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No. 80251-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 57011-1-I)

FILED
JUL 1 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

VERNON BRAATEN,
Respondents-Plaintiffs,

v.

BUFFALO PUMPS, INC., *et al.*,
Petitioners-Defendants.

MEMORANDUM OF *AMICUS CURIAE* INGERSOLL RAND
COMPANY IN SUPPORT OF PETITION FOR REVIEW

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Amicus Curiae Ingersoll Rand Company (“Ingersoll Rand”) submits this Memorandum in support of the Petitions for Review of Buffalo Pumps, Inc., Yarway Corp., Crane Co., and IMO Industries, Inc. (“Petitioners”), and specifically in support of their argument that under Washington State common law, equipment manufacturers such as Petitioners and Ingersoll Rand do not have a duty to warn of the hazards of asbestos-containing products they did not manufacture or distribute.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Like Petitioners, Ingersoll Rand manufactured and sold industrial equipment to the United States Navy. Respondent Vernon Braaten seeks to impose liability on Petitioners by arguing they failed to warn of the hazards of asbestos-containing insulation despite the undisputed fact that Petitioners did not manufacture or distribute any such insulation. In particular, Respondent argues that Petitioners and other manufacturers had a duty to warn of the hazards of asbestos-containing thermal insulation that the Navy or its agents chose to attach to the exterior of their equipment after it had been delivered to the Navy. This issue is likely to recur in many cases before the Washington courts, including cases in which Ingersoll Rand is a defendant.

PRELIMINARY STATEMENT

Had a responsible equipment manufacturer in the 1940s, 1950s, or 1960s asked any knowledgeable lawyer at that time whether it had a duty under Washington common law, first, to investigate the hazards of asbestos insulation manufactured by another company and applied by the

Navy to equipment on board naval vessels, and, second, warn of whatever hazards it might have discovered, the lawyer would doubtless have responded that no such duty existed given the equipment manufacturer never placed the asbestos insulation product into the stream of commerce. Yet the Court of Appeals has taken the extraordinary leap of imposing that duty retroactively, notwithstanding that neither Petitioners nor any other equipment manufacturer at the time could reasonably have anticipated that they had such a duty.

In doing so, the Court of Appeals, in a matter of first impression, has created new rules in 2007 to govern primary conduct that occurred half a century ago under a legal regime that since has been superseded by the Washington Products Liability Act.¹ The parties who actually did have a duty to warn and failed to do so – the companies that manufactured and sold the asbestos insulation, and the Navy that purchased and installed the asbestos insulation (as opposed to choosing non-asbestos insulation) –

¹ In a case administratively linked below, the same panel of the Court of Appeals purports not to decide “whether any temporal limitations may apply to a retroactive application of the duty to warn.” *Simonetta v. Viad Corp*, 137 Wn. App. 15, 32 n. 3, 151 P.3d 1019 (2007). But the opinions below in both *Sinonetta* and *Braaten* necessarily and indisputably apply to conduct that took place long ago: according to the Court of Appeals, Petitioners should have warned of the hazards of asbestos insulation in the 1950s and 1960s, and could be liable for not having done so. In fact, the same Division of the Court of Appeals this week extended strict product liability to apply retroactively to conduct that occurred before Washington first adopted strict product liability. *Lunsford v. Saberhagen Holdings, Inc., et al.*, No. 57293-8-I (Court of Appeals Division One - June 25, 2007) (“*Lunsford I*”) (a copy is included in the Appendix). Division I took the position that the issue of retroactivity was “already resolved” by previous decisions – notwithstanding that the defendant never had the opportunity to challenge that conclusion and that none of the previous decisions actually analyzed the issue of retroactivity. The draconian ruling in *Lunsford II* reinforces the need for this Court to review *Braaten*, which did not even bother to discuss retroactivity but, like *Lunsford II*, unfairly evaluated conduct by standards that did not exist at the time of the conduct.

are unavailable, the insulation manufacturers long since driven into bankruptcy by the asbestos litigation, and the Navy is shielded from suit by sovereign immunity. Respondents' lack of a remedy against the only culpable parties does not justify rewriting the law to effectively place the full liability on equipment manufacturers for failing to issue warnings that were the responsibility of the Navy and insulation manufacturers. This far-reaching and fundamentally unfair expansion of Washington law warrants close scrutiny and thorough review by this Court.

ARGUMENT

I. **The Law At The Time Of Respondent's Exposure Did Not Require Companies To Warn Of The Hazards Of Products They Did Not Manufacture Or Distribute, And No Such Duty Could Reasonably Have Been Foreseen.**

The Court of Appeals below created a new and far-reaching duty that neither existed at the time Petitioners manufactured and sold the equipment with which Mr. Braaten allegedly worked nor could reasonably have been foreseen. By that time – the 1940s, 1950s, and 1960s – there had been only a handful of Washington cases that involved product liability claims alleging a negligent failure to warn, and in each of those cases, the hazard at issue was inherent to the product manufactured or sold by the defendant. None of those cases suggested that a defendant's duty to warn extended to the hazards of other companies' products that happened to be used alongside or in conjunction with the defendant's own product.

The Restatement of Torts sanctioned this view. Since the 1934 publication of the First Restatement, Section 388 has provided that

manufacturers and sellers have a duty to warn of their own products' potentially dangerous conditions. Yet the Restatement has consistently limited that responsibility to parties in a product's chain of distribution, defining "suppliers" as:

any person, who for any purpose or in any manner gives possession of a chattel for another's use or who permits another to use or occupy it while it is in his own possession or control, [including] vendors, lessors, donors or lenders irrespective of whether the chattel is made by them or by a third person . . . bailors . . . [and] one who undertakes the repair of a chattel . . .²

The Restatement thus did not contemplate, much less recommend, imposing a duty to warn of a product's hazards on parties outside that product's supply chain. A review of the citations in the appendix to the Restatement (Second) reveals no case even suggesting that liability for negligent failure to warn would extend beyond the parties in a product's supply chain to the manufacturer of an entirely separate product.³

Indeed, for many years, Washington was reluctant to extend the duty to warn even to parties in the supply chain other than the sellers, and certainly gave no hint that a manufacturer would have the duty to warn of the dangers of other manufacturers' products.⁴ It was not until 1967 that

² Rest. (First) of Torts § 388 cmt. c (1934); *see also* Rest. (Second) of Torts § 388 cmt. c (1965) (same).

³ *See* Rest. (Second) of Torts § 388 app. (1966).

⁴ *See, e.g., Foster v. Ford Motor Co.*, 139 Wash. 341, 246 P. 945 (1926) (reversing plaintiff's jury verdict for injuries caused by tractor purchased by plaintiff's employers, reasoning that "the manufacturer who puts out an article with notice to the purchaser of its limitations, restrictions or defects is not liable to third persons"). Prior to 1970, this Court cited Section 388 of the Restatement on only three occasions: *Belcher v. Lentz Hardware Co.*, 13 Wash.2d 523, 532, 125 P.2d 648, 652 (1942) (declining to apply Section 388 given lack of evidence proving defects in weed burner purchased from defendant retailer); *Bock v. Truck & Tractor, Inc.*, 18 Wash.2d 458, 475, 469, 139 P.2d

this Court recognized that a manufacturer's failure to warn about its own products, by itself, could give rise to tort liability for negligence.⁵

Even law reviews and legal treatises of the time did not identify a separate "failure to warn" cause of action until the 1950s. In 1955, the authors of a leading law review article remarked that "[t]he duty to warn has frequently been mentioned in cases covering a wide variety of products, but few cases have been based on its breach alone."⁶ By 1967, the "failure to warn" claim was viewed as a developing area of the law: an article that year forecast that "it is reasonable to predict that plaintiffs will turn to this ground of recovery more often in the future. The increased

706, 714 (1943) (citing Section 388 in holding that seller of secondhand automobile could be held liable for automobile's harm to both immediate purchaser as well as "those whom the dealer should expect would use it or would be in the vicinity of its probable use"); *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash.2d 465, 467-68, 423 P.2d 926, 928 (1967) (holding individual seller who modified transmission safety switch on pickup truck could be liable for failure to warn buyer of potential hazard, notwithstanding fact that he traded truck on "as is" basis).

⁵ See *Callahan v. Keystone Fireworks Manuf. Co.*, 72 Wash.2d 823, 827, 435 P.2d 626, 630 (1967) (affirming verdict against defendant fireworks manufacturer for plaintiff's negligence claims based on, *inter alia*, failure to warn, citing rule set out in 76 A.L.R.2d that a manufacturer will be liable for failure to warn as to "a product which, to his actual or constructive knowledge, involves danger to users"). In fact, research has revealed not a single case from other jurisdictions during the 1940s, 1950s, or 1960s holding that a company outside a product's supply chain would have a duty to warn of the hazards inherent in that product. And once reviewed with a critical eye, even the post-2000 authorities cited by Respondent do not support the creation or imposition such a duty. The conclusory decision in *Berkowitz v. A.C.&S.*, 733 N.Y.S.2d 410 (App. Div. 2001), lacks cogent analysis, fails to address contrary authorities, and is inconsistent with higher court decisions in, *inter alia*, *Rastelli v. Goodyear*, 79 N.Y.2d 289, 297 (1992) (rejecting "that one manufacturer has a duty to warn about another manufacturer's products"). Further, the unpublished federal court decision 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.

⁶ Hardy Cross Dillard and Harris Hart, *PRODUCT LIABILITY: DIRECTIONS FOR USE AND THE DUTY TO WARN*, 41 Va. L. Rev. 145, 151 (1955).

number of cases decided during the recent years would seem to support this.”⁷ However, that article made clear that the duty to warn rested with the manufacturer of the product at issue:

The manufacturer is most familiar with his product and therefore in the best position to discover dangers. It would not appear to be unfair to require him to keep abreast of developments in the field, and it is likely that a manufacturer of any size is going to do this anyway in order to effectively compete with other companies. The manufacturer is usually able either to spread the loss among his customers by a slight increase in price or to insure against the loss and spread the cost of the premium to his customers through a price increase.

Id. None of these rationales for imposing such a duty apply to Petitioners and similarly-placed equipment manufacturers, who are in no better position to discover asbestos-related dangers than any other manufacturing company whose products might, at some point in the future, be used in conjunction with asbestos-containing products. Further, the economic justification for heightening a manufacturer’s standard of care does not apply here, where Petitioners did not sell asbestos and therefore cannot spread the cost of investigating, testing, and warning about it to the buyers of their industrial wares. How do you insure against a loss for product you never manufactured or even placed in the stream of commerce?

The Court of Appeals’ effort to rewrite the well-established law of the 1950s and 1960s did not end with its creation and retroactive application of a previously unknown and unforeseen duty to warn of the dangers of other companies’ products. Because that newly created duty

⁷ The Manufacturer’s Duty to Warn of Dangers Involved in Use of a Product, 1967 WASH U. L. Q. 206, 221 (1967).

appears to apply to both known hazards and hazards that reasonably should be known, the duty carries with it an obligation to investigate other manufacturers' products to uncover possible risks. However, the duty to investigate and test products, like the duty to warn of hazards, has long been limited to manufacturers' own products. Indeed, absent circumstances suggesting that such testing was needed, the law absolved even a product's seller from this duty. For example, in *Ringstad v. I. Magnin*, the plaintiff argued that had the defendant retailer tested the product at issue (a cocktail robe), "it would have discovered the inherent danger of explosive ignition." 39 Wash.2d 923, 926, 239 P.2d 848 (1952). In rejecting this proposition, the Court stated "the general rule [] that there is no obligation on the retailer to make such a test in the absence of some circumstance suggesting the necessity therefore." *Id.* This holding was consistent with the Restatement, which likewise absolved sellers of the affirmative duty to inspect the goods they sold for hidden defects.⁸ The reasoning for this policy was both simple and sound: "[t]he burden on the vendor of requiring him to inspect chattels he reasonably believes to be free from hidden danger outweighs the magnitude of the risk that a particular chattel may be dangerously defective."⁹

⁸ The 1934 edition of the Restatement imposed liability on retailers if, even though ignorant of their goods' "dangerous character or condition," the retailer "could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have." Rest. (First) of Torts § 402 (1934). However, that provision was amended in the 1948 supplement to absolve retailers of that responsibility. Rest. (First) of Torts § 402 (1948 Supp.).

⁹ Rest. (Second) of Torts § 402 (comment d).

II. The Court Of Appeals' Decision To Create in 2007 A New Duty That Could Not Reasonably Have Been Foreseen In The 1940s, 1950s, And 1960s And Apply It Retroactively To Conduct At That Time Raises Important Issues Of Public Policy And Fundamental Fairness.

Significant and far-reaching issues of law, policy, and fundamental fairness are presented by the decision of the Court of Appeals to impose on Petitioners and other equipment manufacturers a duty that did not exist and could not reasonably have been anticipated at the time of their underlying conduct. Petitioners, *amicus*, and others manufactured and sold industrial equipment that was not itself defective in any way. The Navy purchased the equipment and covered it with asbestos-containing insulation manufactured and sold by others. The absence of the truly culpable parties in these lawsuits is not a legitimate reason to extend the duty to warn far beyond its well established limits, as the Court of Appeals has done. That decision warrants review by this Court.

Moreover, as pre-WPLA case law cited by Respondent makes clear, a product manufacturer has a duty to warn “of dangers necessarily involved in its use.”¹⁰ The only pertinent danger necessarily involved in the use of the pumps, valves, and other equipment manufactured by Petitioners and similarly-placed manufacturers was that they could become hot under operating conditions. But that heat was an open and obvious danger, not only to the Navy but also to any seamen or shipyard workers trained in the maintenance of the equipment. Under Washington common law, there is no duty to warn of open and obvious dangers such

¹⁰ *Terhune v. A.H. Robins Co.*, 90 Wash. 2d 9, 12, 577 P.2d 975 (1978).

as the heat generated by Petitioners' products.¹¹ How that obvious danger was to be addressed was the responsibility not of the equipment manufacturer, but of the Navy which controlled the sites where the equipment was located and necessarily would have to customize its means of addressing the heat to the unique circumstances of each workplace under its control. To the extent that the Navy made use of insulation to contain the heat generated by particular equipment, the responsibility for warning of any hazards of the insulation rested with the very insulation industry spawned by the need for heat containment that developed, manufactured, and sold the insulation to the Navy. Those hazards were not "necessarily involved in [the] use" of the equipment manufactured and sold by Petitioners. Contrary to the suggestion of the Court of Appeals, the dangers of asbestos insulation arise entirely and solely from the insulation itself, not as a result of the placement of the insulation on Petitioners' equipment or any other product. Simply put, asbestos insulation presents the same hazards wherever it happens to be – and it was everywhere on the naval vessels aboard which Mr. Braaten worked.¹²

The decision of the Court of Appeals also threatens devastating practical implications. As Petitioners and other equipment manufacturers

¹¹ See *Kimble v. Waste Sys. Intern'l, Inc.*, 23 Wn. App. 331, 337, 595 P.2d 569 (1979); *Ewer v. Goodyear Tire & Rubber Co.*, 4 Wn. App. 152, 162, 480 P.2d 260 (1971).

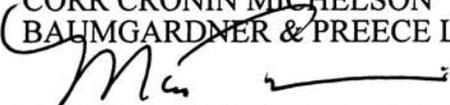
¹² Although Respondent attempts to minimize the potential reach of the decision below and reduce the substantial public interest at issue here, there is nothing in its opinion to indicate that the Court of Appeals' reasoning which has effectively turned Petitioners' un-insulated equipment into the "relevant product," see RCW 7.72.010(3), would not be applied to cases brought under the WPLA.

had to warn of not only known hazards but also hazards of which they reasonably should have known, the duty to warn carries with it a duty to investigate and test. Thus, under the theory adopted by the Court of Appeals and apparently applied retroactively, equipment manufacturers should have affirmatively investigated the hazards of asbestos insulation and sought to warn workers on board naval vessels of those hazards. This standard, applied to govern primary conduct that occurred several decades ago, comes close to creating absolute liability for equipment manufacturers, who are unable to shift costs and can do essentially nothing to defend themselves. This Court should give exacting scrutiny to the decision of the Court of Appeals to impose retroactively such a far-fetched and unforeseen duty, particularly one that has such extraordinary effect.

CONCLUSION

Ingersoll Rand respectfully requests that this Court accept review of the decision of the Court of Appeals and reject Respondent's argument that Washington State common law imposed on Petitioners and other similarly-placed equipment manufacturers a previously unrecognized, unknown, and unforeseen duty to warn of the hazards of asbestos-containing products that they did not manufacture or distribute.

RESPECTFULLY SUBMITTED this 29th day of June, 2007.

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Attorneys for *Amicus Curiae*
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APPENDIX OF NON-WASHINGTON AUTHORITIES
AND RECENT WASHINGTON COURT OF APPEALS DECISION
IN SUPPORT OF MEMORANDUM OF *AMICUS CURIAE*
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Amicus Ingersoll-Rand Company hereby submits the following non-Washington authorities and recent Washington Court of Appeals decision in support of its *amicus curiae* memorandum:

CASES

1. *Berkowitz v. A.C.&S.*, 733 N.Y.S.2d 410 (App. Div. 2001)
2. *Chicano v. General Electric*, 2004 WL 2250990 (E.D.Pa. 2004)
3. *Korin v. Owens Illinois, Inc.*, No. 3323 EDA 2003 (Pa. Super. August 2, 2004)
4. *Lunsford v. Saberhagen Holdings, Inc., et al.*, No. 57293-8-I (Court of Appeals Division One - June 25, 2007)
5. *Rastelli v. Goodyear*, 79 N.Y.2d 289, 297 (1992)
6. *Toth v. Economy Forms Corp.*, 391 Pa.Super. 383 (1990)

RESPECTFULLY SUBMITTED this 29th day of June, 2007.

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Tab 1

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.

Tab 2

**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 veredicto 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 to 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.

Tab 3

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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

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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.

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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

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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.

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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

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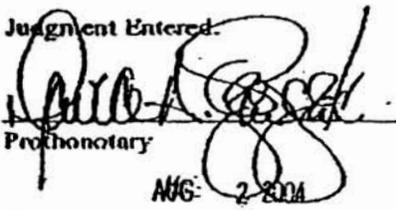
proof of the malfunction of a part for which the manufacturer alone could be responsible, may make out a sufficient case.

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

NIG: 2-2004

Date: _____

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	:	
	:	SUPERIOR COURT DOCKET
v.	:	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

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JAN 14 2004

First Judicial District of Pa.
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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. Siegal 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. Lomasco 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 product liability cases to establish or disprove product defect, they may be used to prove or disprove causation. (In re: Asbestos Litigation Master Docket, No. 86100001, 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 liability 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 14 2004

Tab 4

FACTS

Ronald Lunsford suffers from mesothelioma. He and his wife, Esther Lunsford (together, Lunsford) contend that this was caused in part by respirable asbestos released from insulation supplied by the Brower Company/Saberhagen Holdings, Inc. The claims in this appeal concern only household exposure to asbestos in 1958, carried in Lunsford's father's clothing from his employment at the Texaco refinery in Anacortes, Washington.

In its first appearance in the court below, Saberhagen moved for summary judgment, arguing that because Lunsford himself was not a "user or consumer" of a defective product, he was not entitled to strict liability coverage. The trial court agreed and entered partial summary judgment. Lunsford appealed. On appeal, Saberhagen argued that the trial court correctly dismissed Lunsford's strict product liability claims because he failed to show that he was a "user" or "consumer" of Brower-supplied asbestos products within the meaning of Restatement (Second) of Torts § 402A. This court reversed, holding that, "policy rationales support application of strict liability to a household family member of a user of an asbestos-containing product, if it is reasonably foreseeable that household members would be exposed in this manner." Lunsford v. Saberhagen Holdings, Inc., 125 Wn. App. 784, 793, 106 P.3d 808 (2005) (Lunsford I). Whether Lunsford fit into that category was for the jury to decide—it was incorrect for the trial court to conclude as a matter of law that Saberhagen could

not reasonably foresee that Lunsford would come into contact with its asbestos.

In that same appeal, Saberhagen, for the first time, also raised the argument that when two Washington appellate cases, Ulmer and Tabert, adopted § 402A strict product liability, it was a new rule that should not be applied retroactively under a three-part test from Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971); see also Seattle-First Nat'l Bank v. Tabert, 86 Wn.2d 145, 148-50, 542 P.2d 774 (1975); Ulmer v. Ford Motor Co., 75 Wn.2d 522, 531-32, 452 P.2d 729 (1969). Because Saberhagen had not presented its retroactivity argument to the trial court below, this court declined to address that issue, leaving it to Saberhagen to raise on remand.

On remand, Saberhagen brought this argument before the court in its second motion for summary judgment. There, Saberhagen contended that “[b]ecause § 402A was not the law of Washington in 1958, and because there was no other applicable theory of strict liability at that time, as a matter of law Saberhagen cannot be held liable to plaintiffs under a strict liability theory.” On October 21, 2005, the trial court granted Saberhagen’s motion for partial summary judgment. Lunsford appeals.

ANALYSIS

I. Summary Judgment Standard

On review of summary judgment courts engage in the same inquiry as the trial court. Highline Sch. Dist. v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is appropriate if there is no issue of material fact

and the moving party is entitled to judgment as a matter of law. Police Guild v. City of Seattle, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). The moving party bears this burden of proof. Young v. Key Pharm., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Based on this standard, Saberhagen bears the burden of proof that it was entitled to judgment as a matter of law.

II. Review on Appeal

Saberhagen contends that Lunsford is attempting to raise the retroactivity argument, and should be precluded from doing so because he did not raise this argument below. Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5. But if an issue raised for the first time on appeal is “arguably related” to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. See State Farm Mut. Auto. Ins. Co. v. Amirpanahi, 50 Wn. App. 869, 751 P.2d 329 (1988).

As noted above, Saberhagen first raised the issue of retroactive application of § 402A in the appeal of Lunsford I. There, Saberhagen argued that

[w]hile § 402A was eventually adopted and applied to manufacturers . . . in the 1969 Ulmer decision, and was applied to product sellers . . . in the 1975 Tabert decision, it would be fundamentally unfair to Saberhagen to retroactively impose upon its business activities and conduct in 1958 duties and liabilities that did not exist yet and would not come into existence for another 17 years.

On remand, Saberhagen argued that “[b]ecause § 402A was not the law of Washington in 1958, and because there was no other applicable theory of strict liability at that time, as a matter of law Saberhagen cannot be held liable to plaintiffs under a strict liability theory.” Lunsford, characterizing Saberhagen’s argument as a “retroactivity” argument, countered that “[i]n recognition of these long-standing rules, the courts of this State have frequently, without caveat, applied strict liability to asbestos actions in which the plaintiff’s exposure occurred prior to the publication of Restatement § 402A.” Lunsford goes on to list five cases in which plaintiffs recovered on theories of strict product liability for asbestos exposure occurring at least in part before 1958. Finally, in the summary judgment hearing, Lunsford’s counsel argued “[b]ut the fact is those exposures occurred prior to the adoption of either one Ulmer or Tabert in ‘68 or in ‘75. And by implication, the court of appeals has consistently applied strict liability to those exposures that have occurred prior.”

Saberhagen’s objection is not well taken. Saberhagen asserts that strict liability should not be applied to exposures occurring before the adoption of § 402A in Ulmer and Tabert. This is a question of prospective versus retroactive application. Lunsford recognized Saberhagen’s argument for what it was and responded. The issue of retroactive application of § 402A is properly before us.

III. Adoption of Strict Liability for Product Defects

The Washington Product Liability Act (WPLA) does not govern Lunsford’s claim because he was exposed to asbestos before its adoption. Mavroudis v.

Pittsburgh-Corning Corp., 86 Wn. App. 22, 33-34, 935 P.2d 684 (1997) (a cause of action “arises” when the plaintiff was exposed to asbestos, not when he discovered his injury); Koker v. Armstrong Cork, Inc., 60 Wn. App. 466, 472, 804 P.2d 659 (1991) (applying the law in effect prior to the WPLA because the plaintiff’s claim arose prior to that act).

The parties disagree as to whether Restatement (Second) of Torts § 402A (1965) retroactively applies to Lunsford’s claim. Section 402A reads:

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

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

In 1969, the Washington Supreme Court, after extensive review of product liability cases beginning in 1913, adopted the strict liability contained in § 402A as the law of this jurisdiction. Ulmer, 75 Wn.2d 522, 531-32. That decision applied only to the liability of manufacturers.

In 1975, the Washington Supreme Court after further review of product liability cases, extended § 402A strict liability to those in the business of selling or distributing a product. Tabert, 86 Wn.2d 145, 148-49. Both Ulmer and Tabert

were remanded for trial with instructions to apply the strict liability rules announced in the appellate decision. Ulmer, 75 Wn.2d at 532; Tabert, 86 Wn.2d at 155-56.

Numerous appellate decisions have applied strict liability to claims arising from exposures to asbestos that occurred before the adoption of § 402A. See e.g. Mavroudis, 86 Wn. App. at 22 (upholding a jury verdict finding strict liability under pre-WPLA law based on inadequate warnings of exposure occurring between 1957 and 1963); Van Hout v. Celotex Corp., 121 Wn.2d 697, 853 P.2d 908 (1993) (holding that under pre-WPLA law, strict liability should have been applied for exposure occurring between 1946 and 1980); Krivanek v. Fibreboard Corp., 72 Wn. App. 632-33, 865 P.2d 527 (1993) (upholding a jury verdict based on pre-WPLA strict liability standards for exposure occurring between 1953 and 1986); Falk v. Keene Corp., 113 Wn.2d 645; 782 P.2d 974 (1989) (holding that the WPLA did not change the standard to negligence—it remained strict liability as explained in § 402A and as adopted by Ulmer and Tabert—and remanding for application of strict liability to claims arising from exposure between 1947 and 1953); Lockwood v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987) (upholding a jury verdict finding AC&S strictly liable for exposure to asbestos occurring between 1942 and 1972). In none of these cases did the court limit the application to the specific facts of each situation.

IV. Retroactive Application

Saberhagen argues that the adoption of § 402A by Ulmer and Tabert was

a new rule and is therefore subject to a three-part analysis under Chevron Oil to determine whether it should apply retroactively. Since none of the Washington cases previously applied the Chevron Oil test and squarely addressed the issue, Saberhagen argues the test should be applied here. Under Saberhagen's analysis, the adoption of § 402A should not apply retroactively to Lunsford's exposure.

The United States Supreme Court in 1971 announced a three-prong test to determine whether a new federal rule of law in a civil case would be applied purely prospectively, selectively prospectively, or retroactively:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron Oil Co v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) (internal citations and quotation omitted). This is the test Saberhagen invokes. However, the United States Supreme Court has long ago limited the use of the Chevron Oil analysis by rejecting selectively prospective application of new decisional law. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529,

111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) (holding that it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so, “principles of equality and stare decisis here prevailing over any claim based on a Chevron Oil analysis”). Beam Distilling, 501 U.S. at 540. Prior to Beam Distilling, courts had three choices in civil matters: pure prospectivity, selective prospectivity, and pure retroactivity. The “purely prospective method of overruling” occurs when “a new rule is [not] applied . . . to the parties in the law-making decision . . . [t]he case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision.” Beam Distilling Co., 501 U.S. at 536. Selective prospectivity allowed retroactive application of a newly decided rule to some litigants but not others, based on the equities of the case. Beam Distilling, 501 U.S. at 540-43. Pure retroactive application requires that once a rule is applied to the parties before the court it is applied to all:

Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law is not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of “new” rules.

Beam Distilling, 501 U.S. at 543. Once rung, the bell is not unring.

To the extent this court finds strict liability applicable to asbestos claims, Saberhagen seeks purely prospective application of any new rule, or selective prospective application of any existing rule. But after Beam Distilling, courts are

left with only two choices: purely prospective application of a new principle or rule of law overruling past precedent or deciding an issue of first impression, or purely retroactive application of such a principle or rule of law.

The Washington Supreme Court first applied Chevron Oil in Taskett v. King Broad. Co., 86 Wn.2d 439, 448, 546 P.2d 81 (1976). This was to determine whether a new state rule, announced in that case, should be applied retroactively. But in 1992 in Robinson v. City of Seattle, the court rejected the Chevron Oil test. 119 Wn.2d 34, 830 P.2d 318 (1992). Finding that “[t]he practice of retroactive application is ‘overwhelmingly the norm’” the Robinson court adopted Beam Distilling’s rejection of selective prospectivity.¹ Id., at 79.

When a Washington appellate decision applies a rule announced in that decision retroactively to the parties in that case, the rule will also be applied to all litigants not barred by a procedural rule. Id., at 80. “To apply an appellate decision ‘retroactively’ means to apply its holding to causes of action which arose prior to the announcement of the decision.” Id., at 71 (emphasis added).

¹ In explaining its choice to abolish selective prospectivity of state appellate decisions, the Robinson court relied heavily on the reasoning in Beam Distilling:

“The plurality in Beam Distilling holds that selective prospectivity is not available in the civil context. The opinion concludes that once the Supreme Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata[.]”

Robinson, 119 Wn.2d at 75 (citing Beam Distilling, 501 U.S. at 543-44) (other citations omitted).

“To this extent, our decision here does limit the possible applications of the Chevron Oil analysis, however irrelevant Chevron Oil may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case. . . .”

Robinson, 119 Wn.2d at 76, (quoting Beam Distilling, 501 U.S. at 543) (other citations omitted).

“[T]here is no balancing the equities to determine whether we should now apply rules which were applied retroactively” in the previous decisions. Id., at 80.

Litigants are not

to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.

Id., at 80. (quoting Beam Distilling, 501 U.S. at 543). Consequently, the Robinson court upheld retroactivity as sound and abolished the selective prospectivity analysis in the application of state appellate decisions. Id. Two options are available to a court when adopting a new rule: pure prospective application and retroactive application. Applying the new rule in the case before it necessarily invokes retroactivity.

V. Strict Product Liability Applies to Lunsford

Because Ulmer and Tabert adopted § 402A strict product liability, and Mavroudis, Van Hout, Krivanek, Falk and Lockwood all applied the theory to claims regarding exposure to asbestos to the parties before the court, Robinson requires that strict product liability apply to Lunsford. It does not matter that none of those courts applied the Chevron Oil test; the issue of retroactivity is already resolved with respect to asbestos exposure claims.

Even if it applied, the Chevron Oil test required the announcement of a new rule in those cases, not application of an existing rule. In this case the

question is whether the rule of strict liability for asbestos exposure applied in Mavroudis, Van Hout, Krivanek, Falk and Lockwood may be applied to Lunsford. This is a question of application of an existing rule to a new fact pattern, rather than an announcement of a new rule. Neither selective prospective application nor purely prospective application of strict liability is available to Saberhagen.

VI. Robinson is Not Overruled Sub Silentio

Saberhagen argues that the Robinson retroactivity rule has been overruled sub silentio by two recent cases from the Washington Supreme Court: In re the Det. of Audett, 158 Wn.2d 712, 147 P.3d 982, 986-87 (2006) and State v. Atsbeha, 142 Wn.2d 904, 916-17, 16 P.3d 626 (2001). In these cases, the Supreme Court used the analysis from Chevron Oil to determine whether previously announced “new” rules were appropriately applied to the defendants in Audett and Atsbeha. Saberhagen contends that because the Washington Supreme Court used the Chevron Oil analysis, Robinson’s retroactivity rule has been overruled sub silentio.

We do not agree. The Washington Supreme Court “will not overrule such binding precedent sub silentio.” State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). While use of Chevron Oil is contrary to Robinson, we note no one asked the court to overrule Robinson in either case. In fact, no party cited either Chevron Oil or Robinson to the court. A close look at the cases shows that the interjection of Chevron Oil was erroneous.

Atsbeha, a criminal case, involved the application of a change in the law

of evidence announced in State v. Ellis, 136 Wn.2d 498, 963 P.2d 843 (1998). The Chevron Oil test by its own terms only applies in a case in which a new rule is being adopted, not when a relatively new rule from another decision is being applied. Further, while the Washington Supreme Court cited to its earlier decision in Digital Equip. Corp. v. Dept. of Revenue for the elements of the Chevron Oil test, the next paragraph of that decision cites Robinson for the proposition that the precedential weight of Chevron Oil had been called into question by recent United States Supreme Court decisions. 129 Wn.2d 177, 184, 916 P.2d 933 (1996). The Digital court concluded, "Chevron Oil no longer controls in this area." Id., at 188. Moreover, Chevron Oil was a test for application of a new rule adopted in a federal civil case, and has not been applied to application of a new rule adopted in a state criminal case. There was no precedent for use of Chevron Oil in this context.

However, under binding state precedent, the same result would have been reached. The United States Supreme Court has held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Washington courts have cited Griffith with approval: "A new rule announced by the state or federal Supreme Court applies to all cases pending direct review at the time the rule is announced." State v. Gamble, 118 Wn. App. 332, 335-36, 72

P.3d 1139 (2003) reversed in part on other grounds by 154 Wn.2d 457 (2005); see also In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 325-26, 823 P.2d 492 (1992). The rule announced in Ellis was applied to Ellis; under Griffith and St. Pierre, the rule should have retroactively applied to Atsbeha without reference to a Chevron Oil analysis.

While Griffith and St. Pierre should have been controlling precedent, neither case was cited in the briefing to Atsbeha. And, the parties did not ask that these cases be overruled in name or theory; nor did they cite Chevron Oil to the court as the test. Further, to the extent that the Rules of Evidence were at issue and could also apply in a civil context, Robinson would have been the controlling authority. However, it also was not cited by either party. This reinforces the conclusion that the court did not intend to overrule binding precedent sub silentio.

In Audett the Washington Supreme Court referred to the Chevron Oil analysis as instructive to determine whether to apply new civil commitment procedures from In re the Detention of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002) overruled on other grounds by 117 Wn. App. 611 (2003). But, the Audett opinion was not purporting to adopt a new rule, which is the first requirement of the Chevron Oil test. Digital Equip., 129 Wn.2d at 184. Under Robinson, “once this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements.” Robinson, 119 Wn.2d at 77. The new rule had been announced

and applied in Williams, therefore it applied to all subsequent litigants including, Audett. While the Audett court reached the result required by Robinson, the reference to Chevron Oil is at odds with Robinson and Digital Equip. The parties did not ask the court to overrule Robinson or Digital; they did not even cite Robinson, Digital or Chevron Oil to the court. Further, the Audett opinion does not mention Beam, Robinson or Digital all of which disavow Chevron Oil. We conclude that the court was not asked to and did not intend to overrule Robinson sub silentio.

In sum, a Chevron Oil analysis is not appropriate in this case. Robinson is a clear and binding statement of the rule of retroactivity in civil cases. We conclude that it is still good law. Because the rule of strict product liability adopted in Ulmer and Tabert was applied to the litigants in subsequent asbestos exposure cases, it applies retroactively to all subsequent litigants not barred by procedural requirements. This includes litigants, like Lunsford, exposed to asbestos prior to Washington's adoption of § 402A of the Restatement of Torts.

VII. Admissibility of American Law Institute (ALI) Documents

We find that the trial court was correct when it denied Lunsford's motion to strike documents describing the proceedings of the ALI as inadmissible hearsay. Evidence Rule (ER) 803(a)(16) provides a hearsay exception for "[s]tatements in a document in existence 20 years or more whose authenticity is established." ER 901(b)(8) and 902(e) provide for authentication of ancient documents. The reasons for this exception were explained in Bowers v.

Fibreboard Corp., 66 Wn. App. 454, 461-63, 832 P.2d 523 (1992), rev. denied, 120 Wn.2d 1017 (1992). They do not bear repeating. The ALI documents recorded proceedings from 1958, 1961 and 1964. They have been in existence for more than 20 years. They are authenticated as official publications under 902(e). The documents meet the hearsay exception under ER 803(a)(16).

We reverse and remand.

Appelwick, C.J.

WE CONCUR:

Demp, J.

Schindler, ACS

Tab 5

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

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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.

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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 conformed 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.

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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 RH5 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]).

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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.

Tab 6

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, TAMILIA and Johnson, JJ.

OPINIONBY:

TAMILIA

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

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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-

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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.