIONBY:

QUINNELL

OPINION:

[*712] [**47] On Remand

This matter is on remand to this Court following the Supreme Court's decision in *Tulku v Mackworth Rees Division of Avis Industries, Inc*, 406 Mich 615, 618-619;

281 NW2d 291 (1979). The facts, as stated by the Supreme Court, are as follows:

"On October 4, 1967, plaintiff, Karl Tulku, suffered an injury to his left hand in a press accident at the Chrysler Sterling Stamping Plant. The press which plaintiff was operating at the time of the accident was one that required two operators for the completion of a cycle. In order to activate the press, each operator was required to depress two palm buttons and to hold them down until the press had completed its downward cycle. The palm buttons had been installed as safety devices to prevent an operator's hand from being in the die area while [***6] the press was in operation.

"At the time of the accident, plaintiff's co-worker had depressed both of his palm buttons and plaintiff had depressed his right-hand palm button while attempting to blank a piece of metal caught in the rear of the press with his left hand. With only three buttons depressed, the press inexplicably cycled causing severe injury to plaintiff's hand.

"Upon a subsequent investigation, it was discovered that the plastic case on the snap-action microswitch in plaintiff's left-hand palm button was broken in the area where the cover was screwed to the top of the switch. The broken plastic case caused the switch to fail with the result that the press completed its cycle without the palm button having been pushed.

" [***48] Plaintiff brought suit alleging both negligence and breach of warranty against defendant Mackworth Rees, [*713] the manufacturer of the palm button assembly, and Illinois Tool Works, the manufacturer of the switch."

At trial, plaintiff had requested an instruction to the effect that contributory negligence would not be a defense if the defendants negligently failed to provide a proper, adequate, and suitable safety device and that such

101 Mich. App. 709, *; 301 N.W.2d 46, **;
1980 Mich. App. LEXIS 3081, ***

[***7] failure was a proximate cause of the plaintiff's injuries. The trial court declined to give the requested instruction but, instead, gave the standard jury instruction concerning contributory negligence, *i.e.*, that contributory negligence would bar plaintiff's negligence claim. As to the warranty claim, the court gave an "abuse of product" instruction that was agreed upon by all parties. The jury returned a general verdict in favor of the defendants.

The Court of Appeals had affirmed, *76 Mich App 472; 257 NW2d 128 (1977)*.

On further appeal, the Supreme Court reviewed available authorities and policy considerations and held:

"We, therefore, hold that contributory negligence is no bar to recovery where evidence has been presented of defendant's causal negligence in the design or manufacture of a safety device.

"Our holding today necessarily requires remand to the trial court for a new trial. We note that during the pendency of this appeal, this Court decided *Placek v Sterling Heights*, *405 Mich 638; 275 NW2d 511 (1979)*, and the Michigan Legislature enacted legislation which affects the manner in which products liability actions are to be treated by the courts of this state. [***8] *MCL 600.2945; MSA 27A.2945*. However, we must presently decline to consider the effect of *Placek* and that legislation, if any, on the holding we have reached today as this complex issue was neither argued nor briefed before us." *406 Mich 615, 623 (1979)*.

[*714] Promptly thereafter, plaintiff and defendants moved for rehearing. Both parties sought a determination from the Supreme Court as to whether the comparative negligence doctrine found in either the products liability statute or *Placek* would be applicable on retrial. In addition, defendants in their motion for rehearing sought a determination from the Supreme Court that the retrial would involve only the negligence issue of plaintiff's case " * * in that plaintiff has already prosecuted his warranty theory under what this Honorable Court has determined to be the correct law".

The Supreme Court entered the following special order:

"Motions for rehearing considered and, in lieu of granting rehearing, this cause is remanded to the Court of Appeals for consideration of the issues of the scope of the retrial in this case and the applicability of *Placek v City of Sterling Heights*, *405 Mich 638 (1979)*, and [***9] *MCL 600.2945; MSA 27A.2945* upon such retrial." *407 Mich 1148 (1979)*.

I. Scope of Retrial.

At the original trial, as noted, the court submitted to the jury the issue of defendants' negligence and also gave the standard jury instruction as to contributory negligence. The trial court also submitted the breach of warranty theory to the jury but did not specifically inform the jury that contributory negligence was not a defense to the breach of warranty claim, the nearest approximation of such an instruction being the following:

"In understanding, of course, the nature of the liability of the manufacturer based on a breach of an implied warranty, negligence and fault have no place in it and are not required to be proved."

In our view, having the benefit of cases decided since the trial of this case in October, 1975, the [*715] jury was not properly instructed on the warranty count.

Many cases have noted the potential for jury confusion in a combined negligence/warranty action as to the effect of plaintiff's conduct; for instance, see *Vincent v Allen Bradley Co*, *95 Mich App 426; 291 NW2d 66 (1980)*. Upon request, plaintiff [**49] would have been entitled to an instruction [***10] specifically informing the jury that any negligence on the part of the plaintiff could not be considered as a defense to the warranty action. *Timmerman v Universal Corrugated Box Machinery Corp*, *93 Mich App 680; 287 NW2d 316 (1979)*.

Defendants argue that plaintiff did not preserve the issue for appeal either in this Court or in the Supreme Court, and therefore the jury verdict as to the warranty count is final and may not be retried. Plaintiff has made no response to the preservation issue, arguing only that because the contributory negligence issue and the abuse of product issue are so closely intertwined fundamental fairness requires a new trial as to both counts.

Counsel for the parties have cited few authorities in support of their respective positions, probably for the eminently sensible reason that there are no cases directly on point. In support of their procedural position, defendants cite *Vorrath v Garrelts*, *49 Mich App 142; 211 NW2d 536 (1973)*. There the trial court granted a judgment in favor of plaintiff for a debt and also imposed a mechanics lien. On appeal to the Court of Appeals, the mechanics lien was held void. Thereafter, plaintiff undertook proceedings [***11] supplemental to judgment in the trial court to collect the debt, and, on further appeal, the Court of Appeals determined that the initial reversal of the mechanics lien did not disturb the original judgment as to the debt. [*716] Other cases hold, at least as a general rule, that, upon each new trial, a case must be tried just as if it never had been tried before. *Bathke v Traverse City*, *308 Mich 1; 13 NW2d 184 (1944)*, and cases cited therein. In *Snowden v Detroit & M R Co*, *194 Mich 87; 160 NW 414 (1916)*, the Supreme Court affirmed a trial court's grant of a new trial on a

101 Mich. App. 709, *, 301 N.W.2d 46, **;
1980 Mich. App. LEXIS 3081, ***

common law negligence count which the trial court originally had refused to submit to the jury, after a Supreme Court reversal of a judgment for plaintiff on a statutory count which the trial court had submitted to the jury, suggesting some discretion as to the scope of the retrial in a case involving multiple counts even though plaintiff had not filed a cross-appeal.

In the absence of any persuasive authority in favor of either plaintiff or defendants, we conclude that the new trial should include both the negligence and warranty counts. In the determination of the liability of a defendant, the [***12] distinctions between negligence actions and warranty actions are becoming increasingly blurred. *Owens v Allis-Chalmers Corp*, 83 Mich App 74; 268 NW2d 291 (1978), *Elsasser v American Motors Corp*, 81 Mich App 379; 265 NW2d 339 (1978), *Smith v E R Squibb & Sons, Inc*, 69 Mich App 375; 245 NW2d 52 (1976), *lv den 399 Mich 804 (1977)*. As noted in *Vincent, supra*, the characterization and effect of a plaintiff's conduct with regard to a product can also lead to confusion. It would be unfair to the parties to permit the general verdict to stand as to the implied warranty count, reached after instructions which are not perceived to be incomplete, when a new trial must be held on the negligence count.

II. Applicability of Placek.

It is clear that the comparative negligence rule [*717] announced in *Placek* is applicable to all appropriate cases in which trial commences after the decision date of *Placek*, including those in which a retrial is to occur because of remand on any other issue. *Placek, supra*, 667. Saving the "safety devices" issue for subsequent discussion, it is clear that the comparative negligence principles of *Placek* would apply to the [***13] negligence count on retrial of this case.

III. Applicability of Statute.

The accident out of which this litigation arose occurred on October 4, 1967. The statute (MCL 600.2945; MSA 27A.2945) was effective December 11, 1978. The general rule is that statutes have prospective effect only unless a retrospective legislative intent of the Legislature clearly appears from the language or context of the statute. Various exceptions to [**50] the rule exist. Statutes dealing with the admissibility of evidence are given retrospective effect. *Sherberneau v Metropolitan Life Ins Co*, 44 Mich App 339; 205 NW2d 213 (1973). Remedial legislation is also given retrospective effect. *Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 (1954), *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959), *Freij v St Peter's Evangelical Lutheran Church*, 72 Mich App 456; 250 NW2d 78 (1976), *lv den 399 Mich 862 (1977)*. The *Freij* Court, quoting from *Rookledge, supra*, noted that a statute will be regarded as remedial in nature if it is

designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. The *Rookledge* Court [***14] also quoted approvingly from 50 Am Jur, Statutes, § 15, pp 33, 34 to the effect that legislation is regarded as remedial which abridges superfluities of former laws, remedying defects therein or mischiefs thereof, implying an intention to [*718] reform or extend existing rights, and having for its purpose the promotion of justice and the advancement of public welfare and of important and beneficial public objects, such as the protection of the health, morals, and safety of society or of the public generally. The citation goes on to add that another common use of the term "remedial statute" is to distinguish it from a statute conferring a substantive right and to apply it to acts relating to the remedy, to rules of practice or courses of procedure, or to the means employed to enforce a right or redress an injury. The term "remedial" applies to a statute giving a party a remedy where he had none, or a different one, before.

With these standards in mind, we comfortably conclude that the Legislature intended that this statute have retroactive as well as prospective effect. In § § 2946, 2947, and 2948 the Legislature purports to describe what is admissible evidence in a product [***15] liability action as defined in § 2945, thus addressing itself to the exception noted in *Sherberneau, supra*. There, further, can be no doubt that the Legislature thought it was redressing existing grievances on the part of defendants by providing certain evidentiary defenses to product liability actions and redressing existing grievances as to plaintiffs by providing that a plaintiff's negligence should not totally bar his recovery but merely operate to diminish his recovery. We conclude that the Legislature intended the statute to apply to all actions pending, accrued, or future. n1

n1 We deliberately refrain from citing *Jorae v Clinton Crop Service*, 465 F Supp 952 (ED Mich, 1979), as being in support of our position, even though the result which Judge Joiner reached in that case is identical with our own on the point here discussed. Judge Joiner also had other problem issues which are not present in our case, and we find it unnecessary to either approve or disapprove his resolution of those issues.

[***16]

IV. "Safety device" liability.

[*719] Having found that the comparative negligence statute applies retroactively and that *Placek* applies generally to retrial of the negligence count, we reach the critical issue of this remand proceeding,

101 Mich. App. 709, *, 301 N.W.2d 46, **;
1980 Mich. App. LEXIS 3081, ***

namely, whether the negligence of a plaintiff may be considered to reduce a plaintiff's recovery when the liability of the defendants is predicated upon their failure to provide adequate safety equipment. n2

n2 Lest it be said that all of the preceding discussion is mere dicta, we note that we would not reach this issue if we had determined that the date of the accident precluded the application of the statute or of *Placek*.

A. Application of *Placek*.

Plaintiff argues that the policy considerations underpinning *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), and the Supreme Court decision in *Tulkku, supra*, apply equally to a diminution of plaintiff's recovery and to a bar of plaintiff's recovery. Defendant argues that the harsh effects [***17] of contributory negligence have been abolished by *Placek* which was designed to promote a more equitable allocation of loss among all of the parties legally responsible in proportion to their fault and that, therefore, in any case in which *Placek* is applicable, the safety equipment [**51] analysis of *Funk* and *Tulkku* is not appropriate. Defendant's arguments miss the point of *Funk* and *Tulkku*. Those two cases are concerned with a problem distinct from the equitable allocation of a loss.

In its determination that contributory negligence does not bar recovery where the trier of fact may reasonably find that the failure to provide necessary safety equipment was the cause in fact of the injury, the *Funk* Court noted, *supra*, 104:

"The policy behind the law of torts is more than [*720] compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury."

Similarly the *Tulkku* Court said, *supra*, 623:

"If we are to continue to foster the protection of the worker and to encourage manufacturers to take all reasonable precautions in designing and manufacturing safety devices, we cannot allow the [***18] discredited doctrine of contributory negligence to undermine these goals."

The worker has an incentive -- the avoidance of injury to himself -- to work as safely as permitted by the demands of his employment, the nature of the equipment furnished to him, and the frailties of mankind. To impose an additional economic sanction on a negligent plaintiff n3 ignores the definition of negligence. Without in the least suggesting that manufacturers are totally devoid of humanitarian considerations for workers' safety,

we do suggest that workers' safety (and therefore workers' productivity through uninterrupted production) will be fostered and encouraged by our holding that a plaintiff's recovery may not be diminished by his own negligence if the liability of the defendants arises from their failure to provide adequate safety devices. Other panels of this Court have reached the same result. *Timmerman, supra, Stambaugh v Chrysler Corp*, 96 Mich App 166; 292 NW2d 510 (1980).

n3 Different principles apply to a grossly negligent plaintiff, *Funk, supra*, 113, fn 18.

[***19]

Before we are inundated with a flood of anguished howls from safety device manufacturers and their insurance carriers, we hasten to add that such potential defendants are not the insurers of the safety of working men. *Funk* encourages [*721] "implementation of reasonable safeguards against risks of injury". *Tulkku* encourages manufacturers "to take all reasonable precautions in designing and manufacturing safety devices". Nothing more, but nothing less, is required.

B. Application of the statute.

The statute broadly defines "product liability action" as

"an action based on any legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product." MCL 600.2945; MSA 27A.2945.

Subsequent sections provide that certain types of evidence dealing with manufacture, alteration, and the issuance of written warnings shall be admissible in [***20] such actions.

The comparative negligence portion of the statute reads as follows:

"Sec. 2949 (1) In all products liability actions brought to recover damages resulting from death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or the plaintiff's legal representatives, but damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff." MCL 600.2949; MSA 27A.2949.

101 Mich. App. 709, *; 301 N.W.2d 46, **;
1980 Mich. App. LEXIS 3081, ***

Obviously, the applicability of this statute to safety device products liability cases has [**52] not previously been determined by the Michigan Supreme [*722] Court. *Timmerman, supra*, held (with little discussion) that the statute did not apply in such cases. As to the applicability of comparative negligence statutes to strict liability cases generally, the jurisdictions of the country are apparently split, some applying such statutes despite language which arguably makes them inapplicable, *Murray v Fairbanks Morse*, 610 F2d 149 (CA 3, 1979), while others do not apply statutes which purport to cover only negligence actions to actions based [***21] on strict liability in tort, *Kinard v The Coats Co, Inc*, 37 Colo App 555; 553 P2d 835 (1976). n4

n4 Statutes and cases from other jurisdictions must be read with the understanding that liability normally is predicated on what is called strict liability in tort, 2 Restatement Torts 2, § 402A, p 347, with the effect of plaintiff's contributory negligence being governed by 3 Restatement Torts 2d, § 524, p 50. As noted in *Dooms v Stewart Bolling & Co*, 68 Mich App 5; 241 NW2d 738 (1976), *lv den* 397 Mich 862 (1976), the Michigan doctrine of implied warranty of fitness is worded differently, but is virtually indistinguishable in concept and practical effect. Thus the scope of comparative negligence statutes from other jurisdictions may be facially narrower, but equally as broad as Michigan's in application.

New Jersey is one jurisdiction which applies its comparative negligence statute to strict liability cases generally but not to cases where liability is predicated on the existence of an inadequate [***22] safety device. *Suter v San Angelo Foundry & Machine Co*, 81 NJ 150; 406 A2d 140 (1979). In 1972, New Jersey had held that contributory negligence would not be available as a defense under either a negligence or a strict liability theory if the liability of the defendant resulted from the breach of a duty to install safety devices, reasoning that "It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against". *Bexiga v Havir Manufacturing Corp*, 60 NJ 402, 412; 290 A2d 281 (1972), relied on by the

[*723] Michigan Supreme Court in *Tulkku*. In 1973, the New Jersey Legislature adopted a comparative negligence statute, providing in pertinent part:

"Contributory negligence shall not bar recovery in an action by any person to recover damages for negligence resulting in death or injury to person or property * * * but any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering." NJSA 2A:15-5.1.

In *Suter*, the New Jersey court was called upon to determine whether the act applied [***23] to a case in which plaintiff asserted liability against the defendant on the basis of strict liability arising out of the absence of a safety device. The trial court submitted the case to the jury under the statute. The jury found the plaintiff and defendant each 50 percent responsible for the ensuing personal injuries. The New Jersey Supreme Court concluded:

"We hold that the Comparative Negligence Act is applicable in strict liability to those situations in which contributory negligence would have been a defense. However, we are not expanding the concept of contributory negligence, and comparative negligence is immaterial when no contributory negligence exists either factually or as a matter of law." *Suter*, 406 A2d 140, 153. (Emphasis added.)

The situation in Michigan is identical to that in New Jersey. *Funk*, as refined by *Tulkku*, had determined that contributory negligence would not exist as a defense as a matter of law if defendant's liability arose out of an inadequate safety device; the Legislature then passed our comparative negligence statute, MCL 600.2949; MSA 27A.2949, providing in pertinent part: "but damages sustained by the plaintiff shall be diminished [***24] in proportion [*724] to the amount of negligence attributed to plaintiff." (Emphasis added.) The Legislature did not either expressly include or expressly exclude safety device cases from the operation of the act, despite the previous existence of *Funk*. Under *Funk* and *Tulkku*, no negligence can be attributed to the plaintiff in a safety device case. Therefore, the comparative negligence statute has no applicability.

[**53] Remanded for new trial in conformity with this opinion.

LEXSEE 796 S.W.2D 225

Mark and Nancy WALTON, Appellants v. HARNISCHFEGER D/B/A P & H
CRANE, Appellee

Appeal No. 04-89-00230-CV

COURT OF APPEALS OF TEXAS, Fourth District, San Antonio

796 S.W.2d 225; 1990 Tex. App. LEXIS 2564; CCH Prod. Liab. Rep. P12,617

July 31, 1990

SUBSEQUENT HISTORY: [1]**

Rehearing Denied September 14, 1990. Application for Writ of Error Denied January 30, 1991. Motion for Rehearing of Application for Writ of Error Overruled March 20, 1991.

PRIOR HISTORY:

Appeal from the 216th District Court of Kerr County; Trial Court No. 86-287-A; Honorable Stephen B. Ables, Judge Presiding.

DISPOSITION:

Affirmed.

LexisNexis(R) Headnotes

COUNSEL:

Attorneys for appellant: R. Louis Bratton, Bonnie Bratton, The Bratton Firm, Austin, Texas, William Powers, Jr., Austin, Texas.

Attorneys for appellee: Cathy J. Sheehan, Richard N. Francis, Jr., Plunkett, Gibson & Allen, San Antonio, Texas.

JUDGES:

Blair Reeves, Fred Biery and Ron Carr, Justices.

OPINIONBY:

CARR

OPINION:

[*226] OPINION

CARR, Justice. This is an appeal from a summary judgment in a products liability case. This case arises out

of an accident that resulted in injuries to appellant Mark Walton and which occurred when a nylon strap rigged to a load of tin and attached to a crane designed, manufactured, distributed and marketed by appellee Harnischfeger d/b/a P & H Crane, broke and caused the load of tin to drop on Mark Walton. Walton and his wife, Nancy Walton, also an appellant to this appeal, brought suit against appellee, Mark Walton's [**2] employer, the owner of the crane, the alleged manufacturer and seller of the nylon strap used to rig the load of tin, and the party that provided the nylon strap. Appellants' suit against appellee, based on negligence and strict liability, alleged that appellee failed to warn or to provide instructions regarding rigging of the crane and that the crane was defective due to the placement of the winch and boom extender controls.

Appellee filed a motion for summary judgment on the following grounds:

1. appellee had no duty to warn or instruct users of the crane in question with regard to rigging of the load in question;
2. the crane in question operated properly and in no way contributed to or caused the incident in question.

The trial court granted appellee's summary judgment motion and severed appellants' case against appellee. From the summary judgment below, appellants bring this appeal, alleging, in their sole point of error, that the trial court erred in granting summary judgment for appellee. We affirm.

Duty to Warn or Instruct

The first issue this appeal presents is whether appellee, as a crane manufacturer, had a duty to warn and instruct about a particular [**3] type of rigging product, i.e., a nylon strap, even though the summary judgment evidence is uncontroverted that appellee did not manufacture, distribute, sell, or otherwise place the nylon strap

or any other rigging material into the stream of commerce.

Courts in other jurisdictions have expressly held that a manufacturer does not have a duty to warn or instruct about another manufacturer's products, even though those products might be used in connection with the manufacturer's own product. See *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986); *Mitchell v. Sky Climber, Inc.*, 396 Mass. 629, 487 N.E.2d 1374, 1376 (1985).

In the *Baughman* case, the plaintiff was injured by the explosive separation of a multi-piece truck wheel rim assembly. It was undisputed that General Motors Corporation had not manufactured or designed the wheel rim assembly, nor had General Motors incorporated any such assembly into its truck. Nevertheless, the plaintiff sued General Motors because it had manufactured the truck on which the plaintiff was placing the wheel when the explosion occurred. The district court granted summary judgment in favor of General Motors [*227] [**4] in part on the ground that General Motors had no duty to warn of possible dangers posed by replacement parts that it did not design, manufacture, or place into the stream of commerce. In affirming the decision, the court stated:

Since the exploding rim in question was a replacement component part and not original equipment, *Baughman's* position would require a manufacturer to test all possible replacement parts made by any manufacturer to determine their safety and to warn against the use of certain replacement parts. If the law were to impose such a duty, the burden upon a manufacturer would be excessive. While a manufacturer can be fairly charged with testing and warning of dangers associated with components it decides to incorporate into its own product, it cannot be charged with testing and warning against any of a myriad of replacement parts supplied by any number of manufacturers.

(Emphasis added.) *Baughman*, 780 F.2d at 1133.

The plaintiff in *Mitchell* asserted that Sky Climber, the manufacturer of an electrically-powered lift motor, violated a duty to give instructions concerning the safe and proper rigging to use with scaffolding. Sky Climber sold or leased [**5] lift motors to the plaintiff's employer, along with other scaffolding equipment. The scaffolding equipment, which was attached to a building at the time of this accident, lost power while the plaintiff's decedent attempted to move to another floor of the building. The decedent attempted to correct what appeared to be a loose connection between the main power cords leading to the two motors. The problem, however, was in the rigging instead of the power cords. Apparently, the rigging had strained the power supply line and

cut the insulation of a wire. The live wire came into contact with an ungrounded metal junction box. The decedent touched the box and subjected himself to 200 volts of electricity.

Sky Climber provided no part of the scaffolding equipment other than the electrically-powered lift motors, nor did Sky Climber design or assemble the scaffolding. The court found that the manufacturer had no duty to set forth in customers' manuals a warning of possible risk created solely by the act of another. The court stated that, while a manufacturer does have a duty to provide warnings regarding the dangers of its own product, "we have never held a manufacturer liable, however, for [**6] failure to warn of risks created solely in the use or misuse of the product of another manufacturer." *Mitchell*, 487 N.E.2d at 1376.

The nylon strap used to lift the load of tin involved in this incident was not a component part of the crane nor was the nylon strap incorporated into the crane by appellee when it manufactured the crane. To require the manufacturer to warn of all rigging dangers would be unfair and unrealistic -- a fact recognized in *Baughman* and *Mitchell*.

Whether a duty exists is a question of law to be decided by the court. See *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) (negligence case); *Hamilton v. Motor Coach Indus., Inc.*, 569 S.W.2d 571, 576 (Tex. Civ. App. -- Texarkana 1978, no writ) (strict tort liability case); Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1200 (1976).

Our Supreme Court stated in *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970), regarding summary judgment proof that

the question . . . is not whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff's claim or cause [**7] of action, but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action.

The appellee's summary judgment evidence in this case is uncontroverted in the following regards: appellee did not manufacture, distribute, sell, or otherwise place the nylon straps or any other rigging material into the stream of commerce; appellee is not in the business of manufacturing or selling any rigging material; and rigging is [*228] a complex art that requires different loads to be rigged in a multitude of different ways. We hold that, under the facts of this case, appellee had no duty to warn or instruct users of its crane about rigging it did not manufacture, incorporate into its crane, or place

into the stream of commerce. Since a duty to warn is an essential element of the Walton's claim, the absence of a duty compels a summary judgment for appellee based upon its "no-duty" ground.

Causation

Appellant contends that a material issue of fact exists as to whether the alleged design defect in the placement of the controls for the winch and boom extender on [**8] the crane in fact caused the accident under either a negligence or strict liability cause of action. Appellee contends that it was entitled to judgment as a matter of law because the summary judgment evidence conclusively shows that the alleged defect in the placement of the winch and boom extender controls on the crane was not the cause in fact of appellant Mark Walton's injuries.

Our Supreme Court, in *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985), set out in the standard for reviewing a summary judgment:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Summary judgment for a defendant is proper when at least one element of a plaintiff's cause of action has been established conclusively against the plaintiff. *Cloys v. Turbin*, 608 S.W.2d 697, 699 (Tex. [**9] Civ. App. -- Dallas 1980, no writ); see *Otis Eng'g Corp.*, 668 S.W.2d at 311. An actionable tort, whether based on negligence or strict liability, includes the element of causation or cause in fact. See *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985); Prosser and Keeton on Torts, § 41 (5th ed. 1984). Therefore, a defendant is entitled to summary judgment if cause in fact is negated by the summary judgment evidence.

Appellee's summary judgment evidence consisted primarily of the deposition of defendant Rocky Powell, who was appellant Mark Walton's employer and who was the operator of the crane at the time of the incident in question. Appellee contends that Powell's testimony that, at the time of the accident, the crane operated properly, that he had no problems finding any of the levers, that the crane was not malfunctioning, that he was not confused regarding which levers control the winch and the boom extender, that the boom was not extended nor being raised or lowered, and that only the winch was

lifting the load of tin establishes as a matter of law that the crane did not contribute to or cause the accident in question.

Appellants argue that [**10] Powell's testimony cannot establish lack of causation because he is an interested witness and his testimony consists of lay opinions and conclusions. Appellants further argue that Powell's testimony was rebutted by appellants' summary judgment evidence, namely that of their expert witness, Norm Sachnik, whose affidavit states:

The product in question manufactured by [appellee] in light of its function requires special design attention. This product presents risks and hazards to operator and bystanders and riggers. It is my opinion based on all of the above that the crane in question was and is unreasonably dangerous when used in conjunction with the type of nylon strap that failed on the day in question and produced the accident in question.

(Emphasis added.)

We disagree with appellant's arguments. Even if Powell could be deemed an interested witness, his testimony meets the requirements of the exception under *Tex. R. Civ. P. 166a(c)*, which allows an interested lay witness to support a summary judgment [**229] if his testimony is uncontroverted, clear, positive, and direct, and could have been readily controverted. See *Martin v. Cloth World*, 692 S.W.2d [**11] 134, 136 (Tex. App. -- Dallas 1985, writ ref'd n.r.e.); *A & S Electric Contractors, Inc. v. Fischer*, 622 S.W.2d 601, 603 (Tex. App. -- Tyler 1981, no writ). Powell's above-described testimony clearly and directly asserts facts; is not in the form of opinions or conclusions; and is precisely the type of evidence that could be readily controverted. In addition, the affidavit of Mr. Sachnik does not controvert Powell's testimony. Sachnik's testimony makes no reference to Powell's factual statements regarding the boom extender and the winch controls. Sachnik's testimony does not state that the boom extender or the winch controls were defective and that such defect was the producing cause of the accident, but merely asserts that the crane was unreasonably dangerous when used in tandem with a nylon strap that failed and that produced the accident. This does not controvert Powell's direct testimony. Therefore, Powell's deposition testimony meets the standards of summary judgment testimonial evidence. See *Wiley v. City of Lubbock*, 626 S.W.2d 916, 918 (Tex. App. -- Amarillo 1981, no writ).

For the above reasons, we overrule appellants' sole point of error.

The judgment of the trial [**12] court is affirmed.

SKIP WRIGHT et al., Plaintiffs and Appellants, v. STANG MANUFACTURING COMPANY et al., Defendants and Respondents.

No. B105686.

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION SEVEN**

54 Cal. App. 4th 1218; 63 Cal. Rptr. 2d 422; 1997 Cal. App. LEXIS 361; CCH Prod. Liab. Rep. P14,934; 97 Cal. Daily Op. Service 3441; 97 Daily Journal DAR 5889

May 7, 1997, Decided

SUBSEQUENT HISTORY: [***1]

Review Denied August 13, 1997, Reported at: *1997 Cal. LEXIS 5071*.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. EC016119. David M. Schacter, Judge.

DISPOSITION: The judgment is reversed, and on remand, the trial court is directed to deny respondents' motion for summary judgment. Appellants are entitled to costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant injured sought review of the decision of the Superior Court of Los Angeles County (California), which granted respondent manufacturer's motion for summary judgment on grounds that there was no evidence of defect, and there was no duty on part of respondent to warn regarding 17 year old component part that was not defective, in appellant's action for products liability.

OVERVIEW: Appellant injured sued respondent manufacturer for products liability after sustaining injuries when a deck gun broke loose and threw appellant in the air. Respondent moved for summary judgment and trial court granted on grounds that there was no evidence of defect and respondent had no duty to warn of 17 year old part which was not defective. Appellant argued that fact that deck gun did not fail did not preclude finding that it was defective and that respondent may be held liable for failure to warn. The court reversed and held that respondent failed to provide sufficient evidence to negate the design defect theory of product defect. The court held

that under warning defect strict liability a product is defective if it is unreasonably dangerous to place in the hands of a user without a warning and the product contained no warning. The court held that where a case was subject to comparative fault principles, it was improper for summary judgment. The court remanded with instructions to deny respondent's summary judgment motion and ordered appellant was entitled to costs on appeal.

OUTCOME: The court reversed the trial court's order granting respondent manufacturer's summary judgment motion because they failed to negate the design defect theory of product defect. The court held that where a case was subject to comparative fault principles, summary judgment was inappropriate. The court remanded with instructions to deny respondent's summary judgment motion and appellant injured was entitled to costs on appeal.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN1] A summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence.

Civil Procedure > Summary Judgment > Supporting Papers & Affidavits

[HN2] When the facts submitted in opposition to a summary judgment motion indicate the existence of a material factual issue, summary judgment should not be entered based on mistaken legal conclusions in the complaint. Summary judgment is also inappropriate where

the opposing party submits evidence indicating that a mistake was made.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN3] Summary judgment is appropriate only if the evidence shows there is no triable issue of any material fact, and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN4] The trial court's obligation in ruling on a summary judgment motion is to determine whether issues of fact exist, not to decide the merits of the issues themselves.

Civil Procedure > Summary Judgment > Supporting Papers & Affidavits

[HN5] When making that determination, the trial court must strictly construe the affidavits of the moving party, and liberally construe those of the opponent.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN6] The court independently reviews the record to determine whether the moving party is entitled to judgment as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof

[HN7] If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. The moving defendant whose declarations omit facts as to any such theory permits that portion of the complaint to be unchallenged. Thus, even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact.

Torts > Products Liability > Strict Liability

[HN8] The uniqueness of a purchaser's order does not alter the manufacturer's responsibilities and is not a defense.

Torts > Products Liability > Duty to Warn

[HN9] Under warning defect strict liability, a product, even though faultlessly made, is defective if it is unreasonably dangerous to place in the hands of a user without

a suitable warning and the product is supplied and no warning is given. It is now settled that knowledge or knowability of the danger is a component of strict liability for failure to warn. This does not require the manufacturer to warn against every conceivable health problem associated with use of a product. However, the more severe the consequences from unprotected exposure, the greater the need to warn of significant health risks.

Torts > Products Liability > Duty to Warn

[HN10] It is necessary to weigh the degree of danger involved when determining whether a warning defect exists. The adequacy of the warning must be commensurate with the risk of harm and level of potential of such harm.

Torts > Products Liability > Negligence

[HN11] Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, what a reasonably prudent manufacturer would have known and warned about.

Torts > Products Liability > Strict Liability

[HN12] Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial.

Torts > Negligence > Defenses > Assumption of Risk

[HN13] Strict liability for failure to warn does not attach if the dangerous propensity is either obvious or known to the injured person at the time the product is used. However, such knowledge of danger by the user would not preclude an instruction on strict liability for failure to warn. It would merely give rise to a potential defense in manufacturer if user voluntarily and unreasonably proceeded to encounter a known danger, more commonly referred to as assumption of the risk.

Torts > Negligence > Defenses > Comparative & Contributory Negligence

[HN14] Where the defendant manufacturer does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty, assumption of the risk is merged into the comparative fault scheme so that a trier of fact may consider the relative responsibility of the parties in apportioning the loss and damage resulting from the injury.

Civil Procedure > Summary Judgment > Summary Judgment Standard

[HN15] Where a case is subject to comparative fault principles, it is inappropriate for summary judgment.

Torts > Products Liability > Plaintiff's Conduct

[HN16] Misuse is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm.

Torts > Products Liability > Duty to Warn

[HN17] The extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. A manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

In a strict products liability action, brought by a city firefighter who was injured when a deck gun and its attachments mounted on a fire truck broke loose and failed while under pressure, against the alleged successors of the corporation that manufactured the deck gun, the trial court entered a summary judgment in favor of defendants. The trial court determined that there was no evidence provided that the deck gun was defective and thus there was no duty to warn regarding the 17-year-old component part. (Superior Court of Los Angeles County, No. EC016119, David M. Schacter, Judge.)

The Court of Appeal reversed the judgment and remanded to the trial court with directions to deny defendants' motion for summary judgment. The court held that the trial court erred in granting defendants' motion for summary judgment. To the extent that plaintiff asserted a design defect theory of strict products liability, the record presented triable issues of fact whether the deck gun was defectively designed. To the extent that plaintiff asserted a "warning defect" theory of strict products liability, defendants failed to establish that the dangers or potential dangers of the deck gun and the nature of its use and operation were matters generally known or even actually

known by plaintiff. Furthermore, even if the case was subject to comparative fault principles, summary judgment was still inappropriate, since triable issues of fact existed on the "warning defect" theory. Finally, since the summary judgment motion did not address or negate successor liability, the motion should have been denied, whether or not any showing was made as to liability based on defendants' own conduct or involvement with the manufacture or distribution of the deck gun. (Opinion by Lillie, P. J., with Johnson and Woods, JJ., concurring.)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 19--Hearing and Determination--Role of Trial Court--Triable Facts--Multiple Theories--Appellate Review--Scope. --Summary judgment is appropriate only if the evidence shows that there is no triable issue of any material fact and that the moving party is entitled to judgment as a matter of law. The trial court's obligation in ruling on a summary judgment motion is to determine whether issues of fact exist, not to decide the merits of the issues themselves. When making that determination, the trial court must strictly construe the affidavits of the moving party and liberally construe those of the opponent. The appellate court independently reviews the record to determine whether the moving party is entitled to judgment as a matter of law. Further, if a plaintiff pleads several theories, the defendant has the burden of demonstrating that there are no material facts requiring trial on any of them. The moving defendant whose declarations omit facts as to any such theory permits that portion of the complaint to be unchallenged. Thus, even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact.

(2) Products Liability § 32--Strict Liability in Tort--Extent of Doctrine. --The doctrine of strict products liability extends to products that have: design defects, i.e., products that are "perfectly" manufactured but are unsafe because of the absence of a safety device; manufacturing defects, i.e., a product that differs from the manufacturer's intended result due to a flaw in the manufacturing process; or warning defects, i.e., a product that is dangerous because it lacks adequate warnings or instructions.

(3a) (3b) Products Liability § 48--Strict Liability in Tort--Evidence--Sufficiency--Defective Design--Deck Gun--Absence of Flange Mounting System. --In a strict products liability action involving an allegation of a

design defect, brought by a city firefighter who was injured when a deck gun and its attachments mounted on a fire truck broke loose and failed while under pressure, throwing him into the air and onto the ground with the deck gun landing on him, against the alleged successors of the corporation that manufactured the deck gun, the trial court erred in granting defendants' motion for summary judgment. The record presented triable issues of fact on the issue of whether or not the deck gun was defectively designed in that it was not manufactured with a flange mounting system or the capability to have such a system attached to the deck gun. Furthermore, defendants failed to provide sufficient authority or evidence to negate the design defect theory.

(4) Products Liability § 38—Strict Liability in Tort—Persons Liable—Manufacturers and Sellers—Uniqueness of Order. —The uniqueness of a purchaser's order does not alter a manufacturer's responsibilities and is not a defense to a strict products liability action.

(5) Products Liability § 35—Strict Liability in Tort—Duty to Warn—Adequacy of Warning. —Under "warning defect" strict liability, a product, even though faultlessly made, is defective if it is unreasonably dangerous to place in the hands of a user without a suitable warning and the product is supplied and no warning is given. Knowledge or knowability of the danger is a component of strict liability for failure to warn. This does not require the manufacturer to warn against every conceivable health problem associated with use of a product. However, the more severe the consequences from unprotected exposure, the greater the need to warn of significant health risks. It is necessary to weigh the degree of danger involved when determining whether a warning defect exists. The adequacy of the warning must be commensurate with the risk of harm and level of potential of such harm.

(6) Products Liability § 35—Strict Liability in Tort—Duty to Warn—Comparison With Negligence Action. —Negligence law in a failure-to-warn products liability case requires the plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. However, strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require the plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the

reasonableness of the defendant's failure to warn is immaterial.

(7) Products Liability § 35—Strict Liability in Tort—Duty to Warn—Factors to Determine Adequacy of Warning. —In a "warning defect" strict products liability case, whether a warning is adequate depends on several factors, among them the normal expectations of the consumer as to how a product will perform, degrees of simplicity or complication in its operation or use, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning.

(8a) (8b) Products Liability § 35—Strict Liability in Tort—Duty to Warn—Against Foreseeable Dangerous Misuse of Deck Gun—Defenses—Contributory and Comparative Negligence and Assumption of Risk—Liability of Successor Corporation. —In a strict products liability action involving an allegation of a "warning defect," brought by a city firefighter who was injured when a deck gun and its attachments mounted on a fire truck broke loose and failed while under pressure, against the manufacturer's alleged successors, the trial court erred in granting defendants summary judgment. Defendants failed to establish that the dangers or potential dangers of the deck gun and the nature of its use and operation were matters generally known or even actually known by plaintiff. Moreover, defendants failed to establish that primary assumption of the risk barred plaintiff's cause of action. Thus, the trial court erred in finding that there was no duty to warn regarding a 17-year-old component part. Furthermore, even if comparative fault principles applied, summary judgment was still inappropriate, since triable issues of fact existed on the "warning defect" aspect of strict products liability. Defendants failed to counter plaintiff's expert's declaration or to otherwise negate plaintiff's allegations that the manufacturer of the deck gun did not provide an adequate, or any, warning against the potential and foreseeable dangers. Finally, since the summary judgment motion did not address or negate plaintiff's claim of successor liability, the motion should have been denied.

[See 6 *Witkin, Summary of Cal. Law* (9th ed. 1988) *Torts*, § § 1265, 1314-1315.]

(9) Products Liability § 42—Strict Liability in Tort—Defenses—Product Misuse. —Product misuse is a defense to a strict liability action only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm.

COUNSEL: Effres & Bryman and Andrew C. Bryman for Plaintiffs and Appellants.

Chapman & Glucksman, Arthur J. Chapman, Rita M. Miller, Stephens, Berg & Lasater and Joseph F. Butler for Defendants and Respondents.

JUDGES: Opinion by Lillie, P. J., with Johnson and Woods, JJ., concurring.

OPINIONBY: LILLIE

OPINION: [*1222]

[**423] LILLIE, P. J.

In this product liability action, plaintiff Skip Wright, a firefighter employed by the City of Glendale, was injured when a "deck gun" or water cannon mounted on a firetruck broke loose while under pressure from the water pump, throwing Wright in the air and onto the ground with the deck gun landing on him. Plaintiffs appeal from summary judgment granted in favor of defendants, collectively referred to herein as Stang, the alleged successors of the corporation which manufactured the deck gun. [***2] The issues on appeal are whether the trial court correctly determined that "There is no evidence provided [**424] that the deck gun was defective. The piece of pipe that disengaged was not part of the deck gun and was requested and installed by another party. . . . [T]here is no duty to warn regarding a 17 year old component part that was not defective."

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 1994, plaintiff Skip Wright filed a complaint against Stang, among others, for negligence, strict liability, and breach of warranties; plaintiff Debbie Wright asserted a claim for loss of consortium. The complaint alleged that while Skip Wright was in the course and scope of his employment as a firefighter for the City of Glendale on November 15, 1993, he was using a Stang Manufacturing Company deck gun attached to a Seagrave fire engine; the deck gun broke loose and failed while under pressure, throwing him into the air and onto the ground, with the deck gun landing on him.

The most comprehensive evidence in our record setting out the details of the accident is provided by the declaration of Ralph Craven (Craven), plaintiffs' expert consultant who is a fire apparatus expert and president [***3] of the National Institute of Emergency Vehicle Safety; Craven inspected the fire engine involved in the incident herein, including the deck gun and the riser to which it was attached; he also viewed a videotape of the incident that resulted in plaintiffs' injuries. According to Craven, water was being supplied to the deck gun from a water tank on the fire truck; when the water supply was exhausted, a hydrant connection was made and the engi-

neer on the fire truck activated a valve that allowed the water to flow through the pump directly to the deck gun; the pump revolutions were high and the water pressure generated a nozzle reaction, known in the industry as a "water hammer." A water hammer occurs when water is rapidly turned on and off, causing force to be generated which is more than four to six times the applied force; a nozzle reaction occurs, which, in turn, causes reactionary forces on the attachments, including the riser, to which the deck gun was attached with a three-inch threaded riser pipe. In this case, the threaded riser [*1223] pipe did not fail or break at its connection with the deck gun, but the riser broke at the point it was mounted on the fire truck. In Craven's [***4] opinion, "the deck gun and its attachments separated from the fire truck mounting, thereby causing the plaintiff's injuries, as a result of this nozzle reaction combined with the absence of a flange mounting system and the presence of corrosion on the riser that was used in place of flanges, as well as inadequate thread depth engagement on the riser pipe, and the fact that the riser was made out of material of insufficient strength."

The deck gun apparently was manufactured in 1977 by Stang Hydronics; the successor to Stang Hydronics is defendant Stang Enterprises, Inc. For purposes of the summary judgment motion, and this appeal, the Stang defendants provided no evidence to explain the nature of their relationship to Stang Hydronics and they did not provide sufficient evidence to negate the assertion that they are liable as successors to the manufacturer of the deck gun under principles set out in *Ray v. Alad Corp.* (1977) 19 Cal. 3d 22 [136 Cal. Rptr. 574, 560 P.2d 3]. n1 [**425] Rather, defendants' summary judgment motion assumed for the sake of the motion only that they are successors to the [*1224] manufacturer of the deck gun, but maintained that (1) there is no evidence [***5] that the deck gun was defective because it did not fail, (2) a component part manufacturer is not liable for failure to warn when the final product is subsequently packaged, labeled and marketed by another manufacturer, and (3) defendants as alleged successor corporations to the manufacturer, have no duty to warn.

n1 Robert Green, the president of defendant GST Industries, Inc., presented a declaration stating that in 1989 he purchased a portion of Stang Hydronics from Stang Enterprises, the successor to Stang Hydronics, Inc. The former corporate name of GST Industries, Inc., was Stang Manufacturing, Inc. According to the caption of defendants' pleadings, Stang Manufacturing Co. is a division of Stang Hydronics, Inc.

54 Cal. App. 4th 1218, *; 63 Cal. Rptr. 2d 422, **;
1997 Cal. App. LEXIS 361, ***; CCH Prod. Liab. Rep. P14,934

In light of the issues raised below, and the state of the record, we need not further address the issue of the relationship of the Stang defendants to the manufacturer of the deck gun, Stang Hydronics. According to plaintiffs' opposition to the summary judgment motion, defendants had previously moved for summary judgment on the ground that they were not successors to the corporation that manufactured the deck gun. We infer that such previous motion was denied or was ultimately unsuccessful. As acknowledged by plaintiffs, in the instant motion for summary judgment before us on this appeal, defendants do not attempt to negate successor liability under principles set out in *Ray v. Alad Corp.*, *supra*, 19 Cal. 3d 22. Although an entity is not involved in the design, manufacture, or distribution of a product, under a special exception judicially created by the California Supreme Court in *Alad*, it is possible for that entity to be held strictly liable in tort for a defect in a product. (*Stewart v. Telex Communications, Inc.* (1991) 1 Cal. App. 4th 190, 195 [1 Cal. Rptr. 2d 669].) The three factors justifying imposition of liability under *Alad* are (1) the virtual destruction of plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. (1 Cal. App. 4th at pp. 195-196.)

Accordingly, even if defendants did not themselves manufacture, design, or sell, etc., the deck gun in this case, they may be liable for injuries caused by a defective product and thus stand in the shoes of the manufacturer, Stang Hydronics, for purposes of imposing liability based on the theory of strict product liability. The *Alad* case thus offers an additional basis for imposition of strict products liability against defendants, in addition to any independent ground based on defendants' own conduct or involvement in the manufacture and distribution of the deck gun. Because of the multiple theories of liability asserted against defendants, including the successor liability theory, defendants cannot prevail on summary judgment merely by showing that they themselves did not manufacture, etc., the deck gun, a proposition which they claim is established by the declaration of Robert Green. Moreover, defendants did not move in the alternative for

summary adjudication of issues. Therefore, if we conclude a triable issue of fact exists as to the products liability cause of action, we must reverse the judgment and need not address the other tort theories of recovery (negligence and breach of warranty) alleged in the complaint.

[***6]

In support of their motion for summary judgment, defendants asserted, and plaintiffs agreed, that the following facts were undisputed: The three-inch riser pipe remained attached to the deck gun at the time of plaintiff's accident, and the threaded pipe did not shear at its connection with the deck gun; the steel which comprises the deck gun did not fail; according to blue prints, a flange mount system was available and could have been utilized by the City of Glendale. Defendants supported their motion with the declaration of Duane Bergmann, a licensed mechanical engineer, who stated that he inspected the deck gun and riser pipe; the pipe did not fail at the connection point with the deck gun; it was his opinion that the threaded mounting area of the deck gun was adequate; the threaded mounting of the deck gun did not fail, and the material which comprises the deck gun did not fail.

Defendants also asserted that they did not manufacture the deck gun, and had no involvement with it, but plaintiffs disputed those assertions on the ground that the evidence did not establish the relationships among the various defendants, or defendants' relationships with the manufacturer of the deck [***7] gun. Thus, plaintiffs maintained that even if it were undisputed that defendants did not manufacture or distribute the deck gun, that fact alone would not entitle them to summary judgment. (See fn. 1, *ante*.)

In opposition to the motion, plaintiffs argued (1) that the fact that the deck gun itself did not fail does not preclude a finding that it was defective based on the lack of sufficient warnings about the proper maintenance of the gun, its attachments, and proper mounting; and (2) a component part manufacturer may be held liable for a failure to warn under the instant circumstances. n2 [**426] Plaintiffs' opposition was supported with the declaration of Craven, who [*1225] stated that based on his inspection of the fire engine and deck gun, his viewing of the videotape of the incident involving plaintiff, and his education and experience, he was of the opinion "that the deck gun and its attachments separated from the fire truck mounting, thereby causing the plaintiff's injuries, as a result of this nozzle reaction combined with the absence of a flange mounting system and the presence of corrosion on the riser that was used in place of flanges, as well as inadequate thread depth [***8] engagement

on the riser pipe, and the fact that the riser was made out of material of insufficient strength."

n2 Defendants below, and on appeal, make a great deal out of the fact that plaintiffs responded "Undisputed" to the following separate statement of fact (No. 7 in defendants' papers, but numbered 8 by plaintiffs, who mixed up the numbers of defendants' separate statement of facts): "The deck gun manufactured by Stang Hydronics did not cause plaintiff's injuries. A three inch riser pipe was installed on the deck gun. The three inch riser pipe broke. There is no damage to the deck gun itself."

It is clear from plaintiffs' opposition that plaintiffs were not conceding the issues of product defect or causation, although plaintiffs admitted the facts that the riser pipe broke and there was no damage to the deck gun itself. Defendants below and in their brief on appeal, fail to establish that plaintiffs' response to their separate statement of undisputed facts is accorded the same effect as a judicial admission in a pleading. As noted by the court in *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal. App. 4th 1059, 1066-1067 [14 Cal. Rptr. 2d 604]: "In *Price v. Wells Fargo Bank* (1989) 213 Cal. App. 3d 465 . . ., we explained that [HN1] a 'summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions, which are contradicted by other credible evidence.' [Citation.] We approved of reliance on admissions made in the course of discovery when they are uncontradicted or contradicted only by self-serving declarations of a party. [Citation.] [P] Seeno asks us to give conclusive effect to an ambiguous statement in an unverified complaint and to ignore the explanation of the statement contained in deposition testimony under oath. This is precisely what we refused to do in *Price*. [HN2] When the facts submitted in opposition to a summary judgment motion indicate the existence of a material factual issue, summary judgment should not be entered based on mistaken legal conclusions in the complaint. [Citation.] Summary judgment is also inappropriate where the opposing party submits evidence indicating that a mistake was made."

In light of *Kirby*, it is clear that plaintiffs made a mistake in responding "Undisputed" to that portion of defendants' separate statement that it was undisputed that the deck gun did not cause

plaintiff's injuries. Such an assertion contradicts other portions of plaintiffs' response to the separate statement, as well as plaintiffs' own list of nine material facts which they claimed were in dispute, and which they supported with Craven's declaration. Moreover, we fail to see how defendants can rely on the mistaken response to bolster their motion when the response to the separate statement is not evidence because it is not under oath, nor is it verified. Accordingly, we do not consider the mistaken response of plaintiffs as a "judicial admission" or concession on the issues of liability and causation.

[***9]

Craven further declared that he was of the opinion "that Stang, as the manufacturer and seller of the deck gun, had a duty to warn the user of the deck gun regarding the potential hazards of a water hammer and the nozzle reaction that occurs as a result thereof, which warning must necessarily include a reference to the need for proper inspection and maintenance of the deck gun, including periodic inspection for the presence of corrosion, proper threading of attachments, and use of a flange mounting system or attachments made of industrial heavy steel or other materials that resist corrosion. In this regard, it is foreseeable to anyone familiar with fire apparatus that [*1226] water hammer nozzle reactions can occur and that steel components on deck gun attachments have a tendency to rust and corrode through normal use and that this can result in failure of any attachments, including risers like the one used here. In the case of the deck gun in question, Stang did not provide any of the aforementioned warnings and, it is my opinion that, had such a warning been given in this case and the deck gun maintained and inspected in accordance with same, this incident could have been prevented [***10] in that the corrosion that was present in the riser would have been detected and replaced before the incident and/or the effects of the water hammer nozzle reaction would have otherwise been reduced. [P] The subject deck gun should have also been installed with a flange mounting surface due to the effects of water hammers and nozzle reaction on the mounted deck gun such as occurred in this case. . . . [I]f a flange type system had been used, the incident in question here would not have occurred. This is due to the fact that the forces created by the water hammer nozzle reaction would have been adequately distributed so as to be able to handle the forces by distributing the load. This is accomplished by increasing the mounting surface area, thereby decreasing the pounds per square inch of reactionary forces. The flange type system would have also provided a system that allows for easier inspection of the deck gun and all attachments in order to ascertain

whether corrosion was present in either the deck or any attachments, including risers."

[**427] Craven also concluded that because Stang did not design the deck gun with a flange mounting system, Stang as manufacturer had a duty to inform [***11] the installer and user of the deck gun that it must be installed in such a manner to safely handle the forces that would be generated during normal and foreseeable use, including those of water hammers; in this regard, it is the fire department that would necessarily be responsible for maintenance of the deck gun and attachments. In addition, Craven opined, the correct riser pipe was not used, nor was the riser installed with adequate thread depth to provide adequate strength. In this case, steel or galvanized steel pipe was used rather than industrial heavy weight steel, which has twice the thickness of typical steel or galvanized steel; in addition, when steel or galvanized steel pipe is used, the amount of the base material is reduced dramatically during the thread-cutting process, resulting in a loss of strength in the pipe and its ability to resist corrosion over time. Thus, Craven was of the opinion that the failure to use the correct pipe and the lack of adequate thread depth on the riser, "when subjected to the water hammer nozzle reaction caused the separation of the riser."

Relying upon Craven's declaration, plaintiffs asserted that the following nine material facts relating [***12] to product defect and causation were in dispute: [*1227] (1) whether the deck gun was defective in that it was manufactured and sold without adequate warnings of proper maintenance of the gun and its attachments; (2) whether the gun was defective in that it was manufactured and sold without adequate warnings concerning proper mounting of the deck gun; (3) whether the deck gun was defective in that it was not designed with a flange mounting system; (4) whether the incident giving rise to this action was caused by conditions that generated a nozzle reaction and a high level of water pressure, that in turn caused the riser attachment to the deck gun to separate from the fire truck mounting; (5) whether the riser separated as a result of the combination of the presence of corrosion on the riser, inadequate depth engagement on the riser pipe, and improper pipe materials; (6) whether the incident would have occurred had the deck gun been designed with a flange mounting system or had adequate warnings about use of such a system been given; (7) whether the incident would have occurred had the riser been regularly inspected for corrosion; (8) whether it was foreseeable to a supplier of [***13] fire apparatus parts that steel components have a tendency to rust and corrode through normal use and can result in failure of attachments, including risers; and (9) whether it is foreseeable to a supplier of fire apparatus parts that

conditions may exist during firefighting operations that cause a water hammer effect to occur.

After hearing on the summary judgment motion, the court issued an order granting the motion. The order stated in pertinent part: "[T]he moving [parties are] entitled to summary judgment as a matter of law for the following reasons. There is no triable issue of fact regarding whether or not the deck gun is defective. There is no evidence provided that the deck gun was defective. The piece of pipe that disengaged was not part of the deck gun and was requested and installed by another party. The court finds that there is no duty to warn regarding a 17 year old component part that was not defective. The court further finds that the plaintiffs' expert declaration did not provide sufficient evidence to overcome the holding in *Union Bank v. Superior Court* (1995) 31 Cal. App. 4th 573 [37 Cal. Rptr. 2d 653]." n3

n3 The trial court's reference to the *Union Bank* case is puzzling, inasmuch as that case simply held that the 1992 and 1993 amendments to the summary judgment law intended to abrogate a Court of Appeal decision prohibiting moving defendants from securing a summary judgment based upon factually inadequate discovery responses of a plaintiff, and that the defendant therein was entitled to summary judgment on a fraud claim because "plaintiffs' interrogatory responses demonstrate they have no evidence defendant made any fraudulent representations; plaintiffs' interrogatory responses indicate they have no evidence defendant was a member of a fraudulent conspiracy; and plaintiffs admitted defendant had done nothing wrong in connection with the actual lending of the money . . ." (*Union Bank v. Superior Court* (1995) 31 Cal. App. 4th 573, 592-593 [37 Cal. Rptr. 2d 653].) There was no indication in the summary judgment motion that Stang was relying upon factually inadequate discovery responses of plaintiffs to show that plaintiffs had no evidence to support their case.

To the extent the court was referring to the plaintiffs' apparently mistaken response of "undisputed" to a portion of one of defendants' separate statements of fact dealing with the issue of causation, we conclude that no authority is provided in *Union Bank* which would allow such an ambiguous and mistaken response to be interpreted to be a "judicial admission" or an admission, when such response was not under oath or part of any pleading, and when the response was

inconsistent with other responses and evidence submitted in opposition to the summary judgment motion. (See fn. 2, *ante*.)

[***14]

[**428] Plaintiffs filed timely notice of appeal from the judgment. [*1228]

I. Summary Judgment Principles

(1) [HN3] "Summary judgment is appropriate only if the evidence shows there is no triable issue of any material fact, and that the moving party is entitled to judgment as a matter of law. [HN4] The trial court's obligation in ruling on a summary judgment motion is to determine whether issues of fact exist, not to decide the merits of the issues themselves. [HN5] When making that determination, the trial court must strictly construe the affidavits of the moving party, and liberally construe those of the opponent. . . . [Citation.] [P] . . . [HN6] We independently review the record to determine whether the moving party is entitled to judgment as a matter of law." (*Schworer v. Union Oil Co. (1993) 14 Cal. App. 4th 103, 110 [17 Cal. Rptr. 2d 227]*.) [HN7] "If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. 'The moving defendant whose declarations omit facts as to any such theory . . . permits that portion of the complaint to be unchallenged.'" (*Huff v. Horowitz (1992) 4 Cal. App. 4th 8, 13 [5 Cal. Rptr. 2d 377]*.) Thus, even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact. (*Ibid.*)

In the instant case, the cause of action for strict products liability alleges that the deck gun was "defectively designed, manufactured, assembled, labeled, distributed, advertised, marketed, sold, inspected, tested, or maintained." Thus, the pleading is broad enough to allege all three theories of product defect. (2) There are commonly three types of product defects. "First, there may be a flaw in the manufacturing process, resulting in a product that differs from the manufacturer's intended result. . . . [P] Second, there are products which are 'perfectly' manufactured but are unsafe because of the absence of a safety device, i.e., a defect in design. . . . [P] The third type of defect . . . is a product that is dangerous because it lacks adequate warnings or instructions." (*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1057 [245 Cal. Rptr. 412, 751 P.2d 470]*.) "This doctrine of strict liability extends to products which have design defects, manufacturing [*1229] defects, or 'warning defects.'" (*Sparks v. Owens-Illinois, [***16] Inc. (1995) 32 Cal. App. 4th 461, 472 [38 Cal. Rptr. 2d 739]*.)

(3a) Respondents argue that because the deck gun did not "fail,"—which we interpret to mean that it did not break, or suffer any damage, during Skip Wright's accident—it was not a defective product within the meaning of strict products liability law. Appellants agreed it was undisputed that the deck gun did not "fail," and that the pipe remained attached to the gun during the accident, and the pipe did not shear at the point it was connected with the deck gun. However, respondents cite no authority for their implied proposition that when a product causes personal injuries it is not defective merely because the product itself remains intact or is not damaged in an accident. Further, no explanation or evidence was offered by respondents to link the fact that the deck gun itself did not break with the alleged theories of design defect and "warning defects," which appear to be the product defects upon which appellants are basing their action.

One of the theories of liability suggested by appellants, and supported by Craven's declaration, is that the deck gun was defective in design because it was not designed with a flange [***17] mounting system. Appellants in their opening brief appear to concede the fact that the deck gun was manufactured in accordance with the requests of the Glendale Fire Department, although there was no evidence on the issue either way offered by the parties below. We thus cannot determine whether the deck gun in question was mass produced, or a special [**429] piece of equipment made in accordance with the purchaser's plans. (4) In any event, [HN8] the uniqueness of a purchaser's order does not alter the manufacturer's responsibilities and is not a defense. (See *DeLeon v. Commercial Manufacturing & Supply Co. (1983) 148 Cal. App. 3d 336, 346-347 [195 Cal. Rptr. 867]*.) It is unclear from appellants' brief whether appellants are asserting the design defect theory as a separate theory of liability, or in connection with the warning defect theory of liability, which appears to be the primary focus of the parties' briefs. (3b) To the extent that appellants are asserting a design defect theory of strict products liability, we conclude that the instant motion for summary judgment should have been denied because the instant record presents triable issues of fact on the issue of whether or not the deck gun [***18] was defectively designed in that it was not manufactured with a flange mounting system or the capability to have such a system attached to the deck gun. We also note that in their moving papers below, Stang failed to cite any authority on the issue of the manufacturer's liability even assuming that the Glendale Fire Department specified that it intended to use the threaded pipe attachment instead of a flange mounting system, which the parties admitted was available for use by the fire department. In other words, Stang failed to provide sufficient authority or evidence to negate the design defect theory of product defect. [*1230]

We now turn to the focus of the parties' briefs, the "warning defect" theory of product defect.

II. Product Defect Based on Inadequate Warnings or Instructions n4

n4 Respondents incorrectly contend that there is no evidence in the record that there were no warnings, and that the "warning defect" issue is not properly before us because appellants failed to establish the product lacked a warning. Inasmuch as Stang were the parties moving for summary judgment, they had the burden to negate all theories of liability reflected in the complaint. If there were indeed warnings or instructions given with respect to the deck gun, it was up to Stang to provide evidence of such. They did not do so. On the other hand, Craven's declaration provides evidence that "Stang did not provide any of the aforementioned warnings [regarding the potential hazards of a water hammer and nozzle reaction, the need for proper inspection and maintenance, and the use of a flange mounting system or attachments made of industrial heavy steel]."

Thus, there is indeed evidence in our record that Stang did not provide the foregoing warnings with respect to the deck gun.

***19] (5) [HN9] Under 'warning defect' strict liability, a product, even though faultlessly made, is defective if it is 'unreasonably dangerous to place . . . in the hands of a user without a suitable warning and the product is supplied and no warning is given.' [Citation.] It is now settled that 'knowledge or knowability [of the danger] is a component of strict liability for failure to warn.' (*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000 . . .*)" (*Hufft v. Horowitz, supra, 4 Cal. App. 4th at p. 13.*) "This does not require the manufacturer to warn against every conceivable health problem associated with use of a product. However, the more severe the consequences from unprotected exposure, the greater the need to warn of significant health risks. [HN10] '[I]t is necessary to weigh the degree of danger involved when determining whether a warning defect exists.' [Citations.] '[T]he adequacy of the warning must be commensurate with the risk of harm and level of potential of such harm . . .'" (*Schwoerer v. Union Oil Co., supra, 14 Cal. App. 4th at p. 112.*)

(6) [HN11] "Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer ***20] or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of

care, i.e., what a reasonably prudent manufacturer would have known and warned about. [HN12] Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. [***430] Thus, in strict liability, as opposed to [*1231] negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1002-1003 [281 Cal. Rptr. 528, 810 P.2d 549]*, fn. omitted.)

In this case, Stang did not claim below, nor do they contend on appeal, that a "water hammer," nozzle reaction, and corrosion are unknown or unknowable risks associated with the use of a deck gun. (7) Therefore, "Whether a warning is adequate depends on several factors, among them 'the normal expectations of the consumer as to [***21] how a product will perform, degrees of simplicity or complication in its operation or use, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning.'" (*Schwoerer v. Union Oil Co., supra, 14 Cal. App. 4th 103, 111.*)

(8a) Respondents argue that "The duty to warn does not include the duty to warn of known dangers foreseeable to the user." They claim that Craven's declaration establishes that it is foreseeable to anyone familiar with fire apparatus, including Skip Wright, allegedly a firefighter for 13 years, that water hammer nozzle reactions can occur and that this, in combination with corrosion, can result in the failure of attachments to the deck gun. Respondents fail to cite any evidence that Wright was aware of any of the dangers of separation due to the design features of the deck gun and attachments as noted by Craven. Although Wright may have been aware of the water hammer effect in general, there is no evidence that he was aware that he was using a product which had the problems or defects noted by Craven, or that he may have been subjecting himself to the risk of injury [***22] in using the deck gun with the riser pipe attachment. Respondents' reliance on 6 *Witkin, Summary of California Law (9th ed. 1988) Torts, section 1265*, page 707, and on *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930 [133 Cal. Rptr. 483, 95 A.L.R.3d 386]*, does not support their claim that the manufacturer herein is not subject to "warning defect" principles of strict product liability on the ground that the danger, or potential danger of the deck gun is generally known and recognized. The product in *Bojorquez* was a slingshot, and the court's only discussion of this issue was as follows: "Is the po-

tential danger of a slingshot generally known? Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly. [Citation.] There is no need to include a warning; the product is not defective because it lacked a warning; there is no cause of action in strict liability." (62 Cal. App. 3d at p. 934.) Inasmuch as respondents fail to establish that the dangers or potential dangers of the deck gun and the nature of its use and operation are matters "generally known," or even actually known by Skip Wright herein, we conclude that the [***23] foregoing authorities are inapposite. [*1232]

Moreover, we question whether any conduct by Wright in voluntarily and unreasonably encountering a known risk would provide a complete defense to respondents unless respondents meet the test for primary assumption of the risk set out in *Knight v. Jewett* (1992) 3 Cal. 4th 296 [11 Cal. Rptr. 2d 2, 834 P.2d 696]. In a pre-*Knight* case of *Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal. App. 3d 1143 [238 Cal. Rptr. 18], the court stated that [HN13] "Strict liability for failure to warn does not attach if the dangerous propensity is either obvious or known to the injured person at the time the product is used." (*Id.* at p. 1151-1152.) However, the court in *Gonzales* continued to explain that such knowledge of danger by the user "would not preclude an instruction on strict liability for failure to warn. It would merely give rise to a potential defense in *Carmenita* [the manufacturer] if *Gonzales* 'voluntarily and unreasonably proceed[ed] to encounter a known danger, more commonly referred to as assumption of the risk.'" (*Id.* at p. 1152.)

In *Milwaukee Electric Tool Corp. v. Superior Court* (1993) 15 [***24] Cal. App. 4th 547 [19 Cal. Rptr. 2d 24], the plaintiff worker, a glazier, was injured by a heavy-duty, variable-speed drill manufactured by defendant, and the manufacturer moved for summary adjudication on the ground that its affirmative defense of reasonable implied assumption of the [**431] risk barred plaintiff's claims for strict products liability and breach of warranty. The trial court denied the manufacturer's motion and the Court of Appeal denied the manufacturer's petition for writ of mandate on the ground that the manufacturer failed to show the absence of any duty of care to plaintiff under the doctrine of primary assumption of risk set out in *Knight v. Jewett, supra*, 3 Cal. 4th 296.

In examining the two elements of the test for application of primary assumption of the risk--the nature of the activity in which defendant is engaged, and the relationship between the defendant and the plaintiff to that activity--the court in *Milwaukee Electric Tool Corp.* stated as to the first factor: "We find nothing in the nature of the manufacturing activity to indicate that a finding of no duty on the manufacturer's part should be

made. To the contrary, we believe there is a sound [***25] basis in the development of strict products liability doctrine to support analysis of a products liability case, even one involving an assertion of assumption of the risk, in terms of a duty on the part of the manufacturer to produce defect-free products." (15 Cal. App. 4th at p. 562.) Moreover, in addressing the second factor, the court stated: "[W]e do not find that an injury claimed to have been caused by a dangerously defective power tool is 'a risk that is inherent' in a worker's job. [Citation.] In the relationship of the defendant and the plaintiff to the activity, the use of the tool, it cannot be said that the plaintiff user undertook to act as a product tester or guinea pig. In other words, those defendants in [*1233] primary assumption of the risk cases who have been found not to owe any duty to an injured plaintiff . . . are in a different position than is a manufacturer of a tool which ultimately causes injury to its user, because the user was not necessarily a professional employed to confront the very danger posed by the injury-causing agent. In short, we are not persuaded that the reasons supporting the firefighter's rule indicate that primary assumption of [***26] the risk also exists in the strict products liability context." (15 Cal. App. 4th at pp. 562-563.)

"According to [*Knight v. Jewett, supra*, 3 Cal. 4th 296], once it is found that a defendant owes a duty to a particular plaintiff, secondary assumption of the risk theory is merged into comparative fault. . . . [P] . . . [P] Accordingly, [HN14] where the defendant manufacturer does owe a duty of care to the plaintiff, 'but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty' [citation], assumption of the risk is merged into the comparative fault scheme so that a trier of fact may consider the relative responsibility of the parties in apportioning the loss and damage resulting from the injury." (*Milwaukee Electric Tool Corp. v. Superior Court, supra*, 15 Cal. App. 4th at p. 565.) [HN15] Where a case is subject to comparative fault principles, it is inappropriate for summary judgment. (*Id.* at p. 566.)

We find *Milwaukee Electric Tool Corp.* persuasive here, and conclude that respondents failed to establish primary assumption of the risk as a bar to appellants' cause of action for strict products liability. Accordingly, the trial court [***27] erred in finding there was "no duty to warn regarding a 17 year old component part" n5 Further, assuming without deciding that the case is subject to comparative fault principles, summary judgment still would have been inappropriate. Inasmuch as respondents have failed to establish that primary assumption of the risk bars appellants' claim for strict products liability, we proceed to address respondents' contention that as a component part manufacturer it is not liable for a failure to warn when the final product is subsequently

packaged, labeled and marketed by another manufacturer.

n5 In this aspect of its order, the court appears to confuse the theory of successor liability under *Ray v. Alad Corp.*, *supra*, 19 Cal. 3d 22, which provides one of the underpinnings for the instant complaint against respondents, with other theories of liability based on respondents' own independent negligence or breach of warranty.

To support their claim that they are not liable as component part manufacturers, [***28] respondents rely upon *Walker v. Stauffer Chemical Corp.* (1971) 19 Cal. App. 3d 669 [96 Cal. Rptr. 803], and *Lee v. Electric Motor* [***432] *Division* (1985) 169 Cal. App. 3d 375 [215 Cal. Rptr. 195]. *Walker* is factually distinguishable from the instant case and does not support the summary judgment herein. In *Walker*, the plaintiff was a tenant in a building owned by defendant Mueller, who supplied her with a drain-cleaning product known as [*1234] Clear-All; Stauffer supplied bulk sulfuric acid to the manufacturer of Clear-All, Fazio; Clear-All contained 50 percent sulfuric acid and 50 percent alkaline base. The court found no authority extending strict product liability to the "supplier of a substance to be used in compounding or formulating the product which eventually causes injury to an ultimate consumer. . . . [P] . . . We do not believe it realistically feasible or necessary to the protection of the public to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulfuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility [***29] for that injury. The manufacturer (seller) of the product causing the injury is so situated as to afford the necessary protection." (19 Cal. App. 3d at pp. 673-674.)

Unlike the situation in *Walker*, there is no evidence in this case that the deck gun was not intended to reach the ultimate consumer in the same condition as it left the manufacturer. *Walker* is not dispositive here.

We also conclude that *Lee* is not dispositive in the instant case. In *Lee*, the defendant manufactured a component part, a motor, which was installed in a meat grinding machine which injured plaintiff; plaintiffs claimed that the motor was defective because it lacked a warning that it did not stop immediately when turned off. The court upheld summary judgment in favor of defendant, stating that ". . . there is nothing to indicate that the motor in its use had unreasonably dangerous propensities

not ordinarily discoverable by the user. The uncontradicted evidence shows that all motors, even 'brake motors,' do not stop immediately. There is no danger in the motor which would not have been obvious to a person of ordinary intelligence. [P] Moreover, we stress that defendant gave no input and [***30] had no control over the design, manufacture, and packaging of the finished product. The cases relied on by defendant demonstrate a reluctance against imposing liability for the component-part manufacturer's failure to warn the consumer where the final product is subsequently packaged, labeled and marketed by another manufacturer. [Citations.] [P] . . . [P] Accordingly, we conclude that defendant owed no duty to plaintiffs to warn that the motor did not stop immediately." (169 Cal. App. 3d at pp. 388-389, fn. omitted.)

In light of *Knight v. Jewett and Milwaukee Electric Tool Corp.*, discussed above, we question *Lee's* analysis of the "duty" issue for purposes of determining liability under strict products liability principles. We also fail to see how the deck gun was "packaged, labeled, and marketed," by the Glendale Fire Department; rather, the fire department apparently installed it on their firetruck without making any changes to the deck gun or firetruck. It is also *not negated* on our record that the manufacturer knew that the fire [*1235] department intended to attach the deck gun to a threaded riser pipe. Accordingly, the instant case presents different [***31] issues than those discussed in *Lee*.

We find the circumstances in the instant case more similar to those in *Huynh v. Ingersoll-Rand* (1993) 16 Cal. App. 4th 825 [20 Cal. Rptr. 2d 296], where a worker suffered an eye injury when a hand-held power grinder with a "mismatched" disc, which did not meet the specified revolutions per minute, exploded; plaintiff alleged that the manufacturer's warning was not adequate in that it did not foresee the "misuse" of the grinder by attaching the wrong disc, and provide an adequate warning. The defendant predicated its summary judgment motion on the ground that the plaintiff "misused" the grinder by coupling it with a disc not rated to handle the higher speeds at which the grinder was capable of running. The Court of Appeal reversed the summary judgment, finding that several triable issues remained on the affirmative defense of misuse.

(9) [HN16] " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiffs' [***433] injury, not when some other defect produces the harm." (*Huynh v. Ingersoll-Rand*, *supra*, 16 Cal. App. 4th at p. 831.) "Huynh responded to Ingersoll's assertion of the affirmative defense of 'misuse' of the grinder [***32] by contending this was a foreseeable 'misuse' of Ingersoll's product. Since it was a foreseeable 'misuse'—actually a foreseeable danger in how the product could be used—

54 Cal. App. 4th 1218, *, 63 Cal. Rptr. 2d 422, **;
1997 Cal. App. LEXIS 361, ***; CCH Prod. Liab. Rep. P14,934

Huynh argued Ingersoll remains liable unless it provides an *adequate* warning. [P] This position accurately reflects the current state of the law. '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.' [Citation.] [HN17] '[T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.' [Citation.] '[A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' [Citation.] As [*Self v. General Motors Corp. (1974) 42 Cal. App. 3d 1 (116 Cal. Rptr. 575)*] and [*Balido v. Improved Machinery, Inc. (1973) 29 Cal. App. 3d 633, 645 (105 Cal. Rptr. 890)*] make clear the risks which must be warned against obviously include foreseeable dangerous 'misuses' of the product, such as attaching an inappropriate grinding disc [***33] to the grinder." (*16 Cal. App. 4th at p. 833.*)

The court in *Huynh* went on to state that "A manufacturer does not satisfy its duty to warn by supplying a warning so vague and ambiguous only some users are likely to read and comprehend the danger. It cannot count on the sophisticated users--even those in an employment setting--passing on to the less sophisticated the fact the obtuse language the manufacturer included [*1236] actually constitutes a warning against certain uses of the product." (*16 Cal. App. 4th at p. 834.*)

(8b) As in *Huynh*, we conclude that respondents failed to counter Craven's declaration, or to otherwise negate appellants' allegations that the manufacturer of the deck gun did not provide an adequate, or any, warning against the potential dangerous and foreseeable "mismatch" of the deck gun and riser pipe attachments which did not have adequate strength or design to withstand the water pressures generated with the use of the deck gun,

and the alleged foreseeable danger that the deck gun or its attachments may become separated from the fire truck under such pressures. We thus conclude that triable issues of fact exist on the "warning defect" aspect of strict [***34] products liability.

Finally, we note that since the summary judgment motion admittedly did not address or negate successor liability under *Alad*, the motion should have been denied, whether or not any showing was made as to liability based on respondents' own conduct or involvement with the manufacture or distribution of the deck gun. Thus, respondents' citation to *Gee v. Tenneco, Inc. (9th Cir. 1980) 615 F.2d 857* is inapposite, as that case discussed the issue of the duty to warn of the dangers of a chemical used as a dye for X-ray purposes only as an *independent duty* of a corporation with knowledge of the potential dangers of the chemical, apart from its liability purely as a successor of the manufacturer. (*Id. at p. 865.*) We need not address the former issue here because we have found triable issues of fact to exist assuming that respondents are successors of the manufacturer of the deck gun, and respondents failed to negate their status as successors liable under *Alad*. Respondents also failed to move for summary adjudication of issues to highlight or focus on other theories of liability which may be at issue in this case.

DISPOSITION

The judgment is reversed, [***35] and on remand, the trial court is directed to deny respondents' motion for summary judgment. Appellants are entitled to costs on appeal.

Johnson, J., and Woods, J., concurred.

Respondents' petition for review by the Supreme Court was denied August 13, 1997.

LEXSTAT SC CODE ANN 15-73-10

SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** THIS DOCUMENT IS CURRENT THROUGH ALL LEGISLATION ENACTED IN 2004 ***
*** ANNOTATIONS CURRENT THROUGH NOVEMBER 2, 2005 ***

TITLE 15. CIVIL REMEDIES AND PROCEDURES
CHAPTER 73. SELLERS OF DEFECTIVE PRODUCTS

GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

S.C. Code Ann. § 15-73-10 (2004)

§ 15-73-10. Liability of seller for defective product.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) shall apply although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

HISTORY: 1962 Code § 66-371; 1974 (58) 2782.

NOTES:

CROSS REFERENCES

Implied warranty of fitness for a particular purpose under Commercial Code, see § 36-2-317.

NOTES OF DECISIONS

I. In general

Section 15-73-10 applied to Crimper which left the manufacturer's hands in Germany, apparently in December 1974, and was delivered and installed in South Carolina, early in 1975, inasmuch as both dates were well after the effective date of the statute, notwithstanding the fact that purchase order for the Crimper was made on November 23, 1973 more than 7 months before the effective date of the statute. *Martin v. Fleissner GmbH (C.A.4 (S.C.) 1984) 741 F.2d 61*. Products Liability 2

In a products liability action, regardless of the theory on which the plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant. *Rife v. Hitachi Const. Machinery Co., Ltd. (S.C.App. 2005) 609 S.E.2d 565*, rehearing denied. Products Liability 1

A products liability case may be brought under several theories, including negligence, strict liability, and warranty. *Rife v. Hitachi Const. Machinery Co., Ltd. (S.C.App. 2005) 609 S.E.2d 565*, rehearing denied. Sales 425

Since § 15-73-10 determines the liability of the seller of a defective product, the pertinent date to determine its application is the date the product was sold by the seller. Thus, in an action arising out of injuries sustained by a cement

company employee due to an allegedly defective wheel assembly, the statute applied to both the seller and lessor of a trailer containing the defective wheel assembly, even though the defective parts of the wheel assembly were manufactured prior to the effective date of the statute, where the trailer was sold to the lessor after the effective date of the statute, and the lessor leased the trailer to the cement company after the effective date of the statute. *Scott by McClure v. Fruehauf Corp.* (S.C. 1990) 302 S.C. 364, 396 S.E.2d 354.

Blood is not a product for purposes of strict liability in tort. *Samson v. Greenville Hosp. System* (S.C. 1989) 297 S.C. 409, 377 S.E.2d 311. Products Liability 46.1

Cause of action in strict liability does not exist under Code § 15-73-10 in favor of party injured, after July 9, 1974, by product placed in stream of commerce prior to codification of *Restatement (Second) of Torts Section 402A* as Code § 15-73-10. *Schall v. Sturm, Ruger Co., Inc.* (S.C. 1983) 278 S.C. 646, 300 S.E.2d 735. Products Liability 2

Academically, it may be argued that all products are defective because they can be made more safe, however, it does not automatically follow that products are deemed "unreasonably dangerous"; balancing is required and numerous factors must be considered, including usefulness and desirability of product, cost involved for added safety, likelihood and potential seriousness of injury, and obviousness of danger. *Claytor v. General Motors Corp.* (S.C. 1982) 277 S.C. 259, 286 S.E.2d 129.

Strict Liability in tort was not part of South Carolina common law at time of passage of this section, which operates prospectively only and therefore does not apply to injury which occurred before that date. *Hatfield v. Atlas Enterprises, Inc.* (S.C. 1980) 274 S.C. 247, 262 S.E.2d 900.

2. Negligence or strict liability

South Carolina would admit testimony on "state of the art" in design defect cases tried under the theory of strict liability. *Reed v. Tiffin Motor Homes, Inc.* (C.A.4 (S.C.) 1982) 697 F.2d 1192. Products Liability 81.1

Strict liability does not apply where under defendant's sales agreement with plaintiff, defendant warranted only that its tobacco curing barns would be free from defects in parts and workmanship and confined plaintiff's remedies to repair or replacement of defective parts; plaintiff's showing that barns caused physical injury to tobacco by failing to cure it does not establish that barns were unreasonably dangerous to property so as to allow doctrine of strict products liability to override contract. *Purvis v. Consolidated Energy Products Co.* (C.A.4 (S.C.) 1982) 674 F.2d 217.

In South Carolina, some differences exist between product liability claims brought under negligence and strict liability theories; under a negligence theory, the plaintiff has the additional burden of proving the seller or manufacturer failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Products Liability 5; Products Liability 6

Under South Carolina law, a plaintiff may bring a product liability claim under several theories, including negligence and strict liability. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Products Liability 1

In a product liability action brought under both negligence and strict liability theories in South Carolina, the plaintiff must show (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Products Liability 5; Products Liability 6

In a products liability action, liability for negligence requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Products Liability 11

Worker could maintain negligence claim against manufacturer and lessor of trash compactor in connection with alleged injuries arising from sudden fright when compactor crushed co-worker to death as worker operated controls. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Damages 57.60

Analysis governing a bystander's cause of action for negligent infliction of emotional distress does not apply to strict liability cause of action by a user of defective product to recover for physical harm from emotional damage arising from death or serious injury to a third person; user of defective product is not a mere bystander in such cases, but a pri-

mary and direct victim of product defect. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Damages 57.60

In a products liability case in which the theory of recovery is strict liability, the only inference of any import to be made from a finding that a given warning is adequate is that the product is not in defective condition nor is it unreasonably dangerous. Code 1976 § § § 15-73-10, 15-73-30. *Curcio v. Caterpillar, Inc.* (S.C.App. 2001) 344 S.C. 266, 543 S.E.2d 264, rehearing denied, certiorari granted, reversed 355 S.C. 316, 585 S.E.2d 272. Products Liability 71

In a products liability action under both negligence and strict liability theories, the plaintiff must establish (1) that he was injured by the product, (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant, and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user; liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. *Allen v. Long Mfg. NC, Inc.* (S.C.App. 1998) 332 S.C. 422, 505 S.E.2d 354, rehearing denied, certiorari denied. Products Liability 1

Common law indemnification does not apply among joint tortfeasors in strict liability. *Scott by McClure v. Fruehauf Corp.* (S.C. 1990) 302 S.C. 364, 396 S.E.2d 354.

Contributory negligence is an affirmative defense to an action for negligence; it has no application to an action based on breach of warranty or liability for a defective product. *Wallace v. Owens-Illinois, Inc.* (S.C.App. 1989) 300 S.C. 518, 389 S.E.2d 155. Products Liability 27; Sales 430

Although § 15-73-10 uses the terms "sells" and "sellers," these terms are merely descriptive and the doctrine of strict liability may be applied if the requirements for its application are otherwise met, even though no sale has occurred in the literal sense. *Henderson v. Gould, Inc.* (S.C.App. 1986) 288 S.C. 261, 341 S.E.2d 806. Products Liability 23.1

3. "User"

Worker who witnessed co-worker being fatally crushed by trash compactor was a "user" of compactor under statute governing strict liability actions for defective products, where worker was operating controls on compactor in an effort to assist co-worker. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Products Liability 48

If a person is considered a "direct victim" for the purposes of proximate cause analysis under one products liability cause of action, that person must be a direct victim for all causes of action; it would be too fine a distinction to say that person is a user and therefore a foreseeable plaintiff under a strict liability theory, but that same person is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Products Liability 15

4. "Physical harm"

Worker's alleged physical injuries arising from emotional trauma of witnessing co-worker being fatally crushed by trash compactor constituted "physical harm" within meaning of statute governing strict liability actions for defective products. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Damages 57.60; Products Liability 48

5. Questions of fact

Genuine issue of material fact existed as to whether tobacco companies' manufactured cigarettes were distinct from raw tobacco, precluding summary judgment, in product liability action under *South Carolina law*. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

Genuine issue of material fact existed as to when health risks of smoking were commonly known, precluding summary judgment, in product liability action against tobacco companies under *South Carolina law*. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

Genuine issue of material fact existed as to whether there existed safer alternative design for cigarettes, precluding summary judgment, in product liability action against tobacco companies under *South Carolina law*. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

Genuine issue of material fact existed as to whether "lower tar and nicotine" cigarettes were fit for their intended use as safer and healthier cigarettes, precluding summary judgment, in product liability action against tobacco company

under *South Carolina law. Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

6. Sufficiency of evidence

Mechanic who was injured when radiator hose detached as he was adjusting transmission cable of pickup truck failed to establish negligence liability of truck manufacturer under South Carolina products liability law when he failed to show that manufacturer had knowledge of any problem with allegedly defective plastic inlet connector for radiator hose; manufacturer's statement that it had never received complaint about inlet connector in connection with any of more than 2.5 million trucks using that part went unchallenged. *Oglesby v. General Motors Corp.* (C.A.4 (S.C.) 1999) 190 F.3d 244. Products Liability 35.1

Widow of smoker failed to carry her burden of showing on failure to warn claim against tobacco company that smoker would not have begun smoking, or would have stopped smoking, had tobacco company provided warning about danger of its cigarettes, in product liability action under *South Carolina law. Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Products Liability 59

A renter of tree climbing equipment was entitled to summary judgment in a products liability action where the plaintiff admitted that there was nothing wrong with either the spikes or the harness which he rented, and that his fall was caused by the failure of the knot he tied in his own safety rope. *Koester v. Carolina Rental Center, Inc.* (S.C.App. 1993) 311 S.C. 115, 427 S.E.2d 708, rehearing denied, certiorari granted, reversed 313 S.C. 490, 443 S.E.2d 392.

7. Foreseeability

Excavator manufacturer could not reasonably foresee that its excavator, not equipped with seat belt, would injure person in United States, and thus, manufacturer was not liable to excavator operator injured when sudden stop ejected him through front window of operator's cab; excavator was designed and manufactured solely for distribution and use in Japan. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Products Liability 48

Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 387

Test of foreseeability is whether some injury to another is the natural and probable consequence of the complained-of act; for an act to be a proximate cause of the injury, the injury must be a foreseeable consequence of the act. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 387

Proximate cause, in products liability context, requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Products Liability 15

In a product liability action arising from injuries sustained when the plaintiff slipped and fell in liquid on the floor while cleaning up an exploded glass soft drink bottle, the test of foreseeability was met. It was to be expected that if the defective bottle exploded, broken glass and liquid would spill on the floor. It was also predictable that a spill of broken glass and liquid would create a hazard which might cause injury to someone; that a person might slip on the liquid or be cut by the broken glass was readily foreseeable, and any resulting injury would be the natural and probable consequence of furnishing a defectively manufactured bottle containing liquid under pressure. *Wallace v. Owens-Illinois, Inc.* (S.C.App. 1989) 300 S.C. 518, 389 S.E.2d 155.

7.5. Proximate cause

The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 422

Proximate cause is the efficient or direct cause of an injury; proximate cause does not mean the sole cause. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 422

7.7. Intervening cause

An intervening force may be a superseding cause that relieves an actor from liability; however, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 431

8. Knowledge

In South Carolina, the "common knowledge" requirement, that a product cannot be labeled either defective or unreasonably dangerous if a danger associated with the product is one that the product's users generally recognize, is emasculated if a defendant may show merely that the public was aware that a product presented health risks at some vague, unspecified, and undifferentiated level. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Products Liability 8

Manufacturer of motorboat held not liable on theory of strict liability due to boat's lack of kill switch to shut off motor when improperly repaired steering cable on boat parted causing deceased's ejection from boat, since normal risk of boating includes being thrown overboard, and absence of kill switch did not render boat more dangerous than that contemplated by consumer who purchases boat with ordinary knowledge common to community. *Young v. Tide Craft, Inc.* (S.C. 1978) 270 S.C. 453, 242 S.E.2d 671, 1 A.L.R.4th 394.

9. Causation

Genuine issue of material fact existed as to whether 25% of citizen's smoking history could have constituted proximate cause of his cancer, precluding summary judgment, in product liability action against tobacco companies under South Carolina law. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Federal Civil Procedure 2515

Citizen's smoking of particular brand of cigarette was not efficient cause without which his injury would not have resulted to as great an extent, in context of product liability action against tobacco companies under South Carolina law, since one percent of citizen's smoking history, which was attributable to particular cigarette, was de minimis, and none of smoker's experts opined that such contribution was substantial. *Little v. Brown & Williamson Tobacco Corp.*, 2001, 243 F.Supp.2d 480. Products Liability 59

Causation in fact is proved by establishing the injury would not have occurred but for the defendant's negligence; legal cause is proved by establishing foreseeability. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 387

Proximate cause requires proof of causation in fact and legal cause. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Negligence 373

Genuine issue of material fact existed as to whether incident in which co-worker was fatally crushed by trash compactor was proximate cause of physical harm to worker, who was operating controls on compactor, from emotional trauma of witnessing incident, precluding summary judgment for manufacturer and lessor of compactor on worker's strict liability cause of action. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Judgment 181(33)

A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained. *Bray v. Marathon Corp.* (S.C. 2003) 356 S.C. 111, 588 S.E.2d 93, rehearing denied. Products Liability 15

10. Stream of commerce requirement

A sale need not occur in the literal sense for strict liability to apply as long as the product is injected into the stream of commerce by other means. *Priest v. Brown* (S.C.App. 1990) 302 S.C. 405, 396 S.E.2d 638. Products Liability 5

An electric utility could not be held strictly liable for the electrocution death of a deputy sheriff who attempted to move a downed power line from the road after an automobile accident, where there was no evidence of an unreasonably dangerous defective condition, and the power line had not been placed into the stream of commerce since it was within the exclusive possession, ownership and control of the electric utility and the electricity through the lines was of such a high voltage that it was not in a form immediately useable by the consumer. *Priest v. Brown* (S.C.App. 1990) 302 S.C. 405, 396 S.E.2d 638.

10.5. Sellers

Seller of excavator machine could not be liable under products liability theory for design or manufacturing defect in operator's action brought after operator was injured when sudden stop ejected him through front window of operator's cab; seller had absolutely no involvement in design or manufacture of excavator, and operator knew that excavator did not have seat belt prior to accident. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Products Liability 48

11. Warnings

Doctrine of strict tort liability, recognized in South Carolina, provides that manufacturer of product sold in defective condition unreasonably dangerous is liable to ultimate user who was injured by product; manufacturer of pace-maker device does not have duty to warn consumer directly about potential risks provided that physician receives adequate notice of possible complications. *Brooks v. Medtronic, Inc.* (C.A.4 (S.C.) 1984) 750 F.2d 1227.

Product package insert adequately warned against danger of medical nail's breaking if nonunion or delayed union were to occur, even though patient alleged that product was unreasonably dangerous on basis that language in insert stated that "if there is delayed union or nonunion of bone in the presence of weight bearing or load bearing, the implant could eventually break due to metal fatigue" was guarantee that nail would not break before nonunion or delayed union could be declared; insert also contained general warning that indicated nail could break under any of number of stresses. *Phelan v. Synthes (U.S.A.)* (C.A.4 (S.C.) 2002) 35 Fed.Appx. 102, 2002 WL 1058900, Unreported. Products Liability 46.1

The adequacy of a warning in a products liability case is generally a jury question. *Curcio v. Caterpillar, Inc.* (S.C. 2003) 355 S.C. 316, 585 S.E.2d 272, rehearing denied. Products Liability 87.1

Warning printed on track loader was adequate as a matter of law and prevented loader from being "unreasonably dangerous," and thus manufacturer was not liable in strict products liability suit brought by personal representative of estate of mechanic killed while working on loader, where warning advised those working on loader to disconnect batteries before performing service, mechanic failed to do so, and mechanic's death could have been prevented if he had heeded warning. *Curcio v. Caterpillar, Inc.* (S.C.App. 2001) 344 S.C. 266, 543 S.E.2d 264, rehearing denied, certiorari granted, reversed 355 S.C. 316, 585 S.E.2d 272. Products Liability 48

Once it is established that a product must display a warning to be safe, the question of the adequacy of the warning is one of fact for the jury as long as evidence has been presented that the warning was inadequate. *Allen v. Long Mfg. NC, Inc.* (S.C.App. 1998) 332 S.C. 422, 505 S.E.2d 354, rehearing denied, certiorari denied. Products Liability 87.1

Once it is established that a product must display a warning to be safe, the question of the adequacy of the warning is one of fact for the jury as long as evidence has been presented that the warning was inadequate. *Allen v. Long Mfg. NC, Inc.* (S.C.App. 1998) 332 S.C. 422, 505 S.E.2d 354, rehearing denied, certiorari denied. Products Liability 87.1

Operator of catfish and eel farming operation failed to produce evidence from which jury could conclude that either of two manufacturers had reason to believe warning was necessary where, on each occasion of failed compressor, one manufacturer obtained compressor from operator's serviceman and returned it to remanufacturer, which furnished replacement; as to other manufacturer, operator had produced no evidence that it was actually aware of any problems with compressors at issue which would necessitate warning. *Livingston v. Noland Corp.* (S.C. 1987) 293 S.C. 521, 362 S.E.2d 16, 72 A.L.R.4th 83.

12. Defense of completion and acceptance

The defense of completion and acceptance was inapplicable as a matter of law in a products liability action based on allegations of strict liability, negligence and breach of warranties. The defense of completion and acceptance is inconsistent with the statute providing that sellers of defective products are strictly liable for physical harm caused to the ultimate users of the products or to their property, and is inconsistent with the statute extending the warranty of sellers beyond those with whom they have a contractual relationship. *Stanley v. B.L. Montague Co., Inc.* (S.C.App. 1989) 299 S.C. 51, 382 S.E.2d 246.

13. Particular products

Failure of outboard motor manufacturer to equip its engine with kill switch did not render engine defective within purview of strict liability law. *Tisdale v. Teleflex, Inc.* (D.C.S.C. 1985) 612 F.Supp. 30.

Absence of seat belt on excavator machine did not factually or legally prove that excavator was unreasonably dangerous, and thus, seller of machine was not liable under any products liability theory. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Products Liability 85

No evidence of negligence through failure to warn found on part of distributor of extendable crane, where employee of crane purchaser was injured as result of co-employee's failure to properly extend crane boom, even though aware of dangers that could result. *Marchant v. Mitchell Distributing Co.* (S.C. 1977) 270 S.C. 29, 240 S.E.2d 511.

Crane was not in defective condition unreasonably dangerous by reason of absence of optional safety device to prevent overextension of crane boom. *Marchant v. Mitchell Distributing Co.* (S.C. 1977) 270 S.C. 29, 240 S.E.2d 511.

14. Altered product

Under § 15-73-10, the manufacturer or seller of a product is not strictly liable if it can be shown that (1) the product was materially altered before it reached the injured user, and (2) such alteration could not have been expected by the manufacturer or seller. *Fleming v. Borden, Inc.* (S.C. 1994) 316 S.C. 452, 450 S.E.2d 589, rehearing denied. Products Liability 16

In a products liability action, the trial court erred in granting the manufacturer summary judgment based on the fact that the product had been materially altered after delivery to the consumer where there was an issue of fact as to the foreseeability of the alteration. *Fleming v. Borden, Inc.* (S.C. 1994) 316 S.C. 452, 450 S.E.2d 589, rehearing denied.

15. Performance of service

A pharmacy may not be held strictly liable for properly filling a prescription in accordance with a physician's orders; in filling a prescription, a pharmacy is providing a service, rather than selling a product. *Madison v. American Home Products Corp.* (S.C. 2004) 358 S.C. 449, 595 S.E.2d 493. Products Liability 46.2

Worker who was injured when he fell through partially opened hatch door on catwalk had no strict liability claim against contractor that performed assembly work on catwalk; assembly work amounted to service, rather than product. *Duncan v. CRS Serrine Engineers, Inc.* (S.C.App. 1999) 337 S.C. 537, 524 S.E.2d 115. Products Liability 42

South Carolina's strict liability statute does not apply to services. *Duncan v. CRS Serrine Engineers, Inc.* (S.C.App. 1999) 337 S.C. 537, 524 S.E.2d 115. Products Liability 5

Health care providers who use products, including breast implants, during course of providing treatment to patients are providing "services," and are not "sellers" within meaning of Defective Products Act; thus, providers cannot be strictly liable under Act for such products. *In re Breast Implant Product Liability Litigation* (S.C. 1998) 331 S.C. 540, 503 S.E.2d 445. Products Liability 46.1

Providers of services may not be held liable under *Defective Products Act*. *In re Breast Implant Product Liability Litigation* (S.C. 1998) 331 S.C. 540, 503 S.E.2d 445. Products Liability 23.1

In an action arising out of defective installation of an automobile tire by a tire company, the company was entitled to a directed verdict on the injured party's cause of action for strict liability since the tire had not been defective and the scope of strict liability does not apply to negligent installation of non-defective products. *DeLoach v. Whitney* (S.C. 1981) 275 S.C. 543, 273 S.E.2d 768.

16. Parties

School maintenance man could not base cause of action on strict liability under § 15-73-10 against manufacturer of lawn mower which ran over and propelled bolt into his back while being operated by fellow worker because injured maintenance man was not user or consumer of allegedly defective lawn mower. *Lightner v. Duke Power Co.*, 1989, 719 F.Supp. 1310.

17. Recovery for economic losses

Owner of utility truck which had been rebuilt by defendant could not recover from defendant for economic losses sustained when truck caught fire, allegedly as result of defendant's negligence, because strict liability cause of action is not available to cover economic losses between commercial entities. *Laurens Elec. Co-op., Inc. v. Altec Industries, Inc.* (C.A.4 (S.C.) 1989) 889 F.2d 1323.

A plaintiff suing under a products liability cause of action can recover all damages that were proximately caused by the defendant's placing an unreasonably dangerous product into the stream of commerce. *Rife v. Hitachi Const. Machinery Co., Ltd.* (S.C.App. 2005) 609 S.E.2d 565, rehearing denied. Products Liability 15

18. Liability of successor corporation

Defendant corporation's motion for summary judgment in product liability case was denied, where motion was based upon defendant corporation's contention that it was not manufacturer of alleged defective product in question because it had purchased the assets of its predecessor corporation two years after such predecessor had sold alleged defective product and where evidence indicated that defendant corporation was mere continuation of predecessor corporation. *Holloway v. John E. Smith's Sons Co., Division of Hobam, Inc.* (D.C.S.C. 1977) 432 F.Supp. 454.

19. Jury instructions

In an action to recover for alleged design and construction defects affecting the plaintiff's car, the trial court erred by instructing the jury that even if the condition of the car was unreasonably dangerous, the plaintiff could recover only if she was an "ordinary consumer"; moreover, the trial court's error was not harmless where the plaintiff suffered from psychiatric illness and the defendant had emphasized her illness in its final argument. *Vaughn v. Nissan Motor Corp. in U.S.A., Inc.* (C.A.4 (S.C.) 1996) 77 F.3d 736.

The trial court properly instructed the jury in a products liability action that the defendants were liable only to the extent of proven damages, even though the court failed to include this wording in its charge on strict liability, where the court twice instructed the jury that the burden to prove damages was on the plaintiff. *Dunn v. Charleston Coca-Cola Bottling Co.* (S.C.App. 1992) 307 S.C. 426, 415 S.E.2d 590, rehearing denied, certiorari granted in part, reversed 311 S.C. 43, 426 S.E.2d 756. Damages 216(2)

20. Punitive damages

Recovery of punitive damages is not allowed under a cause of action based solely upon the South Carolina strict liability statute. Under § 15-73-10(1), recovery is limited to actual damages, which compensate "for physical harm caused," and punitive damages are not assessed to compensate the plaintiff for "physical harm" suffered, but rather, their purpose is to punish the wrongdoer and to deter him or her and others from engaging in similar misconduct. *Barnwell v. Barber-Colman Co.* (S.C. 1989) 301 S.C. 534, 393 S.E.2d 162.

HISTORY: 1962 Code § 66-371; 1974 (58) 2782.

LexisNexis (R) Notes:

CASE NOTES

1. Intermediate court properly reversed a trial court's entry of summary judgment for a manufacturer as to an injured party's strict liability claim under the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq., as the injured party, who operated a trash compactor in an effort to assist a co-worker who was crushed to death by the compactor, was a user within the meaning of S.C. Code Ann. § 15-73-10; there was a genuine issue of material fact as to whether the event was the proximate cause of the injured party's physical harm, although the intermediate court properly concluded that the bystander analysis did not apply to a strict liability claim. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

2. Intermediate court erred in affirming a trial court's entry of summary judgment for a manufacturer on an injured party's negligence claim as the injured party might have been able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker, and, as the injured party was considered a direct victim for the products liability claim under the South Carolina Defective Products Act, S.C. Code Ann. §

15-73-10 et seq., she was a foreseeable plaintiff for a negligence claim. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

3. In an indemnity suit based on strict liability and breach of implied and express warranties, that a truck was sold in an unreasonably dangerous defective condition subjected the seller to liability by way of indemnity for damages arising out of a lawsuit where a driver was killed and his passenger injured when the buyer's agent lost control of the truck and hit the decedent's vehicle head-on; that the jury found the buyer negligent in the underlying action did not make the seller a joint tortfeasor. *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 301 S.E.2d 552, 1983 S.C. LEXIS 253, 36 U.C.C. Rep. Serv. (CBC) 74 (S.C. 1983).

4. Where strict liability in tort for sellers of products in a defective condition unreasonably dangerous to users, consumers or their property became the law of South Carolina by the enactment of 1974 Act No. 1184, effective July 9, 1974, there was no strict liability cause of action for a product entering the stream of commerce prior to July 9, 1974 and allegedly causing an injury after that date. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).

5. Given the facts of a particular case, the Supreme Court of South Carolina did not decide, nor intimate, whether strict liability in tort had any applicability prior to enactment of S.C. Code § 15-73-10. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671, 1978 S.C. LEXIS 536, 1 A.L.R.4th 394 (S.C. 1978).

6. Respondents' demurrer to appellant's strict liability cause of action was properly granted because strict liability was not recognized in the common law at the time of appellant's injury; the doctrine of strict liability in tort, imposed as a result of a product's defective condition, did not emerge until S.C. Code Ann. § § 15-73-10 to 15-73-30 were enacted after appellant's injury, and those sections applied prospectively only. *Hatfield v. Atlas Enters.*, 274 S.C. 247, 262 S.E.2d 900, 1980 S.C. LEXIS 288, CCH Prod. Liab. Rep. P8613 (S.C. 1980).

7. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" for purposes of strict liability in tort. S.C. Code Ann. § 15-73-10 imposed strict liability in tort upon the suppliers of defective products and was applicable only to products and not to services. *Samson v. Greenville Hosp. Sys.*, 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).

8. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" under S.C. Code Ann. § 15-73-10 for purposes of strict liability in tort, and, based on the blood shield statute, S.C. Code Ann. § 44-43-10, the legislature did not intend for blood to be classified as a product within the context of strict tort liability. *Samson v. Greenville Hosp. Sys.*, 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).

9. Summary judgment was properly granted in favor of a manufacturer in plaintiff's suit to recover damages for personal injuries pursuant to S.C. Code Ann. § 15-73-10(1); plaintiff failed to demonstrate that his injuries were proximately caused by the manufacturer's failure to equip an excavator with a seat belt. Because the excavator was made solely for use in Japan, where seat belts were not required, the manufacturer could not have reasonably foreseen that a user in a foreign market would be injured. *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005).

S.C. Code Ann. § 15-73-10

10. Punitive damages were improperly awarded to an injured party in an action based solely upon the strict liability statute (the act), S.C. Code § § 15-73-10 to -30, which does not specify that punitive damages are recoverable and permits liability only for "physical harm" under S.C. Code Ann. § 15-73-10 of the act; punitive damages are not awarded for "physical harm" because their purpose is to punish a wrongdoer and to deter him and others from engaging in similar misconduct. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).

11. Recovery of punitive damages is not allowed under a cause of action based solely upon the South Carolina strict liability statute, S.C. Code Ann. § § 15-73-10 to -30; such damages are not awarded for "physical harm" within the meaning of S.C. Code 15-73-10 of the strict liability statute. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).

12. In an indemnity suit based on strict liability and breach of implied and express warranties, that a truck was sold in an unreasonably dangerous defective condition subjected the seller to liability by way of indemnity for damages arising out of a lawsuit where a driver was killed and his passenger injured when the buyer's agent lost control of the truck and hit the decedent's vehicle head-on; that the jury found the buyer negligent in the underlying action did not make the seller a joint tortfeasor. *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 301 S.E.2d 552, 1983 S.C. LEXIS 253, 36 U.C.C. Rep. Serv. (CBC) 74 (S.C. 1983).

13. Intermediate court erred in affirming a trial court's entry of summary judgment for a manufacturer on an injured party's negligence claim as the injured party might have been able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker, and, as the injured party was considered a direct victim for the products liability claim under the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq., she was a foreseeable plaintiff for a negligence claim. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

14. S.C. Code Ann. § 15-73-10 by its terms determines the liability of the seller of a defective product; the pertinent date to determine its application is the date the product was sold by the seller. *Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354, 1990 S.C. LEXIS 162, CCH Prod. Liab. Rep. P12635 (S.C. 1990).

15. Summary judgment was properly granted in favor of a manufacturer in plaintiff's suit to recover damages for personal injuries pursuant to S.C. Code Ann. § 15-73-10(1); plaintiff failed to demonstrate that his injuries were proximately caused by the manufacturer's failure to equip an excavator with a seat belt. Because the excavator was made solely for use in Japan, where seat belts were not required, the manufacturer could not have reasonably foreseen that a user in a foreign market would be injured. *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005).

16. Summary judgment was properly granted in favor of a seller in plaintiff's suit to recover damages for personal injuries pursuant to S.C. Code Ann. § 15-73-10(1); plaintiff failed to show that the seller participated in the design of the product, an excavator, or that the excavator was in a defective condition unreasonably dangerous due to the fact that it lacked a seat belt. Though the excavator would have been more safe if this optional safety feature had been present, such did not make the excavator defective or unreasonably dangerous. *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005).

17. Where the trial court found in its judgment notwithstanding the verdict order, contrary to the jury's verdict, that a company's warning was adequate to defeat an estate representative's strict products liability case pursuant to S.C. Code Ann. § § 15-73-10, -30, the trial court erred in making this finding, as there was evidence to support the jury's verdict in favor of the estate representative. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272, 2003 S.C. LEXIS 172, CCH Prod. Liab. Rep. P16697 (S.C. 2003).

18. In a traditional tort setting S.C. Code § 15-73-10(2)(a) rendered irrelevant the concept of duty because recovery could be had although a seller exercised all possible care in the preparation of the sale of a product. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).

19. If a person is considered a "direct victim" for the purposes of one products liability cause of action under the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq., the person must be a direct victim for all causes of action; it is too fine a distinction to say that an injured party is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

20. Viewing the evidence in the light most favorable to plaintiff executrix, a jury could have found that the lifting mechanism on a bin that fell on a worker and seriously injured him was defectively designed and unreasonably dangerous in ordinary use particularly where it was undisputed that the worker was injured by the product and that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the manufacturer; thus, the evidence was sufficient for the jury to have concluded that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108, 1985 S.C. App. LEXIS 311, CCH Prod. Liab. Rep. P10464 (S.C. Ct. App. 1985), appeal dismissed by 286 S.C. 127, 332 S.E.2d 102, 1985 S.C. LEXIS 570 (S.C. 1985).

21. By bringing an action under S. C. Code § 15-73-10, a plaintiff assumes the burden of presenting evidence which tends to prove that a product was in a defective condition unreasonably dangerous, which proximately caused his injury; the fact that the injury occurred and the fact that the product could have been safer are not sufficient to support a finding that the product was unreasonably dangerous. *Marchant v. Mitchell Distrib. Co.*, 270 S.C. 29, 240 S.E.2d 511, 1977 S.C. LEXIS 246 (S.C. 1977).

22. Summary judgment was properly granted in favor of a seller in plaintiff's suit to recover damages for personal injuries pursuant to S.C. Code Ann. § 15-73-10(1); plaintiff failed to show that the seller participated in the design of the product, an excavator, or that the excavator was in a defective condition unreasonably dangerous due to the fact that it lacked a seat belt. Though the excavator would have been more safe if this optional safety feature had been present, such did not make the excavator defective or unreasonably dangerous. *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005).

23. South Carolina's strict liability statute, the Defective Products Act, S.C. Code Ann. § 15-73-10, applies only to products, not to services, and the South Carolina Pharmacy Practice Act, S.C. Code Ann. § 40-43-10, specifically states that the practice of pharmacy centered around the provision of pharmacy care services and assisting the patient to achieve optimal therapeutic outcomes; because a pharmacy was providing a service, rather than selling a product, it may not have been held strictly liable for properly filling a prescription in accordance with a physician's orders, and a strict liability cause of action brought against the pharmacy by a drug consumer was properly dismissed. *Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 595 S.E.2d 493, 2004 S.C. LEXIS 92, CCH Prod. Liab. Rep. P16980 (S.C. 2004).

24. Intermediate court properly reversed a trial court's entry of summary judgment for a manufacturer as to an injured party's strict liability claim under the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq., as the injured party, who operated a trash compactor in an effort to assist a co-worker who was crushed to death by the compactor, was a user within the meaning of S.C. Code Ann. § 15-73-10; there was a genuine issue of material fact as to

whether the event was the proximate cause of the injured party's physical harm, although the intermediate court properly concluded that the bystander analysis did not apply to a strict liability claim. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

25. Intermediate court erred in affirming a trial court's entry of summary judgment for a manufacturer on an injured party's negligence claim as the injured party might have been able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker, and, as the injured party was considered a direct victim for the products liability claim under the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq., she was a foreseeable plaintiff for a negligence claim. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

26. Because S.C. Code Ann. § 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as has been found necessary in the bystander setting; it is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

27. If a person is considered a "direct victim" for the purposes of one products liability cause of action under the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq., the person must be a direct victim for all causes of action; it is too fine a distinction to say that an injured party is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

28. S.C. Code Ann. § 15-73-30 provides that the comments to Restatement of Torts, Second, § 402A, are incorporated as the legislative intent of the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq. *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).

29. South Carolina law recognizes the principles of strict liability in product liability actions and requires that one who sells any product in a defective condition unreasonably dangerous to the user is subject to liability for physical harm caused to the user. S.C. Code Ann. § 15-73-10. However, a seller may prevent a product from being "unreasonably dangerous" if the seller places an adequate warning on the product regarding its use; if a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous. *Allen v. Long Mfg. N.C., Inc.*, 332 S.C. 422, 505 S.E.2d 354, 1998 S.C. App. LEXIS 105, CCH Prod. Liab. Rep. P15401 (S.C. Ct. App. 1998).

30. Healthcare provider was not held strictly liable for a medical device or instrument that was used in the course of treating a patient and could not be liable as a seller under the warranty provisions of the Defective Products Act, S.C. Code Ann. § 15-73-10 to S.C. Code Ann. § 15-73-30. *In re Breast Implant Prod. Liab.*, 331 S.C. 540, 503 S.E.2d 445, 1998 S.C. LEXIS 62, 38 U.C.C. Rep. Serv. 2d (CBC) 49 (S.C. 1998).

31. S.C. Code Ann. § 15-73-10 imposes strict liability upon a manufacturer and seller for an injury to any user caused by its product if the product is expected to and does reach the user or consumer without substantial change. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321, 1995 S.C. App. LEXIS 125, CCH Prod. Liab. Rep. P14387 (S.C. Ct. App. 1995).

32. In a products liability action, because S.C. Code Ann. § 15-73-10 (1976) imposes strict liability upon the manufacturer and seller for an injury to any user caused by its product, if the product is expected and does reach the user or consumer without substantial change, if it can be shown that the product was (1) materially altered before it reached the injured user and (2) such alteration could not have been expected by the manufacturer or seller, then the manufacturer or seller is not liable. *Fleming v. Borden, Inc.*, 316 S.C. 452, 450 S.E.2d 589, 1994 S.C. LEXIS 200, 10 I.E.R. Cas. (BNA) 117, 129 Lab. Cas. (CCH) P57856 (S.C. 1994).

S.C. Code Ann. § 15-73-10

33. Pursuant to S.C. Code Ann. § 15-73-10, a supplier and lessor were strictly liable to a victim because a trailer with a defective wheel rim and side ring was sold by the supplier and leased by the lessor after the effective date of the statute. *Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354, 1990 S.C. LEXIS 162, CCH Prod. Liab. Rep. P12635 (S.C. 1990).

34. S.C. Code Ann. § 15-73-10 by its terms determines the liability of the seller of a defective product; the pertinent date to determine its application is the date the product was sold by the seller. *Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354, 1990 S.C. LEXIS 162, CCH Prod. Liab. Rep. P12635 (S.C. 1990).

35. Punitive damages were improperly awarded to an injured party in an action based solely upon the strict liability statute (the act), S.C. Code § § 15-73-10 to -30, which does not specify that punitive damages are recoverable and permits liability only for "physical harm" under S.C. Code Ann. § 15-73-10 of the act; punitive damages are not awarded for "physical harm" because their purpose is to punish a wrongdoer and to deter him and others from engaging in similar misconduct. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).

36. Recovery of punitive damages is not allowed under a cause of action based solely upon the South Carolina strict liability statute, S.C. Code Ann. § § 15-73-10 to -30; such damages are not awarded for "physical harm" within the meaning of S.C. Code 15-73-10 of the strict liability statute. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).

37. In an action brought by an injury victim against the manufacturer and designer of machinery, alleging causes of action for strict liability, negligence, and breach of warranties, the manufacturer was appropriately disallowed to assert the defense of completion and acceptance where the defense was consistent with neither S.C. Code Ann. § § 15-73-10 et seq., which provided that sellers of defective products were strictly liable for physical harm caused to ultimate users, nor S.C. Code Ann. § 36-2-318, which extended the warranty of sellers beyond those with whom they had a contractual relationship. *Stanley v. B.L. Montague Co.*, 299 S.C. 51, 382 S.E.2d 246, 1989 S.C. App. LEXIS 83 (S.C. Ct. App. 1989).

38. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" for purposes of strict liability in tort. S.C. Code Ann. § 15-73-10 imposed strict liability in tort upon the suppliers of defective products and was applicable only to products and not to services. *Samson v. Greenville Hosp. Sys.*, 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).

39. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" under S.C. Code Ann. § 15-73-10 for purposes of strict liability in tort, and, based on the blood shield statute, S.C. Code Ann. § 44-43-10, the legislature did not intend for blood to be classified as a product within the context of strict tort liability. *Samson v. Greenville Hosp. Sys.*, 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).

40. Claim for strict liability was improperly stricken from a complaint for failure to allege a sale because a cause of action under S.C. Code Ann. § 15-73-10 did not require an allegation of a sale. *Henderson v. Gould, Inc.*, 288 S.C. 261, 341 S.E.2d 806, 1986 S.C. App. LEXIS 301 (S.C. Ct. App. 1986).

41. Viewing the evidence in the light most favorable to plaintiff executrix, a jury could have found that the lifting mechanism on a bin that fell on a worker and seriously injured him was defectively designed and unreasonably dangerous in ordinary use particularly where it was undisputed that the worker was injured by the product and that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the manufacturer; thus, the evidence was sufficient for the jury to have concluded that that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108, 1985 S.C. App. LEXIS 311, CCH Prod. Liab. Rep. P10464 (S.C. Ct. App. 1985), appeal dismissed by 286 S.C. 127, 332 S.E.2d 102, 1985 S.C. LEXIS 570 (S.C. 1985).

42. Where strict liability in tort for sellers of products in a defective condition unreasonably dangerous to users, consumers or their property became the law of South Carolina by the enactment of 1974 Act No. 1184, effective July 9, 1974, there was no strict liability cause of action for a product entering the stream of commerce prior to July 9, 1974

and allegedly causing an injury after that date. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).

43. In a traditional tort setting S.C. Code § 15-73-10(2)(a) rendered irrelevant the concept of duty because recovery could be had although a seller exercised all possible care in the preparation of the sale of a product. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).

44. Under S.C. Code Ann. § 15-73-10, lug nuts were not defective because they were not unreasonably dangerous to a consumer given the conditions and circumstances that foreseeably attend the use of the lug nuts. *Claytor v. GMC*, 277 S.C. 259, 286 S.E.2d 129, 1982 S.C. LEXIS 248, CCH Prod. Liab. Rep. P9170 (S.C. 1982).

45. Where a tire company installed tires on a customer's car and during the installation a deteriorated valve stem, not a part of the tire, was left on the wheel, the customer could not sue the tire company in strict liability under S.C. Code Ann. § 15-73-10 for injuries resulting from the valve stem because that section imposed liability on sellers of products in a defective condition, and the tire company neither supplied nor used a defective product in conjunction with mounting the tires on the customer's car. *De Loach v. Whitney*, 275 S.C. 543, 273 S.E.2d 768, 1981 S.C. LEXIS 289, CCH Prod. Liab. Rep. P8901 (S.C. 1981).

46. Respondents' demurrer to appellant's strict liability cause of action was properly granted because strict liability was not recognized in the common law at the time of appellant's injury; the doctrine of strict liability in tort, imposed as a result of a product's defective condition, did not emerge until S.C. Code Ann. §§ 15-73-10 to 15-73-30 were enacted after appellant's injury, and those sections applied prospectively only. *Hatfield v. Atlas Enters.*, 274 S.C. 247, 262 S.E.2d 900, 1980 S.C. LEXIS 288, CCH Prod. Liab. Rep. P8613 (S.C. 1980).

47. To warrant recovery for the death of her husband in a boating accident on a theory of strict liability in tort for a boat manufacturer's failure to install a "kill switch" that cut power to the motor whenever the operator was thrown from the seat and was no longer in a position to control the boat, the widow had to establish that the absence of the kill switch constituted a defect "unreasonably dangerous to the user or consumer," S.C. Code § 15-73-10, and the test of whether or not the failure to incorporate the safety device constituted a defect was whether the product, absent such device, was unreasonably dangerous to the user or consumer or to his property, i.e., whether the absence of the kill switch per se rendered the boat dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics. Under such test, the widow could not recover because the danger posed by the obvious lack of a kill switch could hardly be beyond the husband's contemplation. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671, 1978 S.C. LEXIS 536, 1 A.L.R.4th 394 (S.C. 1978).

48. Given the facts of a particular case, the Supreme Court of South Carolina did not decide, nor intimate, whether strict liability in tort had any applicability prior to enactment of S.C. Code § 15-73-10. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671, 1978 S.C. LEXIS 536, 1 A.L.R.4th 394 (S.C. 1978).

49. By bringing an action under S. C. Code § 15-73-10, a plaintiff assumes the burden of presenting evidence which tends to prove that a product was in a defective condition unreasonably dangerous, which proximately caused his injury; the fact that the injury occurred and the fact that the product could have been safer are not sufficient to support a finding that the product was unreasonably dangerous. *Marchant v. Mitchell Distrib. Co.*, 270 S.C. 29, 240 S.E.2d 511, 1977 S.C. LEXIS 246 (S.C. 1977).

50. In an indemnity suit based on strict liability and breach of implied and express warranties, that a truck was sold in an unreasonably dangerous defective condition subjected the seller to liability by way of indemnity for damages arising out of a lawsuit where a driver was killed and his passenger injured when the buyer's agent lost control of the truck and hit the decedent's vehicle head-on; that the jury found the buyer negligent in the underlying action did not make the seller a joint tortfeasor. *Stuck v. Pioneer Logging Mach., Inc.*, 279 S.C. 22, 301 S.E.2d 552, 1983 S.C. LEXIS 253, 36 U.C.C. Rep. Serv. (CBC) 74 (S.C. 1983).

LAW REVIEWS

1. *48 S.C. L. Rev. 193*, ANNUAL SURVEY OF SOUTH CAROLINA LAW (January 1-December 31, 1995): The Law of Torts: I. Court of Appeals Adopts Restatement Approach to Determine an Accountant's Duty to Third Party Investors, Fall, 1996.
2. *50 S.C. L. Rev. 463*, ADDENDUM * TORT LAW: IV: Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices, Summer, 1999.
3. *51 S.C. L. Rev. 1033*, ANNUAL SURVEY OF SOUTH CAROLINA LAW: Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.: South Carolina's Suboptimal Approach to Indemnity Claims of Retailers Against Manufacturers of Defective Products, Summer, 2000.
4. *45 S.C. L. Rev. 337*, ARTICLE: A GUIDE TO THE COMMON LAW OF NUISANCE IN SOUTH CAROLINA, WINTER, 1994.
5. *46 S.C. L. Rev. 31*, ARTICLE: CONTRACT LAW, 1994.
6. *48 S.C. L. Rev. 193*, ANNUAL SURVEY OF SOUTH CAROLINA LAW (January 1-December 31, 1995): The Law of Torts: I. Court of Appeals Adopts Restatement Approach to Determine an Accountant's Duty to Third Party Investors, Fall, 1996.
7. *50 S.C. L. Rev. 463*, ADDENDUM * TORT LAW: IV: Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices, Summer, 1999.
8. *51 S.C. L. Rev. 1033*, ANNUAL SURVEY OF SOUTH CAROLINA LAW: Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.: South Carolina's Suboptimal Approach to Indemnity Claims of Retailers Against Manufacturers of Defective Products, Summer, 2000.
9. *10 S. Carolina Lawyer 32*, FEATURE: PROBLEMS WITH SYNTHETIC STUCCO, by Rulph C. McCullough II and Michael M. Shetterly, November/December, 1998, Copyright (c) 1998 South Carolina Bar, South Carolina Lawyer.
10. *11 S. Carolina Lawyer 38*, FEATURE: COMPARING FIRST COLLISION "FAULT" WITH SECOND COLLISION "DEFECT", By Robert H. Brunson, July/August, 1999, Copyright (c) 1999 South Carolina Bar, South Carolina Lawyer.
11. *10 S. Carolina Lawyer 32*, FEATURE: PROBLEMS WITH SYNTHETIC STUCCO, by Rulph C. McCullough II and Michael M. Shetterly, November/December, 1998, Copyright (c) 1998 South Carolina Bar, South Carolina Lawyer.
12. *11 S. Carolina Lawyer 38*, FEATURE: COMPARING FIRST COLLISION "FAULT" WITH SECOND COLLISION "DEFECT", By Robert H. Brunson, July/August, 1999, Copyright (c) 1999 South Carolina Bar, South Carolina Lawyer.